APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER AND MANDATE

STATUTES AND EXECUTIVE ORDER

APPENDIX TABLE OF CONTENTS (Cont.)

APPELLATE CASE MATERIALS

DISTRICT CASE MATERIALS
[FROM THE APPELLANT RECORD FILE]

APPENDIX TABLE OF CONTENTS (Cont.)

MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JUNE 12, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC,

Defendant-Appellee.

No. 19-16232

D.C. No. 4:18-cv-05159-JSW

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Submitted June 10, 2020**
San Francisco, California

Before: M. SMITH and HURWITZ, Circuit Judges,
and EZRA,*** District Judge.

---

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Jason Fyk appeals the district court's order and judgment dismissing with prejudice his state law claims against Facebook, Inc. (Facebook) as barred pursuant to the Communications Decency Act (CDA). We have jurisdiction pursuant to 28 U.S.C. § 1291. "We review de novo the district court's grant of a motion to dismiss under Rule 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016).[1] We affirm.

1. Pursuant to § 230(c)(1) of the CDA, 47 U.S.C. § 230(c)(1), "[i]mmunity from liability exists for '(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.'" *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009)). "When a plaintiff cannot allege enough facts to overcome Section 230 immunity, a plaintiff's claims should be dismissed." *Id.* The district court properly determined that Facebook has § 230(c)(1) immunity from Fyk's claims in this case.

*** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

[1] We reject Fyk's argument that the district court impermissibly converted the motion to dismiss into a motion for summary judgment. The district court did not deviate from the Rule 12(b)(6) standard by alluding to the allegation in Fyk's complaint that Facebook de-published one of his pages concerning urination, nor did that allusion affect the court's analysis.

The first and second requirements for § 230(c)(1) immunity are not in dispute.[2] Fyk focuses on the third requirement. He contends that Facebook is not entitled to § 230(c)(1) immunity because it acted as a content developer by allegedly de-publishing pages that he created and then re-publishing them for another third party after he sold them to a competitor. We disagree.

"[A] website may lose immunity under the CDA by making a material contribution to the creation or development of content." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016); *see also Fair Hous.*, 521 F.3d at 1166. Fyk, however, does not identify how Facebook materially contributed to the content of the pages. He concedes that the pages were the same after Facebook permitted their re-publication as when he created and owned them. We have made clear that republishing or disseminating third party content

---

[2] Fyk concedes that Facebook is the provider of an "interactive computer service." 47 U.S.C. § 230(f)(2); *see also Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) (en banc) ("[T]the most common interactive services are websites[.]"). He has also not challenged the district court's determination that his claims seek to treat Facebook as a publisher and has therefore waived that issue. *See Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief."). In any event, it is clear that Fyk seeks to hold Facebook liable as a publisher for its decisions to de-publish and re-publish the pages. *See Barnes*, 570 F.3d at 1103 ("[R]emoving content is something publishers do. . . . It is because such conduct is publishing conduct that we have insisted that section 230 protects from liability any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." (emphasis in original) (citation and internal quotation marks omitted)).

"in essentially the same format" "does not equal creation or development of content." *Kimzey*, 836 F.3d at 1270, 1271.

That Facebook allegedly took its actions for monetary purposes does not somehow transform Facebook into a content developer. Unlike 47 U.S.C. § 230(c)(2)(A), nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service. We otherwise reject Fyk's argument that his case is like *Fair Housing* because Facebook allegedly "discriminated" against him by singling out his pages. Fyk mistakes the alleged illegality of the particular content at issue in *Fair Housing* with an antidiscrimination rule that we have never adopted to apply § 230(c)(1) immunity.

2. Contrary to Fyk's arguments here regarding a so-called "first party" and "third party" distinction between §§ 230(c)(1) and 230(c)(2)(A), the fact that he generated the content at issue does not make § 230(c)(1) inapplicable. We have explained that "[t]he reference to 'another information content provider' [in § 230(c)(1)] distinguishes the circumstance in which the interactive computer service itself meets the definition of 'information content provider' with respect to the information in question." *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003), *superseded in part by statute on other grounds as stated in Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766–67 (9th Cir. 2017). As to Facebook, Fyk is "another information content provider." *See Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F.Supp.3d 1088, 1094 (N.D. Cal. 2015), *aff'd*, 697 F.App'x 526, 526 (9th Cir. 2017).

3. We reject Fyk's argument that granting § 230(c)(1) immunity to Facebook renders § 230(c)(2)(A)

mere surplusage. As we have explained, § 230(c)(2)(a) "provides an additional shield from liability." *Barnes*, 570 F.3d at 1105 (emphasis added). "[T]he persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but any provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue can take advantage of subsection (c)(2)." *Id.*

4. Finally, we reject Fyk's argument that Facebook is estopped from relying on § 230(c)(1) immunity based on its purported pre-suit reliance on § 230(c)(2)(A) immunity to justify its conduct. The CDA precludes the imposition of liability that is inconsistent with its provisions. 47 U.S.C. § 230(e)(3).

AFFIRMED.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (JUNE 18, 2019)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC,

Defendant.

No. C 18-05159 JSW

Before: Jeffrey S. WHITE, United States District Judge.

Pursuant to the Court's Order granting Defendant Facebook, Inc's motion to dismiss, it is HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Defendant and against Plaintiff.

IT IS SO ORDERED.

/s/ Jeffrey S. White
United States District Judge

Dated: June 18, 2019

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA GRANTING MOTION TO DISMISS (JULY 18, 2019)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC,

Defendant.

No. C 18-05159 JSW

Before: Jeffrey S. WHITE, United States District Judge.

Now before the Court is Defendant Facebook, Inc. ("Facebook")'s motion to dismiss. Plaintiff, Jason Fyk, filed suit under diversity jurisdiction, for intentional interference with prospective economic advantage, violation of California Business and Professions Code section 17200 *et seq.*, civil extortion, and fraud for Facebook's devaluation of Plaintiff's online pages. Plaintiff had used Facebook's free online platform to create a series of, among other amusing things, pages dedicated to videos and pictures of people urinating. In enforcing its community standards, Plaintiff alleges that Facebook blocked content posted by Plaintiff and

removed content in order to make room for its own sponsored advertisements. Plaintiff contends these actions by Facebook destroyed or severely devalued his pages.

Facebook moves to dismiss on two bases. First, that the claims are barred by Section 230(c)(1) of the Communications Decency Act ("CDA") which immunizes internet platforms like Facebook for claims relating to moderation of third-party content on the platform such as "reviewing, editing, and deciding whether to publish or to withdraw publication of third-party content." *Barnes v. Yahoo!*, 570 F.3d 1096, 1102 (9th Cir. 2009). Second, Facebook contends that Plaintiff fails to state a cause of action for each of his individual claims.

ANALYSIS

Facebook invokes Section 230 of the CDA which "immunizes providers of interactive computer services against liability arising from content created by third parties." *Perkins v. Linkedin Corp.*, 53 F.Supp.3d 122, 124 (N.D. Cal. 2014) (internal citations omitted). Specifically, Section 230(c)(1) provides that "[n]o provider or user of an interactive 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). Section 230(c)(1) "establish[es] broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751, 767 (9th Cir. 2007) (internal citations omitted). Immunity extends to activities of a service provider that involve its moderation of third-party content, such as "reviewing,

editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102.

The immunity, "like other forms of immunity, is generally accorded effect at the first logical point in the litigation process" because "immunity is an immunity from suit rather than a mere defense to liability." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (9th Cir. 2009); *see also Levitt v. Yelp! Inc.*, 2011 WL 5079526, at *8-9 (N.D. Cal. Oct. 26, 2011) (holding that Section 230(c)(1) immunity protects service providers from lawsuits for their "exercise of a publisher's traditional editorial functions."); *see also Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (holding that Section 230 should be "interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.").

The CDA immunizes Facebook from suit if three conditions are met: (1) Facebook is a "provider or user of an interactive computer service;" (2) the information for which Plaintiff seeks to hold Facebook liable is "information provided by another information content provider;" and (3) Plaintiff's claim seeks to hold Facebook liable as the "publisher or speaker" of that information. *See Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F.Supp.3d 1088, 1092-93 (2015) (citing 47 U.S.C. § 230(c)(1); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014)).

Facebook qualifies as an interactive computer service provider. The CDA defines this element 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). Here, the complaint itself alleges that Facebook provides an internet-based platform where millions of users can access third party content, including the content uploaded on Plaintiff's pages. (*See* Complaint ¶ 2.) The first element of the CDA immunity provision is therefor met. *See Sikhs for Justice*, 144 F.Supp.3d at 1093; *see also Fraley v. Facebook, Inc.*, 830 F.Supp.2d 785, 801-02 (N.D. Cal. 2011) (finding that Facebook acts as an interactive computer service).

With regard to the second element of the CDA immunity provision, Plaintiff contends that Facebook is not entitled to immunity because although the statute provides immunity for a website operator for the removal of third-party material, here there is no third party as Plaintiff himself contends that he created the content on his pages. This was precisely the argument rejected by this Court in *Sikhs for Justice* which distinguished the reference to "another information content provider" from the instance in which the interactive computer service itself is the creator or developer of the content. 144 F.Supp.3d at 1093-94. In other words, "the CDA immunizes an interactive computer service provider that 'passively displays content that is created entirely by third parties,' but not an interactive computer service provider by creating or developing the content at issue." *Id.* at 1094. Put another way, "'third-party content' is used to refer to content created entirely by individuals or entities other than the interactive computer service provider." *Id.* (citing *Roommates*, 521 F.3d at 1162). Here, there is no dispute that Plaintiff was the sole creator of his own content which he had

placed on Facebook's pages. As a result, those pages created entirely by Plaintiff, qualifies as "information provided by another information content provider" within the meaning of Section 230. *See id.*

Lastly, Plaintiff's claims here seek to hold Facebook liable as the "publisher or speaker" of that third party content. The three causes of action alleged in the complaint arise out of Facebook's decision to refuse to publish or to moderate the publication of Plaintiff's content. To determine whether a plaintiff's theory of liability treats the defendant as a publisher, "what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.* (citing *Barnes*, 570 F.3d at 1101). Consequently, if the duty that the plaintiff alleges was violated by defendant "derives from the defendant's status or conduct as a 'published or speaker,' . . . section 230(c)(1) precludes liability." *Id.* (citing *Barnes* 570 F.3d at 1102). Publication "involves the reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Id.* Thus, "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Id.* (citing *Roommates*, 521 F.3d at 1170-71).

Here, all three of Plaintiff's claims arise from the allegations that Facebook removed or moderated his pages. (*See* Complaint ¶¶ 20, 49-73.) Because the CDA bars all claims that seek to hold an interactive computer service liable as a publisher of third party content, the Court finds that the CDA precludes Plaintiff's claims. In addition, the Court concludes that granting leave to amend would be futile in this

instance as Plaintiff's claims are barred as a matter of law. *See, e.g., Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."); *see also Lopez v. Smith*, 293 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (holding that dismissal without leave to amend is justified where "pleading could not possibly be cured by the allegation of other facts.")

CONCLUSION

For the foregoing reasons, the Court GRANTS Facebook's motion to dismiss without leave to amend. A separate judgment shall issue and the Clerk shall close the file.

IT IS SO ORDERED.

/s/ Jeffrey S. White
United States District Judge

Dated: June 18, 2019

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (JULY 21, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC,

Defendant-Appellee.

No. 19-16232

D.C. No. 4:18-cv-05159-JSW
Northern District of California, Oakland

Before: M. SMITH and HURWITZ, Circuit Judges, and EZRA,* District Judge.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. Accordingly, the petition for rehearing en banc is DENIED. (Dkt. No. 41.)

---

* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JULY 30, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC,

Defendant-Appellee.

No. 19-16232

D.C. No. 4:18-cv-05159-JSW
U.S. District Court for Northern California, Oakland

The judgment of this Court, entered June 12, 2020, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Rhonda Roberts
Deputy Clerk
Ninth Circuit Rule 27-7

TITLE 47, UNITED STATES CODE, SECTION 230

47 U.S.C. § 230—Protection for private Blocking and Screening of Offensive Material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" Blocking and Screening of Offensive Material

(1) Treatment of Publisher or Speaker

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.

(2) Civil Liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Obligations of Interactive Computer Service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on Other Laws

(1) No Effect on Criminal Law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No Effect on Intellectual Property Law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State Law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No Effect on Communications Privacy Law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No Effect on Sex Trafficking Law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct under-

lying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "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.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, § 230, as added Pub. L. 104–104, title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681–739; Pub. L. 115–164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

EXECUTIVE ORDER 13925 OF MAY 28, 2020 PREVENTING ONLINE CENSORSHIP

PRESIDENTIAL DOCUMENTS

Federal Register Vol. 85, No. 106
Tuesday, June 2, 2020

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy.

Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people.

In a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet. This practice is fundamentally un-American and anti-democratic. When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. They cease functioning as passive bulletin boards, and ought to be viewed and treated as content creators.

The growth of online platforms in recent years raises important questions about applying the ideals of the First Amendment to modern communications technology. Today, many Americans follow the news, stay in touch with friends and family, and share their views on current events through social media

and other online platforms. As a result, these platforms function in many ways as a 21st century equivalent of the public square.

Twitter, Facebook, Instagram, and YouTube wield immense, if not unprecedented, power to shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see.

As President, I have made clear my commitment to free and open debate on the internet. Such debate is just as important online as it is in our universities, our town halls, and our homes. It is essential to sustaining our democracy.

Online platforms are engaging in selective censorship that is harming our national discourse. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms "flagging" content as inappropriate, even though it does not violate any stated terms of service; making un-announced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse.

Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called "Site

Integrity" has flaunted his political bias in his own tweets.

At the same time online platforms are invoking inconsistent, irrational, and groundless justifications to censor or otherwise restrict Americans' speech here at home, several online platforms are profiting from and promoting the aggression and disinformation spread by foreign governments like China. One United States company, for example, created a search engine for the Chinese Communist Party that would have blacklisted searches for "human rights," hid data unfavorable to the Chinese Communist Party, and tracked users determined appropriate for surveillance. It also established research partnerships in China that provide direct benefits to the Chinese military. Other companies have accepted advertisements paid for by the Chinese government that spread false information about China's mass imprisonment of religious minorities, thereby enabling these abuses of human rights. They have also amplified China's propaganda abroad, including by allowing Chinese government officials to use their platforms to spread misinformation regarding the origins of the COVID–19 pandemic, and to undermine pro-democracy protests in Hong Kong.

As a Nation, we must foster and protect diverse viewpoints in today's digital communications environment where all Americans can and should have a voice. We must seek transparency and accountability from online platforms, and encourage standards and tools to protect and preserve the integrity and openness of American discourse and freedom of expression.

Sec. 2. Protections Against Online Censorship.

(a) It is the policy of the United States to foster clear ground rules promoting free and open debate on the internet. Prominent among the ground rules governing that debate is the immunity from liability created by section 230(c) of the Communications Decency Act (section 230(c)). 47 U.S.C. § 230(c). It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.

Section 230(c) was designed to address early court decisions holding that, if an online platform restricted access to some content posted by others, it would thereby become a "publisher" of all the content posted on its site for purposes of torts such as defamation. As the title of section 230(c) makes clear, the provision provides limited liability "protection" to a provider of an interactive computer service (such as an online platform) that engages in "'Good Samaritan' blocking" of harmful content. In particular, the Congress sought to provide protections for online platforms that attempted to protect minors from harmful content and intended to ensure that such providers would not be discouraged from taking down harmful material. The provision was also intended to further the express vision of the Congress that the internet is a "forum for a true diversity of political discourse." 47 U.S.C. § 230(a)(3). The limited protec-

tions provided by the statute should be construed with these purposes in mind.

In particular, subparagraph (c)(2) expressly addresses protections from "civil liability" and specifies that an interactive computer service provider may not be made liable "on account of" its decision in "good faith" to restrict access to content that it considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable." It is the policy of the United States to ensure that, to the maximum extent permissible under the law, this provision is not distorted to provide liability protection for online platforms that—far from acting in "good faith" to remove objectionable content—instead engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree. Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.

(b) To advance the policy described in subsection (a) of this section, all executive departments and agencies should ensure that their application of sec-

tion 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard. In addition, within 60 days of the date of this order, the Secretary of Commerce (Secretary), in consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA), shall file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify:

> (i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its own editorial decisions;
>
> (ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are:
>
> (A) deceptive, pretextual, or inconsistent with a provider's terms of service; or
>
> (B) taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard; and

(iii) any other proposed regulations that the NTIA concludes may be appropriate to advance the policy described in subsection (a) of this section.

Sec. 3. Protecting Federal Taxpayer Dollars from Financing Online Platforms That Restrict Free Speech.

(a) The head of each executive department and agency (agency) shall review its agency's Federal spending on advertising and marketing paid to online platforms. Such review shall include the amount of money spent, the online platforms that receive Federal dollars, and the statutory authorities available to restrict their receipt of advertising dollars.

(b) Within 30 days of the date of this order, the head of each agency shall report its findings to the Director of the Office of Management and Budget.

(c) The Department of Justice shall review the viewpoint-based speech restrictions imposed by each online platform identified in the report described in subsection (b) of this section and assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.

Sec. 4. Federal Review of Unfair or Deceptive Acts or Practices.

(a) It is the policy of the United States that large online platforms, such as Twitter and Facebook, as the critical means of promoting the free flow of speech and ideas today, should not restrict protected speech. The Supreme Court has noted that social media sites, as the modern public square, "can pro-

vide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1737 (2017). Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. *Cf. PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85–89 (1980).

(b) In May of 2019, the White House launched a Tech Bias Reporting tool to allow Americans to report incidents of online censorship. In just weeks, the White House received over 16,000 complaints of online platforms censoring or otherwise taking action against users based on their political viewpoints. The White House will submit such complaints received to the Department of Justice and the Federal Trade Commission (FTC).

(C) The FTC shall consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices in or affecting commerce, pursuant to section 45 of title 15, United States Code. Such unfair or deceptive acts or practice may include practices by entities covered by section 230 that restrict speech in ways that do not align with those entities' public representations about those practices.

(d) For large online platforms that are vast arenas for public debate, including the social media platform Twitter, the FTC shall also, consistent with its legal authority, consider whether complaints allege violations of law that implicate the policies set forth in section 4(a) of this order. The FTC shall consider

developing a report describing such complaints and making the report publicly available, consistent with applicable law.

Sec. 5. State Review of Unfair or Deceptive Acts or Practices and Anti-Discrimination Laws.

(a) The Attorney General shall establish a working group regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group shall also develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group shall invite State Attorneys General for discussion and consultation, as appropriate and consistent with applicable law.

(b) Complaints described in section 4(b) of this order will be shared with the working group, consistent with applicable law. The working group shall also collect publicly available information regarding the following:

(i) increased scrutiny of users based on the other users they choose to follow, or their interactions with other users;

(ii) algorithms to suppress content or users based on indications of political alignment or viewpoint;

(iii) differential policies allowing for otherwise impermissible behavior, when committed by accounts associated with the Chinese Communist Party or other anti-democratic associations or governments;

(iv) reliance on third-party entities, including contractors, media organizations, and individuals, with indicia of bias to review content; and

(v) acts that limit the ability of users with particular viewpoints to earn money on the platform compared with other users similarly situated.

Sec. 6. Legislation.

The Attorney General shall develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order.

Sec. 7. Definition.

For purposes of this order, the term "online platform" means any website or application that allows users to create and share content or engage in social networking, or any general search engine.

Sec. 8. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

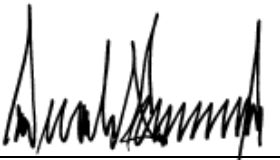
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against

the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



Donald J. Trump

THE WHITE HOUSE,
May 28, 2020.

THE DEPARTMENT OF JUSTICE'S REVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT OF 1996

As part of the President's Executive Order on Preventing Online Censorship, and as a result of the Department's long standing review of Section 230, the Department has put together the following legislative package to reform Section 230. The proposal focuses on the two big areas of concern that were highlighted by victims, businesses, and other stakeholders in the conversations and meetings the Department held to discuss the issue. First, it addresses unclear and inconsistent moderation practices that limit speech and go beyond the text of the existing statute. Second, it addresses the proliferation of illicit and harmful content online that leaves victims without any civil recourse. Taken together, the Department's legislative package provides a clear path forward on modernizing Section 230 to encourage a safer and more open internet.

AREAS RIPE FOR SECTION 230 REFORM

The Department identified four areas ripe for reform:

1. Incentivizing Online Platforms to Address Illicit Content

The first category of potential reforms is aimed at incentivizing platforms to address the growing amount of illicit content online, while preserving the core of Section 230's immunity for defamation.

a. Bad Samaritan Carve-Out.

First, the Department proposes denying Section 230 immunity to truly bad actors. The title of Section 230's immunity provision—"Protection for 'Good Samaritan' Blocking and Screening of Offensive Material"—makes clear that Section 230 immunity is meant to incentivize and protect responsible online platforms. It therefore makes little sense to immunize from civil liability an online platform that purposefully facilitates or solicits third-party content or activity that would violate federal criminal law.

b. Carve-Outs for Child Abuse, Terrorism, and Cyber-Stalking.

Second, the Department proposes exempting from immunity specific categories of claims that address particularly egregious content, including (1) child exploitation and sexual abuse, (2) terrorism, and (3) cyber-stalking. These targeted carve-outs would halt the over-expansion of Section 230 immunity and enable victims to seek civil redress in causes of action far afield from the original purpose of the statute.

c. Case-Specific Carve-outs for Actual Knowledge or Court Judgments.

Third, the Department supports reforms to make clear that Section 230 immunity does not apply in a specific case where a platform had actual knowledge or notice that the third party content at issue violated federal criminal law or where the platform was provided with a court judgment that content is unlawful in any respect.

2. Clarifying Federal Government Enforcement Capabilities to Address Unlawful Content

A second category reform would increase the ability of the government to protect citizens from harmful and illicit conduct. These reforms would make clear that the immunity provided by Section 230 does not apply to civil enforcement actions brought by the federal government. Civil enforcement by the federal government is an important complement to criminal prosecution.

3. Promoting Competition

A third reform proposal is to clarify that federal antitrust claims are not covered by Section 230 immunity. Over time, the avenues for engaging in both online commerce and speech have concentrated in the hands of a few key players. It makes little sense to enable large online platforms (particularly dominant ones) to invoke Section 230 immunity in antitrust cases, where liability is based on harm to competition, not on third-party speech.

4. Promoting Open Discourse and Greater Transparency

A fourth category of potential reforms is intended to clarify the text and original purpose of the statute in order to promote free and open discourse online and encourage greater transparency between platforms and users.

a. Replace Vague Terminology in (c)(2).

First, the Department supports replacing the vague catch-all "otherwise objectionable" language in Section 230(c)(2) with "unlawful" and "promotes

terrorism." This reform would focus the broad blanket immunity for content moderation decisions on the core objective of Section 230—to reduce online content harmful to children—while limiting a platform's ability to remove content arbitrarily or in ways inconsistent with its terms or service simply by deeming it "objectionable."

b. Provide Definition of Good Faith.

Second, the Department proposes adding a statutory definition of "good faith," which would limit immunity for content moderation decisions to those done in accordance with plain and particular terms of service and accompanied by a reasonable explanation, unless such notice would impede law enforcement or risk imminent harm to others. Clarifying the meaning of "good faith" should encourage platforms to be more transparent and accountable to their users, rather than hide behind blanket Section 230 protections.

c. Explicitly Overrule Stratton Oakmont to Avoid Moderator's Dilemma.

Third, the Department proposes clarifying that a platform's removal of content pursuant to Section 230(c)(2) or consistent with its terms of service does not, on its own, render the platform a publisher or speaker for all other content on its service.

APPELLANT'S OPENING BRIEF (SEPTEMBER 18, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC.

Defendant-Appellee.

No. 19-16232

On Appeal from Dismissal with Prejudice and Judgment of the United States District Court for the Northern District of California, No. 4:18-cv-05159-JSW (Hon. Jeffrey S. White)

Callagy Law, P.C.
Sean R. Callagy, Esq.
scallagy@callagylaw.com
Michael J. Smikun, Esq.
msmikun@callagylaw.com
650 From Rd., Ste 565
Paramus, NJ 07652
(201) 261-1700 (o)
(201) 261-1775 (f)

Jeffrey L. Greyber, Esq.
jgreyber@callagylaw.com
1900 N.W. Corporate Blvd., Ste 310W
Boca Raton, FL 33431
(561) 405-7966 (o)
(201) 549-8753 (f)

Putterman Yu, LLP
Constance J. Yu, Esq.
cyu@plylaw.com
345 California St., Suite 1160
San Francisco, CA 94104
(415) 839-8779 (o)
(415) 737-1363 (f)

Attorneys for Plaintiff-Appellant

[TOC & TOA Omitted]

JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of California exercised jurisdiction under Title 28, United States Code, Section 1332, as the parties are diverse and the amount in controversy exceeds $75,000.00 exclusive of fees, costs, interest, or otherwise. Venue was/is proper in the Northern District of California pursuant to Title 28, United States Code, Section 1391(b), as Defendant-Appellee, Facebook, Inc. ("Facebook"), maintains its principal place of business in that judicial district and various events or omissions giving rise to the action occurred within that judicial district.

The District Court erred in dismissing this case. This appeal stems from the District Court's legally, factually, and equitably wayward June 18, 2019, Order Granting Motion to Dismiss ("Dismissal Order"),

4:18-cv-05149-JSW, and the District Court's June 18, 2019, Judgment, *id.* (ER 1-6).[1] This appeal revolves around the only aspect of the Dismissal Order—the Communications Decency Act, "CDA," Title 47, United States Code, Section 230(c)(1) immunity defense.[2]

This Court "has jurisdiction pursuant to 28 U.S.C. § 1291—regardless of the basis for the district court's dismissal of Plaintiff's complaint, its entry of judgment constituted a final decision of the court." *Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 890 (9th Cir. 2019).

On June 19, 2019, Plaintiff-Appellant, Jason Fyk ("Fyk"), filed his Notice of Appeal from a Judgment or Order of a United States District Court, along with his Representation Statement. On June 20, 2019, the Time Schedule Order was entered, prescribing August 19, 2019, as Fyk's opening brief deadline. Thereafter, an enlargement of the August 19, 2019, deadline was procured, extending that deadline to September 18, 2019.

The Dismissal order was with prejudice as to the entire case, and the District Court entered related judgment as to the entire case; hence, this appeal.

---

[1] "ER ___" refers to Plaintiff's/Appellant's Excerpt of Record.

[2] Hereafter, the germane subsection of the CDA is drafted in shortest form. For example, (c)(1) will refer to Title 47, United States Code, Section 230(c)(1). As other examples, (c)(2)(A) will refer to Title 47, United States Code, Section 230(c)(2)(A) and (f)(3) will refer to Title 47, United States Code, Section 230(f)(3).

ISSUES PRESENTED

This appeal asks: (1) Whether Facebook, under the deceptive pre-text of CDA immunity, can perpetrate any and all unlawful or discriminatory action (*e.g.*, intentional interference with prospective economic advantage/relations, unfair competition, civil extortion, fraud/intentional misrepresentation) against Fyk. Put differently, this appeal asks whether (c)(1) completely immunizes Facebook from its unlawful, discriminatory "information content provider" "development"[3] of Fyk businesses/pages (and necessarily the content therein).[4] Put more specifically, this appeal asks whether (c)(1)

---

[3] *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC,* 521 F.3d 1157, 1166-1169 (9th Cir. 2008) (in deciding that Roommates.com had lost CDA immunity because it acted as a "developer" of information content, this Court engaged in an in-depth discussion of development versus creation given (f)(3) defines "information content provider" as someone who is "responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service"); *cf.* the wayward Dismissal Order that failed to apply the (f)(3) "creation" versus "development" distinction elaborated on by this Court in *Fair Housing*. Put differently, and as discussed in greater detail below, the District Court did not understand that Facebook's conduct (at the very least with respect to Facebook's post-October 2016 actions, which such actions are the heart of this lawsuit) put it into the "development" realm of (f)(3) (*i.e.*, made it an "information content provider" under (f)(3)) not subject to any (c) immunity.

[4] The CDA, as a whole, was 1990's legislation enacted to make the Internet safer, not legislation enacted to "sovereignly" immunize social media giants from running roughshod over the rest of the Internet community through any number of otherwise illegal and/or discriminatory activities.

immunizes Facebook from its own active[5] hand in (a) its unlawfully destroying/devaluing the subject businesses/pages while in Fyk's name just because the businesses/pages were then owned and operated by Fyk;[6, 7] (b) its unlawfully orchestrating the distribution of the subject businesses/pages to Fyk's former competitor and revaluing the businesses/pages the moment they were owned and operated by someone else who not-so-coincidentally paid Facebook significantly more money than Fyk in relation to Facebook's purportedly "optional" paid-for-reach program;[8] and (c) its discriminatorily allowing this new owner to operate the businesses/pages with the exact same

---

[5] *Fair Hous.*, 521 F.3d at 1162 ("A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it . . . is 'responsible, in whole or in part' for . . . developing, the website is also a content provider," emphasis added).

[6] Which such destruction/devaluation was effectuated unlawfully, *see, e.g.*, ER 24-28 at ¶¶ 49-57 (First Claim for Relief—Intentional Interference with Prospective Economic Advantage/Relations") and ER 32-33 at ¶¶ 72-78 (Fourth Claim for Relief—Fraud/Intentional Misrepresentation), and effectuated discriminatorily, *see* ER 23-24 at ¶¶ 45-47.

[7] Facebook's discrimination against Fyk is no different than "Sorry, sir, but I can't show you any listings on this block because you are gay/female/black/a parent." *Fair Hous.* at 1167. Here, Facebook's saying "Sorry, Fyk, these businesses/pages cannot be on Facebook's block because you are Fyk."

[8] Which such redistribution/revaluation was effectuated unlawfully, *see, e.g.*, ER 28-30 at ¶¶ 58-66 (Second Claim for Relief—Violation of California Business & Professions Code Sections 17200—17210 (Unfair Competition)); ER 30-31 at ¶¶ 67-71 (Third Claim for Relief—Civil Extortion), and effectuated discriminatorily, *see* ER 23-24 at ¶¶ 45-47.

content Facebook had previously declared problematic (*i.e.*, violative of the CDA/Community Standards) when owned and operated by Fyk.

(2) Whether the District Court erred in deviating from the applicable legal standard at the dismissal stage when it plainly injected Facebook's version of facts (*i.e.*, propaganda such as the factually false and out-of-context nonsense about one of Fyk's supposed pages supposedly being dedicated to featuring public urination) into its ruling.

(3) Whether (c)(1) immunity applies in a "first-party" (rather than a "third-party") setting and whether it has been proper for some district courts (*e.g.*, *Sikhs* and *Lancaster*) to apply (c)(1) immunity to the (c)(2)(A) immunity paradigm. As discussed in Fyk's Response in Opposition to Motion to Dismiss and as many cases cited in Facebook's Motion to Dismiss have directly or indirectly recognized, unless (c)(2)(A) is mere surplusage to (c)(1) (in contravention of ordinary canons of statutory construction), the Legislature had to have intended (c)(1) immunity for "third-party" scenarios (*e.g.*, defamation or false information cases), rather than "first-party" scenarios (*e.g.*, "good faith" content "regulation"/"policing" cases under (c)(2)(A)). *See* ER 43-46.

STATEMENT OF THE CASE/RELEVANT FACTS

In adopting the *carte blanche*, sovereign-like (c)(1) immunity defense advanced by Facebook, the District Court allowed Facebook to destroy Fyk's businesses/pages by employing an inapposite analytical framework and relying on distinguishable case law. As to "inapposite analytical framework," CDA immunity is inapplicable in this case, as this case is not about

(de-)creation of Fyk's content. Rather, this case falls under the development prong of (f)(3)—no CDA immunity (whether that is (c)(1) or (c)(2)(A) immunity) is available to Facebook because it was "responsible, in whole or in part, for the . . . development of information provided through the Internet." 47 U.S.C. § 230(f)(3) (emphasis added). More specifically, Facebook was responsible for the development, in whole or in part, of the relevant Fyk businesses/pages (*i.e.*, "information provided through the Internet"), for his competitor, thereby turning Facebook into an "information content provider" that is not entitled to any CDA immunity.

As to "distinguishable case law," this is a case involving a "first-party" claim. As such, case law involving "third-party" (c)(1) immunity does not apply. If, by contrast, this was a case eligible for any CDA immunity, which it is not, at best Facebook would be eligible for (c)(2)(A) immunity, not (c)(1) immunity. If that was not so, (c)(2)(A) would be rendered superfluous to (c)(1). The District Court erred in relying on case law that wrongly applied (c)(1) immunity to a (c)(2)(A) immunity paradigm (like the *Sikhs* district decision, the crux of the Dismissal Order). This is a case governed by *Fair Housing*,[9] not a case governed by *Sikhs*.

To be clear, this lawsuit is about the business strategy employed by Facebook to develop information for select, "high-quality" valued individuals/entities (*i.e.*, individuals/entities who pay Facebook more), while fraudulently exploiting the protections of CDA

---

[9] *See* footnote 5, *supra* (assessing passive content display versus active content development, with our case being the latter).

immunity in order to tortiously interfere with other businesses targeted for eradication by eliminating those businesses' ability to make money by "disrupt[ing] the[ir] incentives." As a result, Facebook creates a lawless marketplace immersed in unfair competition,[10] and, according to the District Court, is immune from any liability for such acts. As applied specifically to Fyk, this lawsuit is about the several unlawful (*i.e.*, fraudulent, extortionate, unfairly competitive) methods selectively and discriminatorily employed by Facebook to "develop" Fyk's "information content" for an entity Facebook values more (Fyk's competitor, who paid Facebook more), in interference with Fyk's economic advantage to augment Facebook's corporate revenue.

In conjunction with wrongly affording Facebook (c)(1) immunity in a "development" case where no CDA immunity whatsoever is available, the District Court also erred in myriad other ways, including: (1) embracing a Facebook "fact" that was not true (*e.g.*, the inaccurate assertion that Fyk supposedly maintained a page dedicated to featuring public urination), in violation of well-settled law concerning a trial court's having to accept as true the facts pleaded in the four corners of the Complaint and construe same in a light most favorable to the plaintiff; (2) applying (c)(1) immunity in a manner that contravenes canons

---

[10] Facebook does not hide its "development" business strategy. *See, e.g.,* https://newsroom.fb.com/news/2019/04/people-publishers-the-community/ ("so we're working to set incentives that encourage the creation of these types of content," which goes purely to the "development" of content, nothing else such as the "policing" of bad content). What Facebook does try to hide (*via* manipulation of the CDA, as here) is the unlawful conduct it employs (as here) in carrying out its business strategy.

of statutory construction (*e.g.*, rendering the next section, (c)(2)(a), superfluous); and (3) ignoring applicable equitable tenets. Whether viewed legally, factually, or equitably, Fyk did not deserve to have his well-pleaded Complaint dismissed. We turn now to relevant facts.

By way of background, Fyk filed suit against Facebook for damages in excess of $100,000,000.00. *See, e.g.,* ER 8 at ¶ 2. For years, Fyk created and posted humorous content on Facebook's free social media platform. *Id.* at ¶ 2. Fyk's creative content was extremely popular and, ultimately, he had more than 25,000,000 followers at his peak on Facebook pages (ranked fifth in Facebook viewership presence in the entire world) ahead of competitors like BuzzFeed, College Humor, and Upworthy, and other large media companies like CNN. *Id.* at ¶ 1. As a result of this presence and reach, the Fyk businesses/pages housing his humorous content generated hundreds of thousands of dollars a month in advertising and lead generating activities, all of which derived from Fyk's valuable high-volume fanbase. *Id.* at ¶ 2.

From 2010 to 2016, Facebook implemented a purportedly "optional" pay-to-play "reach" program, and, in doing so, became the competitor of content providers like Fyk. ER 11-13 at ¶¶ 17-19. In an effort to justify removing "problematic" competition like Fyk, Facebook created deliberately ambiguous Community Standards with the intent to selectively enforce these "rules" in order to force out any businesses (like Fyk's) who Facebook no longer valued. ER 13 at ¶ 20.

Facebook's anti-competitive tactics resulted in the deactivation or crippling restriction of Fyk's businesses/pages in October 2016. ER 13-22 at ¶¶ 20-41.

Facebook's deactivation or crippling restriction of Fyk's businesses/pages rendered same valueless, forcing Fyk into fire selling same to a competitor in Los Angeles who was in bed with Facebook. ER 22 at ¶¶ 42-43.

In the months following October 2016, at the request of Fyk's competitor to Facebook, the businesses/pages were reactivated (*i.e.*, "developed") by Facebook for the competitor simply because the businesses/pages were no longer owned by Fyk. ER 22-24 at ¶¶ 42-47. Again, the content of these businesses/pages was identical to that which Facebook had deemed (in conjunction with its supposed content "regulation"/"policing" in October 2016 or prior) violative of its Community Standards and/or the CDA when owned by Fyk. ER 23 at ¶ 45. And, upon information and belief, Facebook orchestrated the redistribution/steering of Fyk's businesses/pages to the competitor because the competitor paid Facebook significantly more "optional" pay-to-play "reach" program money than did Fyk. ER 22-24 at ¶¶ 42-47.

If Facebook's pre-suit justification for destroying/devaluing Fyk's livelihood can be said to revolve around anything CDA-related, it most clearly would have to be said to have revolved around (c)(2)(A). *See, e.g.,* ER 20-21, 29 at ¶¶ 38, 64. The pre-suit content-related "justification" (*i.e.*, (c)(2)(A)-related "justification") slung about by Facebook in relation to the deactivation or severe restriction of Fyk's livelihood culminating in October 2016 was lies/fraud/bad faith, as evidenced by Facebook's active hand in developing the businesses/pages for Fyk's competitor and allowing the exact same supposedly offensive Fyk content to be published on the Internet or the Facebook inter-

active computer service by or for the competitor. *See, e.g.,* ER 22-24, 29 at ¶¶ 42-47, 64.

SUMMARY OF THE ARGUMENT

As discussed in Section A below, the District Court erred by deviating from the required legal standard in entering the Dismissal Order. More specifically, as discussed in Section A below, the District Court's embracing an out-of-line, out-of-context, and untrue "fact" injected by Facebook outside the four corners of the Complaint (in a light most favorable to Facebook, rather than Fyk) directly contravened the dismissal standard of review set forth below. Compounding this problem is the fact that the District Court inserted Facebook's "fact" into the very start of the Dismissal Order, strongly suggesting that the "fact" was a predicate for the ruling . . . not to mention, suggesting bias in favor of Facebook.

As discussed in Section B below, if this Court's analysis somehow proceeds past Section A, this case (with a fact pattern in line with *Fair Housing*, for example, when juxtaposed with the backdrop of all the CDA case law out there) is not eligible for any CDA immunity (whether that is (c)(1) or (c)(2)(A) immunity) because of the *Fair Housing* understanding that active "development" renders the "interactive computer service" an "information content provider."

As discussed in Section C below, if this Court's analysis somehow proceeds past Sections A and B, (c)(1) in no way immunizes Facebook from its destructive acts here for more than one reason. Immunity under (c)(1) is only available to Facebook (an "interactive computer service") where (as not here) it is being pursued by someone else for Fyk's

publications or speeches (*i.e.*, content/"information provided") or by Fyk for someone else's publications or speeches (*i.e.*, content/"information provided"). Simply put, (c)(1) applies to a "third-party" setting and (c)(2)(A) applies to a "first-party" setting. This is evidenced by the proper application of (c)(1) immunity in defamation and/or false information cases (which, historically, are the bulk of (c)(1) cases) where, for example, John sues Facebook over something libelous that Susan posted about John on Facebook.

If this was not the case, (c)(1) would swallow (c)(2)(A) in contravention of the ordinary surplusage/superfluidity canon of statutory construction. This canon-repugnant conflation of (c)(1) and (c)(2)(A) was at the heart of wrong results at the district level in *Sikhs* and *Lancaster*, for examples. While content "regulation"/"policing" (which is what *Sikhs* and *Lancaster* were about as pleaded by the plaintiffs in those cases, not as recast by the defendants in those cases) can enjoy immunity under some circumstances, that would be the (c)(2)(A) circumstance and only if there is "good faith" behind the de-creation of content. That would not be a (c)(1) circumstance. The *Sikhs* and *Lancaster* courts (and, by extension, the District Court here) should have never applied (c)(1) to a (c)(2)(A) fact-pattern and perhaps, as other courts in this jurisdiction have properly done, should have denied a (c)(2)(A) immunity defense as premature at the dismissal stage because discovery was needed regarding the justification (or lack thereof) for the content removal such that the "good faith" component of (c)(2)(A) could be analyzed in an informed fashion.

As discussed in Section D below, if this Court's analysis somehow proceeds past Sections A-C, Facebook

must be estopped from wielding (or deemed to have waived any right it may have had to wield) (c)(1) immunity against Fyk.

For any of the reasons discussed in Sections A-D of this brief (whether considered separately or together), the Dismissal Order is due to be reversed and this matter is due to be remanded to the District Court for resolution on the merits; *i.e.*, resolution of the illegalities and discrimination giving rise to Fyk's claims for relief.

ARGUMENT

This Court's review of a district court's failure to state a claim dismissal with prejudice is *de novo*. *See, e.g., Disability Rights Montana, Inc. v. Batista*, No. 15-35770, 2019 WL 3242038, *4 (9th Cir. Jul. 19, 2019); *Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 890 (9th Cir. 2019). And dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment. *See, e.g., Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 655-656 (9th Cir. 2017).

A. The District Court Wrongly Deviated from the Dismissal Standard

In ruling on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim, which necessarily involves an immunized claim because such a claim would "lack[ ] a cognizable legal theory or sufficient facts to support a cognizable legal theory," *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008), on its face, *see, e.g., Sato v. Orange Cty. Dep. of Ed.*, 861 F.3d 923, 927 (9th Cir. 2017), a district court must observe this standard:

> The standard for surviving a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) after the Supreme Court's decisions in *Twombly* and *Iqbal* is that the plaintiff must provide 'a short and plain statement of the claim showing the pleader is entitled to relief' which 'contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.' *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1048 (9th Cir. 2012) (citing *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955, and *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937). To meet this burden, 'the nonconclusory factual content' of [plaintiff's] complaint and 'reasonable inferences from that content,' must be at least 'plausibly suggestive of a claim entitling the plaintiff to relief.' *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955). We must 'take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party.' *Steinle v. City and Cty. of S.F.*, 919 F.3d 1154, 1160 (9th Cir. 2019) (quoting *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995)).

Batista, 2019 WL 3242038 at *4.

In sum, a very high bar must be cleared by a defendant to achieve dismissal; *i.e.*, deprive a plaintiff of his day in court. Dismissal is the ultimate sanction in the adversarial system and should be reserved for those aggravating circumstances in which a different course would not achieve a just result. Facebook's dismissal briefing did not clear the very high bar

and, thus, the District Court should not have sanctioned Fyk *via* dismissal of his well-pleaded Complaint.

> The Dismissal Order begins as follows:
>
> Now before the Court is Defendant Facebook, Inc. ('Facebook')'s motion to dismiss. Plaintiff, Jason Fyk, filed suit under diversity jurisdiction, for intentional interference with prospective economic advantage, violation of California Business and Professions Code section 17200 *et seq.*, civil extortion, and fraud for Facebook's devaluation of Plaintiff's online pages. Plaintiff had used Facebook's free online platform to create a series of, among other amusing things, pages dedicated to videos and pictures of people urinating.

ER 1 (emphasis added).

The factually inaccurate and out-of-context red-herring about a page supposedly "dedicated" to "people urinating" came from Facebook's Motion to Dismiss. *See* ER 86. As if this statement (which has no place in the Motion to Dismiss) was not enough, the reference was to a particular Facebook page, www.facebook.com/takeapissfunny, that was not even about public urination.[11] Rather, upon information and belief, that

---

[11] "Upon information and belief" because, as would have been explained to the District Court had the District Court not deprived Fyk of his literal day in court (*i.e.*, the June 2019 hearing), Fyk does not know much about the www.facebook.com/takeapissfunny business/page because such was not Fyk's business/page. More specifically, as would have been explained to the District Court (in a fleshing out of footnote 1 of the Response in Opposition to Motion to Dismiss, ER 40 at n. 1, though such explanation should not have been required because the District Court should have been construing the subject

business/page simply had that domain name because of the common expression "I laughed so hard that I almost peed my pants." Fyk's Response in Opposition to Motion to Dismiss gave Facebook's urination "factual" red-herring short-shrift, *see* ER 40 at n. 1, because Fyk reasonably believed the District Court would adhere to the above dismissal standard of review by not injecting a "fact" (especially a Facebook "fact") into the dismissal analysis and/or by not construing the facts alleged in the Complaint in a light most favorable to Facebook (rather than Fyk).

It is reversible error for a district court to not follow the applicable standard of review, especially where (as here) the "factual" deviation converted the motion to dismiss into a motion for summary judgment and the "factual" deviation influenced the result. *See, e.g., Alaska NW Pub. Co. v. A.T. Pub. Co.*, 458 F.2d 387 (9th Cir. 1972) (treating a motion to dismiss as a motion for summary judgment where, as here, matters outside the pleading were presented to and not excluded by the court, and holding that the granting of summary judgment was not proper where, as here, there was a genuine issue on the material fact); *Jackson v. S. Cal. Gas Co.,* 881 F.2d 638, 642 n. 4 (9th Cir. 1989); Fed. R. Civ. P. 12(d).

---

matter of footnote 1 in a light most favorable to Fyk in never interspersing the public urination "fact" into the dismissal analysis), Fyk inadvertently included this business/page in paragraph 22 of the Complaint. *See* ER 14-15 at ¶ 22. "Inadvertently" because this was not a business/page that Fyk owned, it was a business/page of somebody else bearing the first name "Jason." To be clear, Fyk did not own a business/page dedicated to public urination . . . and, actually, to the contrary, Fyk has reported public urination pages to Facebook as filthy and Facebook did not take action.

Here, the District Court deviated from the standard of review set forth above by injecting Facebook's "facts" (the off-base bit about a page supposedly being dedicated to featuring public urination) into the dismissal analysis and/or not construing the facts pleaded by Fyk in a light most favorable to him. Here, the District Court's reliance on "facts" injected by Facebook converted Facebook's Rule 12(b)(6) or 12(c) Motion to Dismiss into a Rule 56 motion for summary judgment. Here, the District Court erred in granting Facebook summary judgment because there is genuine dispute as to the public urination "fact" that the District Court deemed material enough to prominently feature in the Dismissal Order. The Dismissal Order is due to be reversed; but, in an abundance of caution, we continue.

B. The District Court Erred in Failing to Recognize That Facebook Was a "Developer"/"Active Hand" (*i.e.*, "Information Content Provider") in Relation to the Wrongs That Fyk Complains of, Removing Facebook from the Comforts of Any CDA Immunity

There is what this case is about (as pleaded by Fyk), and there is what this case is not about (as recast by Facebook and its supporter, the District Court). Part and parcel with that, there is apposite case law (relied on by Fyk) and there is inapposite case law (relied on by Facebook and the District Court) . . . we begin with the former and turn to the later.

1. Fyk's Circuit (*e.g.*, *Fair Housing*, *Batzel*) and District (*e.g.*, *Perkins*, *Fraley*) Authority Is Apposite

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (not-so-surprisingly not cited in Facebook's Motion to Dismiss, *see* ER 86-103, and only glancingly mentioned in Facebook's Reply in Support of Facebook's Motion to Dismiss, *see* ER 112, 114), this Court determined that the "interactive computer service" at play there (Roommates.com) went too far for it to enjoy any CDA immunity; *i.e.*, engaged in the "development of information provided through the Internet or any other interactive computer service," rendering it an "information content provider" per (f)(3) outside the reach of CDA immunity. And that is precisely what Fyk alleges in relation to the heart of his case—that Facebook went too far in its post-October 2016 actions relating to Fyk's competitor; *i.e.*, became the "information content provider" with respect to Fyk's businesses/pages at least in relation to its post-October 2016 "development"/active treatment of Fyk's businesses/pages, putting this case outside of any CDA immunity.

Indeed, Fyk's Response in Opposition to Motion to Dismiss cited *Fair Housing* for that very proposition. For example, Fyk's Response in Opposition to Motion to Dismiss stated as follows: "Then there is *Fair Housing Council*, 521 F.3d 1157 as another example, where Section 230 of the CDA was found inapplicable because Roommates.com's own acts . . . were entirely Roommates.com's doing." ER 45. As another example, Fyk's Response in Opposition to Motion to Dismiss stated as follows:

Subsection (c)(1) immunity is only afforded to an 'interactive computer service' under some situations, not to the 'publisher' (*i.e.*, 'information content provider'). But Facebook's conduct . . . took it outside the shoes of an 'interactive computer service' and inside the shoes of 'information content provider,' in whole or in part; thus, Facebook is not Subsection (c)(1) immune. *See, e.g.*, *Fair Hous. Council*, 521 F.3d at 1165 ('the party responsible for putting information online may be subject to liability, even if the information originated with a user,' citing *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003)); *Fraley*, 830 F. Supp. 2d 785 (denying the CDA motion to dismiss, as Facebook's being both an 'interactive computer service' and an 'information content provider' went beyond a publisher's traditional editorial functions when it allegedly took members' information without their consent and used same to create new content published as endorsements of third-party products or services); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1247 (N.D. Cal. 2014) (denying the CDA motion to dismiss wherein LinkedIn sought immunity as an interactive computer service, with the court endorsing, at least at the dismissal stage, plaintiffs' claim that LinkedIn provided no means by which a user could edit or otherwise select the language included in reminder emails and that true authorship of the reminder emails laid with LinkedIn); *Jurin*, 695 F. Supp. 2d at 1122 (holding, in part, that

> '[u]nder the CDA an interactive computer service qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue,' citing *Carafano*, 339 F.3d at 1123). Facebook's attempt to distance itself from the 'information content provider' role in have its cake and eat it too fashion translates to: 'Accuse your enemy of what you are doing. As you are doing it to create confusion.'—Karl Marx. The M2D must be denied as a matter of law.

ER 48-49.

Notably, Facebook's Motion to Dismiss does not analyze *Fair Housing*, *Batzel*, *Fraley*, and *Perkins*, nor does the Reply in Support of Facebook's Motion to Dismiss other than glancing reference to *Fair Housing*. The Dismissal Order briefly cites to *Perkins* and *Fraley*, but not in relation to the germane holdings. Perhaps most importantly, the Dismissal Order's brief citations to *Fair Housing* clearly demonstrate that the District Court did not thoroughly analyze (or did not comprehend) this apposite Ninth Circuit decision. *See* ER 2 (citing *Fair Housing* for none of the holdings germane to this case) and ER 3-4 (citing *Fair Housing* in relation to the limited use of same in a case wholly inapplicable to this case—*Sikhs for Justice v. Facebook, Inc.*, 144 F. Supp. 3d 1088 (N.D. Cal. 2015)).

The District Court's citation of *Perkins* speaks to "content created." *See* ER 2. The District Court's citation of *Fraley* speaks to Facebook's being "an interactive computer service." *See* ER 3. And the District Court's citation of *Fair Housing* only goes to the

Sikhs district court's limited use of *Fair Housing* in relation to the *Sikhs* "content created" discussion. *See* ER 3.

This is not a (f)(3) "creation" case like *Sikhs* and other cases cited in Facebook's dismissal briefing and in the Dismissal Order. What the District Court completely missed was this Court's lengthy discussion in *Fair Housing* as to the difference between content creation and content development under (f)(3) and how an "interactive computer service" can also be an "information content provider" when it engages in development. The *Sikhs* district level decision dealt with content created by someone not named Facebook. Again, our case is not a (f)(3) "creation" case, our case is a (f)(3) "development" case. Again, what Facebook did after October 2016 is the thrust of our case, and what Facebook did after October 2016 has everything to do with its own active development of the subject businesses/pages (*i.e.*, nothing to do with its "regulation"/"policing" of content created by Fyk in or before October 2016).[12] Again, any naïve notion that Facebook was genuinely "regulating"/"policing" Fyk's content necessarily ended in October 2016 when it took away 14,000,000 of Fyk's fans and then proceeded with developing them for Fyk's competitor. So, we return to discussion of cases that actually pertain to this case, chief among which is *Fair Housing*.

---

12 And, again, even Facebook's pre-October 2016 content "regulation"/"policing" enjoys no immunity when assessed under the appropriate CDA lens—(c)(2)(A). Because, again, such "regulation"/"policing" was not grounded in "good faith" as evidenced by (among other things) Facebook's restoring identical content for Fyk's competitor.

In *Fair Housing*, the Ninth Circuit properly determined that Roommates.com lost any CDA immunity when (just as Facebook did here) it engaged in the "development of information provided through the Internet or any interactive computer service" per (f)(3). *Fair Housing* holdings germane to this case (and not cited by Facebook and overlooked by the District Court) are as follows:

- "This grant of immunity applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of' the offending content. *Id.* § 230(f)(3)." *Fair Hous.*, 521 F.3d at 1162.
    - Here, Facebook is no doubt an "interactive computer service." Fyk concedes that and the District Court properly observed as much. But, here, there is also no doubt that Facebook is an "information content provider" under (f)(3)'s "development" prong. The District Court missed that in its misplaced focus on "creation" (*via* cases like *Sikhs*) that is inapplicable here rather than on "development" (*via* cases like *Fair Housing, Perkins,* and *Fraley*) that is applicable here.
- "A website operator can be both a service provider and a content provider: If it *passively* displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it . . . is 'responsible, in whole or in part'

for . . . *developing*, the website is also a content provider." *Id.* at 1162 (emphasis added).

- Here, Facebook was "responsible, in whole or in part, for developing" Fyk's businesses/pages by way of (at the very least) its orchestration (or facilitation, at minimum) of the redistribution of Fyk's businesses/pages and its revaluation of same for Fyk's competitor (along with its actively allowing the competitor to publish the same content that was supposedly CDA/Community Standard violative when owned by Fyk).

- "For example, a real estate broker may not inquire as to the race of a prospective buyer, and an employer may not inquire as to the religion of a prospective employee. If such questions are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online. The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Id.* at 1164.

  - Here, Facebook's tortious interference, unfair competition, civil extortion, and fraud did not "magically become lawful" because such wrongdoing was carried out "electronically online." Facebook could not destroy/devalue Fyk's businesses/pages, orchestrate (or facilitate, at minimum) the redistribution of his businesses/pages to a Fyk competitor who paid Facebook significantly more money than did Fyk, and allow the

supposedly (c)(2)(A) violative content of Fyk's businesses/pages to go back up on the Internet (and/or the Facebook interactive computer service) when such businesses/pages became those of Fyk's competitor.

- "Roommate's own acts . . . are entirely its doing and thus section 230 of the CDA does not apply to them. Roommate is entitled to no immunity." *Id.* at 1165.
    - Facebook's post-October 2016 acts as it relates to Fyk's businesses/pages (because, again, by then Facebook's purported "regulation"/"policing" of the supposedly violative content housed therein had ended) were "entirely [Facebook's] doing." Facebook worked directly with Fyk's competitor to develop his content for the competitor (*i.e.*, engaged in activity well beyond "regulation"/"policing" of content). "[Facebook] is entitled to no immunity."
- "But, the fact that users are information content providers does not preclude Roommate from *also* being an information content provider by helping 'develop' at least 'in part' the information in the profiles. As we explained in *Batzel*, the party responsible for putting information online may be subject to liability, even if the information originated with a user. *See Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003)." *Id.* at 1165 (emphasis in original).
    - The fact that Fyk (the user) was also an information content provider "does not preclude [Facebook] from *also* being an

information content provider by helping 'develop' at least 'in part' the information [in Fyk's businesses/pages]."

- "By requiring the subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information. And section 230 provides immunity only if the interactive computer service does not 'creat[e] or develop[ ]" the information 'in whole or in part.' *See* 47 U.S.C. § 230(f)(3)." *Id.* at 1166.
    - By Facebook's interfering with Fyk's businesses/pages in unlawful fashion, Facebook "bec[ame] much more than a passive transmitter of information provided by others; it be[came] the developer, at least in part, of th[e] information [that was Fyk's businesses/pages]."
- "This is no different from a real estate broker in real life saying, 'Tell me whether you're Jewish or you can find yourself another broker.' When a business enterprise extracts such information from potential customers as a condition of accepting them as clients, it is no stretch to say that the enterprise is responsible, at least in part, for developing that information." *Id.* at 1166.
    - Facebook's treatment of Fyk in relation to his businesses/pages was no different than telling Fyk, "Tell me whether you are Fyk

and, if you are, your businesses/pages will need to find a new owner in order to have Facebook as the interactive computer service broker of same."

- "We believe that both the immunity for passive conduits and the exception for co-developers must be given their proper scope and, to that end, we interpret the term 'development' as referring not merely to augmenting the content generally, but to materially contributing to it[ ] . . . ." *Id.* at 1167-1168.
    - Facebook was by no means a "passive conduit" as it pertained to Fyk's businesses/pages; rather, Facebook "materially contribut[ed]" to the "development" of the businesses/pages in devaluing same, having an active hand in redistributing same, and having an active hand in allowing the supposedly (c)(2)(A) violative content supposedly found therein to be published on the Internet and/or on Facebook once same found a new home in Fyk's competitor.
- "[S]ection 230(c) uses both 'create' and 'develop' as separate bases for loss of immunity. . . . We are advised by the Supreme Court that we must give meaning to all statutory terms, avoiding redundancy or duplication wherever possible. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 197, 105 S. Ct. 658, 83 L.Ed.2d 582 (1985)." *Id.* at 1168.
    - In this lawsuit, based on what this lawsuit is actually about, it matters not who created the content within Fyk's businesses/pages.

Here, what matters is Facebook's development, in whole or in part, of Fyk's businesses/pages, with such "development" unfolding in myriad illegal and discriminatory ways. The Supreme Court counsels this Court to again (as in *Fair Housing*) recognize the distinction of "developer" versus "creator" within (f)(3) and the impact that that has on immunity (or, rather, lack thereof) under (c). *Fair Housing* properly recognizes that "creation" or "development" under (f)(3) serve as independent bases (per the word "or") for cutting off (c) immunity.

- "A dating website . . . retains its CDA immunity insofar as it does not contribute to any alleged illegality." *Id.* at 1169.
    - The Facebook illegalities that transpired in relation to Fyk's businesses/pages in relation to Fyk's competitor (after October 2016) cut-off any (c) immunity Facebook may have otherwise enjoyed.
- "We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content." *Id.* at 1174.
    - The thrust of this lawsuit is not Facebook's removal of Fyk's content, which, again, transpired in or before October 2016 (though such is certainly actionable because Facebook's (c)(2)(A) "regulation" of Fyk's content pre-October 2016 was fraudulent/bad

faith); *i.e.*, the thrust of this lawsuit is not Facebook's de-"creation" of Fyk's content. Rather, the thrust of this lawsuit is the unlawful activities perpetrated by Facebook after October 2016 in relation to Fyk's businesses/pages in relation to Fyk's competitor; *i.e.*, the thrust of this lawsuit is Facebook's illegal and discriminatory "development" of Fyk's businesses/pages (for Fyk's competitor) and such "development" rendering Facebook an "information content provider" under (f)(3) subject to no CDA immunity.

- "Where it is very clear that the website directly participates in developing the alleged illegality . . . immunity will be lost." *Id.* at 1175.
    - It could not be clearer that Facebook had a direct hand in illegally and discriminatorily interfering with Fyk after October 2016 in ways far outside the realm of supposed "regulation"/ "policing" of content; thus, "immunity [is] lost."
- "When Congress passed section 230 it didn't intend to prevent the enforcement of all laws online; rather, it sought to encourage interactive computer services that provide users neutral tools to post content online to police that content without fear that through their 'good [S]amaritan . . . screening of offensive material,' 47 U.S.C. § 230(c), they would become liable for every single message posted by third par-

ties on their website." *Id.* at 1175 (emphasis in original).

- Facebook's post-October 2016 conduct (which, again, is the conduct at the heart of this case) had nothing to do with "polic[ing] [Fyk's] content," as evidenced by Facebook's having an active hand in the broadcasting/"developing" of the identical content through the Internet and/or through Facebook's interactive computer service once somebody not named Fyk (*i.e.*, Fyk's competitor) owned/operated same.

And *Perkins*, for example, which such decision Facebook ignored, recognized what the District Court should have recognized here. *See, e.g.*, *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1246 (N.D. Cal. 2014) (in deciding LinkedIn did not enjoy CDA immunity, the court held, in pertinent part, that "[i]mportantly, section 230's 'grant of immunity applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is responsible, in whole or in part, for the creation or development of the offending content,'" citing to *Fair Housing*); *see also, e.g.*, ER 49 (citing *Perkins*).

And *Fraley*, as another example, which such decision Facebook ignored, recognized what the District Court should have recognized here. *See, e.g., Fraley v. Facebook*, 830 F. Supp. 2d 785, 801-802 (N.D. Cal. 2011) (in deciding Facebook did not enjoy CDA immunity, the court held, in pertinent part, that "Defendant ignores the nature of Plaintiff's allegations, which accuse Defendant not of publishing tortious

content, but rather of creating and developing commercial content" and that an information content provider is "not . . . entitled to CDA immunity," citing to *Fair Housing* and *Batzel*); *see also* ER 48 (citing *Fraley*).

And, as *Fair Housing* pointed out, the *Batzel* decision, as another example, recognized what the District Court should have recognized here. *See, Fair Hous.*, 521 F.3d at 1165 ("As we explained in *Batzel*, the party responsible for putting information online may be subject to liability, even if the information originated with a user. *See Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003)").

Facebook and the District Court "ignore[d] the nature of Plaintiff's allegations, which accuse Defendant not of [(de-)creating] tortious content, but rather of . . . [tortiously] developing" Fyk's businesses/pages (and, necessarily, the supposed violative content therein) for Fyk's competitor. Just as in *Fair Housing*, for example, here the "interactive computer service" (Facebook) was also the "information content provider" by way of its "development" of Fyk's businesses/pages and accordingly does not enjoy any CDA immunity.

2. Facebook's and the District Court's District (*e.g.*, *Sikhs*, *Lancaster*) Authority Is Inapposite

The Dismissal Order relies heavily (if not entirely) on *Sikhs for Justice, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088 (N.D. Cal. 2015). And that is no surprise because Facebook's dismissal briefing relies heavily on *Sikhs* (and *Lancaster v. Alphabet, Inc.*, No. 15-cv-05299-HSG, 2016 WL 3648608 (N.D. Cal. Jul. 8, 2016), which was/is pretty much the same thing as *Sikhs*) and the District Court has already

exhibited a bias in favor of Facebook (*e.g.*, the District Court's incorporation of the non-fact that was the red-herring public urination nonsense). *Sikhs* and *Lancaster* (along with all the other content "(de-) creation" cases) could not be more inapplicable here.

In *Sikhs* and *Lancaster*, the plaintiffs were pursuing an interactive computer service (Facebook and Alphabet, respectively) over the interactive computer service's "regulation"/"policing" of content. Put differently as it pertains to this case, the plaintiffs in *Sikhs* and *Lancaster* sought redress for activity akin to what Facebook did to Fyk in October 2016 or prior. In *Sikhs* and *Lancaster*, there was no post-October 2016 unlawful conduct, which, again, such post-October 2016 unlawful conduct is the heart of this case. Put differently, in *Sikhs* and *Lancaster*, it could not be said that the interactive computer service was also functioning as an "information content provider" in the "development" of businesses/pages (and necessarily the content housed therein). Facebook's post-October 2016 unlawful conduct (*i.e.*, developing the subject businesses/pages for Fyk's competitor) removes this case entirely from the CDA immunity defense that victimized the plaintiffs in *Sikhs* and *Lancaster*. And, then, as now discussed within the confines of *Sikhs* (although such could also be said for *Lancaster*), the *Sikhs* district court (and the District Court here, by extension) erred in applying (c)(1) to a (c)(2)(A) fact-pattern.

C. The District Court Erred by Applying (c)(1) in This Matter

Case law and canons of statutory construction make clear that, unless (c)(2)(A) is mere surplusage

to (c)(1), (c)(1) affords immunity under some "third-party" circumstances (*e.g.*, Party 1 is accusing the "interactive computer service," Party 2, of content "policing"/"regulation" failures in relation to Party 3's content) whereas (c)(2)(A) affords immunity under some "first-party" circumstances (*e.g.*, Party 1 is accusing the "interactive computer service," Party 2, of content "policing"/"regulation" failures in relation to Party 1's content).

1. Case Law

The great majority of cases cited in Facebook's Motion to Dismiss, for the application of (c)(1), are "third-party" cases. In *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009), for example, cited ER 93, Nemet Chevrolet, Ltd. was suing Consumeraffairs.com over consumer reviews that others had posted on the Consumeraffairs.com platform about Nemet Chevrolet, Ltd. Consistent with Fyk's interpretation of (c)(1), the district court in *Nemet Chevrolet, Ltd.* concluded (and the Fourth Circuit affirmed) that "the allegations contained in the Amended Complaint [d]o not sufficiently set forth a claim asserting that [Consumeraffairs.com] [created] the content at issue." *Id.* at 253. In affirming, the Fourth Circuit held that "interactive computer service providers [are not] legally responsible for information created and developed by *third parties*." *Id.* at 254 (emphasis added) (citing *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc)). Instructively, the Fourth Circuit also held that "Congress thus established a general rule that providers of interactive computer services are liable only for speech [or development] that is properly attributable to them." *Id.* at 254 (citing *Universal*

Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007)). *Nemet Chevrolet, Ltd.* further confirms reality—that (c)(1) immunity pertains to "third-party" liability (Party 1 pursuing the interactive computer service, Party 2, over the interactive computer service's conduct relating to Party 3). Our case is a "first-party" case (Party 1 pursuing the interactive computer service, Party 2, over the interactive computer service's conduct relating to Party 1).

Same with *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), cited at ER 90, 94, 96. In *Barnes*, as another example, the plaintiff sued over defendant's alleged failure to remove indecent posts of (or pertaining to) her made by her ex-boyfriend on the Yahoo!, Inc. platform. Barnes sought to remove Yahoo!, Inc. from (c)(1) immunity based on her arguments that Yahoo!, Inc. served as a "publisher" in relation to the subject indecent posts. The *Barnes* court concluded, however, that the "publisher" of the indecent posts was the third-party ex-boyfriend, thereby finding that (c)(1)'s "third-party" liability immunity applied to Yahoo!, Inc. Our case is a "first-party" case involving Facebook's wrongful development of Fyk's businesses/pages, not a "third-party" case against Facebook over some notion that someone else's post about Fyk on Facebook was indecent and Facebook should have (de-)created the third-party post.

And there are courts out there that have affirmatively recognized that (c)(1) immunity does not fit the (c)(2)(A) paradigm. In *e-ventures Worldwide, LLC v. Google, Inc.*, 214CV646FTMPAMCM, 2017 WL 2210029, at *1 (M.D. Fla. Feb. 8, 2017), for example, cited at ER 40, 45, the court, on summary judgment and accepting as true e-ventures' allegations

that Google's investigation and removal of e-ventures' content was motivated not by a concern over web spam but by Google's concern that e-ventures was cutting into Google's revenues, found that (c)(1) did not immunize Google's actions. Under the facts of that case, the *e-ventures* court found that (c)(1) did not immunize Google's actions and that, while (c)(2)(A) may provide that immunity, that section only immunizes actions taken in good faith. And because the *e-ventures* court found there was sufficient circumstantial evidence to raise a genuine issue of fact as to Google's good faith, the *e-ventures* court denied summary judgment on that basis. More importantly, the *e-ventures* court found that interpreting the CDA in a manner that provides general immunity under (c)(1) to acts similar to those by Facebook swallowed the more specific immunity in (c)(2)(A), *e-ventures* at *3, which violates the surplusage canon of statutory construction as set forth by the United States Supreme Court, as recognized by this Court (*e.g.*, *Fair Housing*) and as discussed next.

2. Canon of Statutory Construction

It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L.Ed.2d 251 (2001) (internal quotation marks omitted); *see also, e.g., United States v. Menasche*, 348 U.S. 528, 538–539, 75 S. Ct. 513, 99 L.Ed. 615 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,'" (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152, 2

S. Ct. 391, 27 L.Ed. 431 (1883)); *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001).

And this Court recognized the applicable canon in *Fair Housing*:

> More fundamentally, the dissent does nothing at all to grapple with the difficult statutory problem posed by the fact that section 230(c) uses both 'create' and 'develop' as separate bases for loss of immunity. Everything that the dissent includes within its cramped definition of 'development' fits just as easily within the definition of 'creation'—which renders the term 'development' superfluous. The dissent makes no attempt to explain or offer examples as to how its interpretation of the statute leaves room for 'development' as a separate basis for a website to lose its immunity, yet we are advised by the Supreme Court that we must give meaning to all statutory terms, avoiding redundancy or duplication wherever possible. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 197, 105 S. Ct. 658, 83 L.Ed.2d 582 (1985).

Fair Hous., 521 F.3d at 1168.

Since (c)(2)(A) immunizes only an interactive computer service's actions "taken in good faith," if the interactive computer service's motives for "regulating"/"policing" content are irrelevant and always immunized by (c)(1) (as Facebook argues here), then

(c)(2)(A) is unnecessary.[13] Per all of the above Supreme Court authority (and as also per this Court in at least *Fair Housing*), one portion of a statute cannot be read in a way that renders another portion of a statute superfluous/surplusage.

At its core, if Facebook is to be treated merely as an "interactive computer service" and the CDA is interpreted to give Facebook blanket immunity for *any* conduct, that interpretation eliminates the requirement of showing "good faith" under (c)(2)(A). For the purposes of this appeal, we need not analyze whether Facebook acted in "good faith" (which it did not) because the District Court did not enter into any analysis related to "good faith" in its Dismissal Order and did not find that Facebook would be entitled to (c)(2)(A) immunity.

Here, although no CDA immunity is available for this "developer" case per *Fair Housing*, *Perkins*, *Fraley*, and to some extent *Batzel*, for examples, if this Court somehow believes this is a "creation" case, then the case has to be assessed under the most appropriate CDA lens—which would plainly be the "first-party" (c)(2)(A) lens (not the "third-party" (c)(1)

---

[13] But motivation for crippling content does matter under (c)(2)(A) per, for examples, *e-ventures* and *Song Fi, Inc. v. Google, Inc.,* 108 F. Supp. 3d 876 (N.D. Cal. 2015) (determining that YouTube was not immune under (c)(2) from suit based on California-law—tortious interference with business relations claims by users in relation to operators' decision to remove users' music video from publicly accessible section of website). Hence, the "good faith" language of (c)(2)(A). And, hence, Facebook's fighting tooth and nail here to make (c)(1) (where there is no "good faith"/motivation assessment) fit the (c)(2)(A) paradigm because there was plainly zero "good faith" underlying Facebook's motivation for crippling Fyk.

lens) because Fyk is not trying to hold Facebook liable as a publisher or speaker of any information provided by another information content provider. The District Court accordingly erred in applying (c)(1) immunity to a case that does not fall within its scope. As to the "(c)(2)(A) lens" (again, if this Court somehow believes this is a "creation" case and worthy of any CDA immunity consideration), there has been no discussion/analysis or a showing of "good faith" and that the material removed was in fact "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A). The District Court's heavy reliance on the *Sikhs* district court decision is likewise erroneous since (c)(1) there was likewise wrongly applied.

D. Facebook Is Estopped from (Or Has Waived Any Right to) Leverage (c)(1) Given Its Pre-Suit "Justification" for Its Actions Was Entirely (c)(2)(A)

Lest the language of (c)(2)(A) is mere surplusage to the language of (c)(1), (c)(1) (c)(2)(A) cannot be the same thing. Meaning, Facebook cannot pull off the about-face from (c)(2)(A) (its pre-suit "justification" for its transgressions) to (c)(1) (its post-suit "justification" for its transgressions)—it is one or the other as a matter of law (discussed above) and as a matter of equity (now discussed). Such maneuvering would be equitably untenable under ordinary estoppel and/or waiver tenets, which are sometimes discussed within the "Mend the Hold" doctrine.

The United States Supreme Court counsels against allowing the kind of "bait and switch" that is Facebook's seismic shift from (c)(2)(A) to (c)(1), albeit within the

phrase of art that is "Mend the Hold," which is legalese for estoppel and, to some extent, waiver.[14] *See, e.g., Railway Co. v. McCarthy*, 96 U.S. 258, 6 Otto 258, 24 L.Ed. 693 (1877). Same with circuit courts. *See, e.g., Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 363 (7th Cir. 1990) (a party's "hok[ing] up a phony defense . . . and then when that defense fails (at some expense to the other party) tr[ying] on another defense for size, can properly be said to be acting in bad faith"); *Tonopah & T.R. Co. v. Commissioner of Internal Revenue*, 112 F.2d 970, 972 (9th Cir. 1940); *Connally v. Medlie*, 58 F.2d 629 (2d Cir. 1932).

As Exhibit B to Fyk's Response in Opposition to Motion to Dismiss demonstrated, *see* ER 62-73, Facebook's professed "basis" to Fyk for destroying his businesses/pages was that the content of same purportedly violated Facebook's "Community Standards" or "terms," which sounds in (c)(2)(A) (content-oriented) if somehow deemed to sound in any supposed CDA immunity (*i.e.*, if this case is somehow deemed the de-creation case that it is not rather than the development case that it is). Fyk heavily relied, to his detriment in time and money,[15] on Facebook's professed "basis" for its businesses/pages crippling, which, again, such "basis" was content-oriented or intentionally nebulous so as to keep Fyk guessing as

---

[14] Glaringly applicable forms of estoppel include "estoppel," *see* Bryan A. Garner, *Black's Law Dictionary* 247 (2001 2d pocket ed.) (defining same), "equitable estoppel," *see id.* (defining same), "quasi-estoppel," *see id.* (defining same), and "estoppel by silence," *see id.* (defining same).

[15] *See* ER 50 at n. 9 for examples of the reliance and detriment experienced here.

to why Facebook was destroying his livelihood. It would be improper to allow Facebook to cripple Fyk's businesses/pages on one ground (purported violation of "Community Standards"/"terms," implicating (c)(2)(A)) and try to avoid liability on different grounds ((c)(1)) when that ground is challenged (this suit).

CONCLUSION

None of the CDA was enacted to enable a social media giant's (here, Facebook) destroying a little guy's (here, Fyk) businesses, orchestrating (or facilitating, at the very least) the redistribution/"development" of the little guy's businesses to and for a bigger guy (here, Fyk's Los Angeles competitor) who paid Facebook far more money as part of its "optional" paid-for-reach program, and revaluing same through things such as allowed (and pre-arranged) re-publishing (beyond "passive conduit") of supposedly CDA/Community Standards violative content . . . all so that the social media giant can get richer because, among other things, the bigger guy pays the giant more "optional" money for "reach." That kind of tortious interference with prospective economic advantage/relations, intertwined with discriminatory (predatory, even) fraud, unfair competition, and/or civil extortion is found nowhere in the CDA's legislative intent. How could it be? Facebook would really have us live in a world where 230(c) was enacted and applied to legalize illegalities directed at, among other things, knocking down the pillars (such as the American Dream) that this country was built on?

Facebook's orchestration (or facilitation, at minimum) of the redistribution of Fyk's businesses/pages and Facebook's revaluation of same for Fyk's com-

petitor (along with Facebook's actively allowing the competitor to publish the same content that was supposedly CDA/Community Standard violative when owned/operated by Fyk) makes this case much different than *Sikhs*, *Lancaster*, or any case in which a court afforded CDA immunity under a (de-)creation (rather than development) analysis. It makes this case a *Fair Housing* case, for example.

Facebook took the proposition of acquiring reach for Fyk's high-paying competitor too far. Facebook took Fyk's reach and promoted the growth of (*i.e.*, "developed") Fyk's content for his competitor without any change in the content of the businesses/pages from which the reach (and all of the related lucrative advertising and trafficking monies) flowed. This case falls squarely within the framework of *Fair Housing*, for example, because the interactive computer service (Facebook) went too far into the "development of information provided through the Internet or any other interactive computer service," rendering Facebook an "information content provider" as to the "development" (not "creation") of same in direct competition with Fyk and in forfeiture of any CDA immunity Facebook may have arguably otherwise enjoyed.[16]

This Court need not get into the illegalities and discrimination, that is for the District Court (and the jury) following remand. Rather, this Court need only recognize what it (*e.g.*, *Fair Housing* and *Batzel*) and

---

[16] As Fyk's Response in Opposition to Motion to Dismiss properly pointed out, fully in line with *Fair Housing*, *Batzel*, *Fraley*, and *Perkins* holdings (and, indeed, citing to those cases), the CDA does not immunize a party from itself (*i.e.*, its own acts) where (as here) that party is the "information content provider." *See* ER 46-49.

other California district courts (*e.g.*, *Perkins* and *Fraley*) have recognized in the past—that Facebook went too far here in its post-October 2016 conduct; *i.e.*, that Facebook's active hand in "developing" Fyk's businesses/pages lost it any CDA immunity it may have arguably otherwise enjoyed in relation to its supposed "regulation"/"policing" of Fyk's content in or before October 2016.[17] In conjunction with this Court's so recognizing, this Court should send this case back to the District Court for resolution based on the merits just as this Court did in *Fair Housing* ("In light of our determination that the CDA does not provide immunity to Roommate . . . , we remand for the district court to determine in the first instance whether" the conduct complained of was illegal); *i.e.*, for discovery and trial on the illegalities and discrimination.

It is time for district courts to stop misinterpreting/misapplying the CDA at the threshold (*i.e.*, missing the critical *Fair Housing* distinction between "creation" and "development" that takes certain cases, such as this case, completely out from underneath any CDA immunity at the outset). It is time for district courts to stop misapplying (c)(1) to "first-party" scenarios and/or to stop squeezing (c)(1) into (c)(2)(A) paradigms (*e.g.*, *Sikhs*, *Lancaster*, this case so far). We respectfully request that this Court clear the muddied water that is the CDA, which such muddied

---

[17] And, again, even Facebook's pre-October 2016 content "regulation"/"policing" enjoys no immunity when assessed under the appropriate CDA lens—(c)(2)(A). Because, again, such "regulation"/"policing" was not grounded in "good faith" as evidenced by (among other things) Facebook's restoring identical content for Fyk's competitor.

water giants (*e.g.*, Facebook) are exploiting so as to drown others (*e.g.*, Fyk) without consequence.

For all of the foregoing reasons, whether considered separately or together, Plaintiff-Appellant, Jason Fyk, respectfully requests this Court's reversal of the Dismissal Order and remand to the District Court for resolution on the merits.

STATEMENT OF RELATED CASES

Fyk is unaware of non-CDA immunity cases like this (*i.e.*, cases like *Fair Housing*, *Batzel*, *Fraley*, and *Perkins*) pending before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(A) because the principal brief does not exceed 13,000 words. It includes 11,401 words even including this certificate. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Respectfully Submitted,

/s/ Michael J. Smikun, Esq
Sean R. Callagy, Esq.
Callagy Law, P.C.
650 From Rd., Ste 565
Paramus, NJ 07652
msmikun@callagylaw.com
scallagy@callagylaw.com
(201) 261-1700 (o)
(201) 261-1775 (f)

Jeffrey L. Greyber, Esq.
Callagy Law, P.C.
1900 N.W. Corporate Blvd., Ste 310W
Boca Raton, FL 33431
jgreyber@callagylaw.com
(561) 405-7966 (o)
(201) 549-8753 (f)

Constance J. Yu, Esq.
Putterman Yu, LLP
345 California St., Ste 1160
San Francisco, CA 94104-2626
cyu@plylaw.com
(415) 839-8779 (o)
(415) 737-1363 (f)

Attorneys for Plaintiff-Appellant, Fyk

Dated: September 18, 2019

APPELLEE'S ANSWERING BRIEF
(NOVEMBER 18, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Petitioner-Appellant,

v.

FACEBOOK, INC.

Respondent-Appellee.

No. 19-16232

On Appeal from the United States District Court for Northern District of California
Honorable Jeffrey S. White, Presiding
No. 4:18-cv-05159-JSW

Keker, Van Nest & Peters LLP
Paven Malhotra # 258429
pmalhotra@keker.com
William S. Hicks # 256095
whicks@keker.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

Attorneys for Respondent-Appellee Facebook Inc

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant Facebook, Inc. states that it has no parent corporation and that no publicly held corporation owned 10% or more of its stock as of March 31, 2019, the date set forth in its 2019 Proxy Statement.

KEKER, VAN NEST & PETERS LLP

By: /s/ William S. Hicks
Paven Malhotra
William S. Hicks

Attorneys for Respondent-Appellee
Facebook, Inc.

Dated: November 18, 2019

[TOC & TOA Omitted]

INTRODUCTION

Whether in his complaint, his trial court papers, or his appellate brief, Appellant Jason Fyk substitutes clarity with complexity and confusion. He transforms what is an otherwise straightforward business dispute into an impenetrable yarn brimming with irrelevant conspiracy theories, meandering asides, page-long block quotes. None of this is necessary. Indeed, at its heart, this case is quite simple.

Mr. Fyk created a series of Facebook pages. At some point, Facebook allegedly disabled certain of those pages for violation of its policies. (Mr. Fyk thinks it was, instead, to make room for its own sponsored advertisements and to "strong-arm" him into paying to advertise.) Mr. Fyk ultimately decided to sell the pages to a third party. This third party allegedly then republished some of the pages on the Facebook platform.

In a well-reasoned order, the District Court dismissed Mr. Fyk's claims after finding they were barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1) (hereinafter CDA § 230(c)(1)). The District Court correctly held that the CDA barred all of Mr. Fyk's claims because they sought to hold Facebook liable as the "publisher or speaker" of content created and provided by Mr. Fyk himself. Undeterred, Mr. Fyk now brings this appeal.

Although Mr. Fyk asserts a host of arguments on appeal, his brief trains most of its attention on two contentions: (1) that Facebook cannot avail itself of CDA § 230(c)(1) because it somehow "developed" the content at issue when the purchaser of Mr. Fyk's pages allegedly decided to publish those pages on Facebook; and (2) that CDA § 230(c)(1) is not available when a defendant removes the plaintiff's own content from its platform. Mr. Fyk did not advance the first argument in the proceedings below and so it is waived. No matter, it along with the second contention is without basis. Ninth Circuit authority holds that *Facebook* could not have "developed" the content at issue if it simply permitted another party to use the Facebook platform to publish content Mr. Fyk had originally created and developed. Ninth Circuit

authority also holds that CDA § 230(c)(1) can be used to shield a defendant for claims stemming from its decision to remove from its platform content the plaintiff developed himself.

This Court should affirm the District Court's order.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332. The District Court entered final judgment in this case on June 18, 2019 after granting Facebook's Motion to Dismiss without leave to amend. *Fyk v. Facebook, Inc.*, Case No. 18-05159-JSW (N.D. Cal. June 18, 2019), Dkt. 39.

ISSUES PRESENTED

(1) Did the District Court err in granting Facebook's motion to dismiss on the ground that the CDA § 230(c)(1) bars Mr. Fyk's claims?

(2) Did the District Court err in determining that Facebook was not estopped from asserting a CDA § 230(c)(1) defense?

(3) Did the District Court err by failing to convert Facebook's motion to dismiss to a Rule 56 motion for summary judgment?

STATEMENT OF THE CASE

Summary of Factual Allegations

Mr. Fyk was "facing bankruptcy and eviction" when he started using Facebook's free platform "in the hopes of experiencing the American Dream." ER 10 at ¶ 15; ER 19 at ¶ 32. Mr. Fyk created various

"humorous" Facebook pages "designed to get a laugh out of Fyk's viewers/followers." ER 10 at ¶ 15; ER 14 at ¶ 22. Initially, those pages attracted a wide following, allegedly generating hundreds of thousands of dollars per month in advertising and net traffic revenue. ER 14 at ¶ 22. According to Mr. Fyk, however, Facebook devalued those pages over time through various forms of alleged unlawful interference such that he was eventually forced to sell them to a competitor for the "relatively nominal approximate" sum of $1,000,000. ER 22 at ¶ 42. Those pages were "realistically valuated by some in the nine figure range," according to Mr. Fyk. *Id.* Thus, Mr. Fyk estimates that Facebook "has deprived" him of hundreds of millions ("if not billions") of dollars. ER 26 at ¶ 55.

Mr. Fyk alleges that Facebook's "meddling" took myriad forms. Most notably, Facebook allegedly blocked or deleted content found to violate Facebook's Community Standards. *E.g.,* ER 13 at ¶ 20. Mr. Fyk contends that these actions were "incorrect" and that Facebook was "unresponsive[ ] to [his] subsequent pleas for appeal and/or customer service." ER 14 at ¶ 21. He also contends that Facebook had no valid basis to block his content because Facebook did not block similar content on other users' Facebook pages. ER 15 at ¶ 23. Instead, Mr. Fyk insists that Facebook selectively enforced its Community Standards to strong-arm him into participating in Facebook's optional paid reach program,[1] which Facebook purportedly implemented "overnight and pursuant to

[1] "Paid reach" generally refers to a marketing strategy in which users pay to reach a wider audience.

corporate greed." ER 10 at ¶ 14; *see also* ER 11-13 at ¶¶ 18-19.

Mr. Fyk also alleges that Facebook engaged in unlawful interference during the alleged "fire sale" of his Facebook pages to a competitor. Specifically, Mr. Fyk alleges that Facebook "offer[ed] [his] competitor customer service before, during, and after the fire sale" in order to "redistribute Fyk's economic advantage" to the competitor. ER 22 at ¶ 43. Mr. Fyk further contends that, after that purported "fire sale," the "supposedly CDA violative Fyk businesses/pages that were fire sold were magically reinstated by Facebook within days of the fire sale's consummation." ER 23 at ¶ 45. According to Mr. Fyk, this shows that "there was absolutely nothing CDA violative about Fyk's businesses/pages" and that "Facebook just wanted to steer Fyk's businesses/pages (a/k/a assets, a/k/a economic advantage) to a competitor and otherwise eliminate Fyk by any means necessary." *Id.*

Procedural History

Mr. Fyk's Complaint, filed on August 22, 2018, alleged four causes of action: (1) intentional interference with prospective economic advantage, (2) violation of California Business & Professions Code Sections 17200-17210 (Unfair Competition), (3) civil extortion, and (4) fraud/intentional misrepresentation. Facebook moved to dismiss the Complaint on November 1, 2018, both because the claims were barred under the Communications Decency Act and because Plaintiff failed to state a claim for any of his causes of action.

On June 18, 2019, the District Court granted Facebook's motion to dismiss after finding that all of Mr. Fyk's claims are barred by CDA § 230(c)(1). *Fyk*,

Case No. 18-cv-05159-JSW, Dkt. 38.[2] The District Court found that the claims "arise from the allegations that Facebook removed or moderated his pages." ER 4. "Because the CDA bars all claims that seek to hold an interactive computer service [provider] liable as a publisher of third party content, the [District] Court [found] that the CDA precludes Plaintiff's claims." *Id.*

Mr. Fyk's Appeal

Mr. Fyk advances three arguments on appeal: (a) the District Court erred in holding that Mr. Fyk's claims were barred by CDA § 230(c)(1); (b) the District Court erred in determining that Facebook was not estopped from asserting a CDA § 230(c)(1) defense; and (c) the District Court applied the incorrect legal standard when it failed to convert Facebook's motion to dismiss to a Rule 56 motion for summary judgment.

STANDARD OF REVIEW

This Court reviews *de novo* a dismissal under Rule 12(b)(6) and can affirm on any ground supported by the record, even if not the ground the district court relied upon. *See Thompson v. Paul*, 547 F.3d 1055, 1058–59 (9th Cir. 2008); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 974 (9th Cir. 2017). Further, on a motion to dismiss, the court will take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party. *See Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

---

2 The District Court did not address Facebook's contention that the Complaint failed to state any claims.

ARGUMENT

This Court should affirm the District Court's dismissal of Mr. Fyk's Complaint. The District Court correctly ruled that all of Mr. Fyk's claims were barred by the CDA. Mr. Fyk's claims fall squarely within the safe harbor protections of CDA § 230(c)(1). Courts have uniformly held that the CDA bars any claim that seeks to hold an interactive computer services provider liable for "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009); 47 U.S.C. § 230(c)(1). Yet this is exactly what Mr. Fyk seeks to do here.

A. The District Court Correctly Held That CDA § 230(c)(1) Bars Mr. Fyk's Claims.

CDA § 230(c)(1) provides 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." The CDA expressly preempts any cause of action that would hold an internet platform liable as a speaker or publisher of third-party speech: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with" the CDA. 47 U.S.C. § 230(e)(3).

In *Barnes v. Yahoo!*, this Court explained that CDA § 230 protects the exercise of a "publisher's traditional editorial functions" such as "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." 570 F.3d at 1102 (emphasis added). "[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." *Id.* at 1103. "[B]ecause such conduct is publishing conduct . . . we have insisted that section 230 protects from liability any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." *Id.* (internal quotations omitted).

CDA § 230(c)(1) warrants dismissal if three conditions are met: (1) Facebook is a provider of an "interactive computer service," (2) the content at issue was "provided by another information content provider," and (3) the claims at issue treat Facebook as the "publisher or speaker" of that content. 47 U.S.C. § 230(c)(1).

Mr. Fyk does not challenge the District Court's determination that the first and third conditions are satisfied. App. Opening Br. at 8-11. Rather, he argues that the second condition is not met here because (i) Facebook purportedly "developed" the content at issue, and (ii) CDA § 230(c)(1) does not confer immunity where a plaintiff seeks to hold an interactive computer service provider liable for blocking the plaintiff's own content. Both arguments fail.

1. The District Court Did Not Err in Failing to Find That Facebook "Developed" the Content at Issue.

For the first time on appeal, Mr. Fyk asserts that CDA § 230(c)(1) does not apply because Facebook somehow "developed" the content when, sometime after October 2016, a "competitor" who purchased Mr. Fyk's pages allegedly published those pages on the Facebook platform. App. Opening Br. at 16-27.

An appellate court should not rule on an issue which was not sufficiently raised in the court below. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("an appellate court will not consider issues not properly raised before the district court"). For this reason alone, the District Court's dismissal should be affirmed without regard to Mr. Fyk's "development" theory. Even if Mr. Fyk had sufficiently raised that argument in the proceedings below, his claims would still be barred by the protections that the CDA affords to Facebook.

As an initial matter, it should be noted that Mr. Fyk's fundamental grievance is that Facebook disabled his pages, thereby allegedly lowering the value of those pages. But those actions all occurred before the sale of the pages at issue. And, all of those actions related to content that Mr. Fyk himself created and developed. Thus, there can be no contention that Facebook played any role in "developing" the pages before October 2016.

As for Mr. Fyk's speculative assertions regarding events after October 2016, they fare no better. Mr. Fyk asserts that "Facebook and the District Court 'ignore[d] the nature of Plaintiff's allegations, which accuse Defendant not of [(de-)creating] tortious content, but rather of . . . [tortiously] developing Fyk's businesses/pages (and, necessarily, the supposed violative content therein) for Fyk's competitor." App. Opening Br. at 26. In other words, Mr. Fyk contends that Facebook somehow became an "information content provider" and "developed" the pages at issue when the pages allegedly were published on the Facebook platform by a third party after it purchased the pages from Mr. Fyk.

But Mr. Fyk does not allege that Facebook did anything other than display the pre-existing content that this third party allegedly purchased from Mr. Fyk. He does not allege that Facebook itself created that content—which, according to Mr. Fyk, he had previously created himself. Put another way, the content at issue after October 2016 purportedly is the same content that Mr. Fyk already created.[3] Putting aside the vague and speculative nature of his assertions, Mr. Fyk offers no allegations whatsoever that Facebook did anything to this content other than display it. To the extent this tardy argument has not been waived, it should be rejected on the merits because it contradicts binding Ninth Circuit precedent.

"[A] website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (emphasis added). The Ninth Circuit's "material contribution" test "draw[s] the line at the crucial distinction between, on the one hand, taking actions . . . to . . . display . . . actionable content and, on the other hand, responsibility for what makes the displayed content [itself] illegal or actionable." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 n.4 (9th Cir. 2016) (internal quotations omitted). For instance, in *Fair Housing*, upon which Mr. Fyk relies, a website operator was held liable for specifically requiring subscribers to provide certain types of information as a condition

---

[3] *See, e.g.*, ER 23 at ¶ 45 (noting that the pages allegedly re-displayed after October 2016 had no "appreciable change (if any change) in the content" over what Mr. Fyk had previously created).

of accessing its service and for filtering search results in a discriminatory way. 521 F.3d at 1166-67.

Here, in contrast, Mr. Fyk does not allege that Facebook contributed in any way to the content at issue. As such, binding Ninth Circuit precedent forecloses Mr. Fyk's argument. In *Kimzey*, for instance, the Ninth Circuit rejected the contention that Yelp's republication of an allegedly defamatory review in the form of "proactively post[ing] advertisements or promotional links [to the negative review] on Google" transformed Yelp into an "information content provider" as to that review. 836 F.3d at 1270 n. 5. This Court noted that "[n]othing in the text of the CDA indicates that immunity turns on how many times an interactive computer service publishes 'information provided by another information content provider.'" *Id.* at 1270 (quoting 47 U.S.C. § 230(c)(1)). Accordingly, this Court held that "[j]ust as Yelp is immune from liability under the CDA for posting user-generated content on its own website, Yelp is not liable for disseminating the same content in essentially the same format to a search engine, as this action does not change the origin of the third-party content." *Id.* (emphasis added); *see also id.* at 1271 ("Simply put, proliferation and dissemination of content does not equal creation or development of content.").[4]

---

[4] *See also Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1099 (9th Cir. 2019) ("Plaintiff cannot and does not plead that [Defendant] required users to post specific content, made suggestions regarding the content of potential user posts, or contributed to making unlawful or objectionable user posts. [Defendant] is entitled to immunity under the plain terms of Section 230 and our case law as a publisher of third-party content."); *Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156, 1173 (N.D. Cal. 2018) ("As with the Yelp review at issue in *Kimzey*

The district court cases that Mr. Fyk cites are not to the contrary. In *Fraley v. Facebook*, for instance, the district court found that the defendant qualified as an "information content provider" under 47 U.S.C. § 230(f)(2) because it was alleged to have used users' names, photographs and likenesses "to create new content that it publishes as endorsements of third-party products or services." 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011) (emphasis added). Similarly, in *Perkins v. Linkedin Corp.*, the defendant was found to be a "developer" of content based on allegations that it had "generated the text, layout, and design" of certain reminder emails that made use of Plaintiffs' names and likenesses as personalized endorsements for LinkedIn without Plaintiffs' knowledge or consent. 53 F. Supp. 3d 1222, 1247 (N.D. Cal. 2014) (noting that "the text and layout of these emails were created by LinkedIn without any input from the user"). No comparable circumstances are present in this case. As noted, Facebook is alleged to have simply displayed the same content that Mr. Fyk had already created. Unlike in *Fraley* and *Perkins*, Facebook did not

---

that was linked to a different website, Google's content recommendation tool 'does not change the origin of the third-party content' that it recommends."); *Force v. Facebook, Inc.*, 934 F.3d 53, 70 (2d Cir. 2019) (rejecting argument that Facebook "developed" content by allegedly making that content "more 'visible,' 'available,' and 'usable'"; "making information more available is . . . an essential part of traditional publishing; it does not amount to 'developing' that information within the meaning of Section 230." (emphasis in original)); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) ("a website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online").

create any new content—it merely re-displayed third party content.

In short, Mr. Fyk has not alleged that Facebook took any action as a "developer" of content that deprive Facebook of the protections Congress afforded it under Section 230.

2. The District Court Correctly Held That CDA § 230(c)(1) can Protect Interactive Computer Service Providers Like Facebook When They Elect to Remove Content from Their Platforms.

Mr. Fyk argues that the District Court erroneously applied CDA § 230(c)(1) to the facts of this case. He asserts that CDA § 230(c)(1) does not apply to what he dubs "first-party" cases—cases where a plaintiff is contesting the removal of his or her own content by an internet platform. Such cases, Mr. Fyk asserts, are, instead, governed by CDA § 230(c)(2)(A). Neither the caselaw nor the statute support Mr. Fyk.[5]

a. The Ninth Circuit Has Held That CDA § 230(c)(1) applies to Decisions to Withdraw or Remove Content from Publication.

CDA § 230(c)(1) provides: "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." In *Barnes*

---

[5] 47 U.S.C. § 230(c)(2)(A) provides: "No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

v. Yahoo!, this Court examined the statutory text and legislative history of CDA § 230(c)(1) and held that it applies whenever "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability." 570 F.3d at 1102. This Court then held that "publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content" and that "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Id.* (internal citations omitted). This Court made clear that "Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties."[6] *Id.* at 1105 (emphasis added). Given these repeated statements in *Barnes*, it is clear that CDA § 230(c)(1) applies to decisions to remove content.

---

[6] *See also Klayman*, 753 F.3d at 1359 ("the very essence of publishing is making the decision whether to print or retract a given piece of content"); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert denied*, 524 U.S. 937 (1998) (listing "deciding whether to publish, withdraw, postpone or alter content" as examples of "a publisher's traditional editorial functions").

b. The Ninth Circuit and District Courts Within the Ninth Circuit Have Applied CDA § 230(c)(1) to Lawsuits Challenging a Defendant's Removal of Plaintiff's Content.

Given the Ninth Circuit's clear interpretation of CDA § 230(c)(1) in *Barnes v. Yahoo*!, it should come as no surprise that courts routinely dismiss lawsuits seeking to hold defendants liable for their decision to remove plaintiffs' content.

In *Sikhs for Justice, Inc. v. Facebook, Inc.*, for example, the Ninth Circuit affirmed the District Court's decision to dismiss a suit against Facebook under CDA § 230(c)(1) filed by a plaintiff whose own Facebook page was disabled from appearing on the Facebook platform. 144 F. Supp. 3d 1088, 1093-1095 (N.D. Cal. 2015*), aff'd*, 697 F. App'x 526, 526 (9th Cir. 2017). In *Riggs v. MySpace*, 444 Fed. Appx. 986 (9th Cir. 2011), *aff'g in part* 2009 WL 10671689, at *3 (C.D. Cal. Sept. 17, 2009), the Ninth Circuit held that the District Court "properly dismissed" a series of tort claims filed against an internet platform that removed plaintiff's online profiles from its platform. The Ninth Circuit specifically held that such "claims were precluded by section 230(c)(1) of the Communications Decency Act." 444 Fed. Appx. at 987.

Numerous District Courts within the Ninth Circuit have likewise applied CDA § 230(c)(1) when a plaintiff challenges removal of its own content by Internet platforms such as Twitter,[7] Google,[8] and

---

[7] *Brittain v. Twitter, Inc.*, 2019 WL 2423375, at *4 (N.D. Cal. June 10, 2019).

Facebook.[9] Courts outside the Ninth Circuit have done the same.[10]

Plaintiff cites only one case holding otherwise—*e-Ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017)—but this is an unpublished, out-of-circuit district court decision whose ruling on the CDA has never been reviewed on appeal and has not been followed by a single court anywhere in the country.

c. Applying CDA § 230(c)(1) When a Plaintiff's Own Content Has Been Removed Does Not Render CDA § 230(c)(2) Moot.

Plaintiff suggests that the application of CDA § 230(c)(1) to cases where plaintiff's own content has been removed renders CDA § 230(c)(2) mere "surplusage." Not so. As the Ninth Circuit already has held, Subsections (c)(1) and (c)(2) provide separate and independent grants of immunity. "Subsection (c)(1), *by itself*, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties." *Barnes*, 570 F.3d at 1105 (emphasis added). By

---

[8] *Darnaa, LLC v. Google, Inc.*, 2016 WL 6540452, at *7-8 (N.D. Cal. Nov. 2, 2016); *Lancaster v. Alphabet Inc.*, 2016 WL 3648608, at *2-3 (N.D. Cal. July 8, 2016).

[9] *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1305 (N.D. Cal. 2019); *King v. Facebook, Inc.*, 2019 WL 4221768, at *4-5 (N.D. Cal. Sept. 5, 2019); *Ebeid v. Facebook, Inc.*, 2019 WL 2059662, at *4-5 (N.D. Cal. May 9, 2019).

[10] *Cox v. Twitter, Inc.*, 2019 WL 2513963 (D.S.C. Feb. 8, 2019), *report and recommendation approved*, 2019 WL 2514732 (D.S.C. Mar. 8, 2019); *Mezey v. Twitter, Inc.*, 2018 WL 5306769, at *1 (S.D. Fla. July 19, 2018).

contrast, for Subsection (c)(2), "the persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but any provider of an interactive computer service." *Id.* (emphasis in original). "Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue," may be able to take advantage of Subsection (c)(2). *Id*

d. Mr. Fyk Constitutes an "Information Content Provider" for Purposes of CDA § 230(c)(1).

Both at the District Court and before the Ninth Circuit, Mr. Fyk has suggested that his own content cannot qualify as "information provided by another information content provider." App. Opening Br. at 27; ER 3. Mr. Fyk never explains how this argument is distinct from his assertion that CDA § 230(c)(1) cannot apply to removal of a plaintiff's own content. In any event, Facebook's arguments are the same. Numerous courts have held that a plaintiff's content qualifies as "information provided by another" and this Court should as well.[11]

---

[11] *Sikhs for Justice, Inc.*, 144 F. Supp. 3d at 1095, *aff'd,* 697 Fed. Appx. 526 (9th Cir. 2017); *Ebeid,* 2019 WL 2059662, at *3 (holding that Facebook was "immune from [Plaintiff's] claims because they essentially seek to hold Facebook liable for restricting what plaintiff can post on the Facebook platform") (emphasis added); *Fed. Agency of News LLC*, 395 F. Supp. 3d at 1305 (holding that Facebook was immune from suit under § 230 where "Plaintiffs do not challenge that the information for which Plaintiffs seek to hold Facebook liable for removing—FAN's Facebook account, posts, and content—was not provided by Facebook, but rather, by FAN"); *Lancaster*, 2016 WL 3648608, at *3 (holding that "§ 230(c)(1) of the CDA precludes

B. The District Court Correctly Declined to Hold That Facebook Is Estopped from Asserting a CDA § 230(c)(1) Defense Because It Did Not Identify That Provision in Pre-Suit Communications with Mr. Fyk.

Mr. Fyk identifies no authority for the unprecedented proposition that a party is estopped from asserting arguments in litigation that it did not specifically identify in pre-suit communications with the plaintiff.

The so-called "mend the hold" doctrine, upon which Mr. Fyk relies, "provides that a contract party is not permitted to change is position on the meaning of a contract in the middle of litigation over it." *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 864 F. Supp. 2d 1157, 1170 n. 9 (D.N.M. 2012) (citing *First Bank & Trust Co. of Illinois v. Cimerring*, 365 Fed. Appx. 5, 8 (7th Cir. 2010)).[12] That doctrine has no application here, among other reasons, because this is not a contract action. In any event, Facebook has not changed its position in this litigation; it asserted CDA § 230(c)(1) immunity in its first response to Mr. Fyk's Complaint, and the District Court properly applied CDA § 230(c)(1) to dismiss this case.[13]

---

as a matter of law any claims arising from Defendants' removal of Plaintiff's [YouTube] videos") (emphasis added).

[12] In *Harbor Ins. Co. v. Cont'l Bank Corp.*, upon which Mr. Fyk relies, the Seventh Circuit explained that the "mend the hold" doctrine "is the name of a common law doctrine that limits the right of a party to a contract suit to change his litigating position." 922 F.2d 357, 362 (7th Cir. 1990) (emphasis added).

[13] Facebook reserves the right to assert CDA § 230(c)(2) in future proceedings should they be necessary.

C. The District Court Did Not Err in Failing to Convert Facebook's Motion to Dismiss to a Rule 56 Motion for Summary Judgment.

In the first paragraph of its dismissal order, the District Court noted by way of background that "Plaintiff had used Facebook's free online platform to create a series of, among other amusing things, pages dedicated to videos and pictures of people urinating." ER 1. Mr. Fyk asserts that the District Court's purported reliance on this "factually inaccurate and out-of-context red-herring"[14] effectively "converted Facebook's Rule 12(b)(6) or 12(c) Motion to Dismiss into a Rule 56 motion for summary judgment." App. Opening Br. at 14, 16. According to Mr. Fyk, dismissal was inappropriate under the Rule 56 standard because "there is a genuine dispute as to the public urination 'fact' . . . " *Id.* at 16. Nonsense.

The District Court held that CDA § 230(c)(1) barred Mr. Fyk's claims because they "seek to hold an interactive computer service [provider] liable as a publisher of third party content." ER 4. In reaching that conclusion, the District Court did not rely upon, or even mention, the so-called "public urination fact."

In any event, application of Rule 56 would not have changed the outcome because there is no genuine issue as to any *material* fact. *See* Fed. R. Civ. Proc.

---

[14] Mr. Fyk asserts for the first time on appeal that he "does not know much about the www.facebook.com/takeapissfunny business/page" (App. Opening Br. at 15, n. 11), but he alleged in paragraph 22 of his Complaint that Facebook "destroyed and/or severely devalued" that page, among others. ER 14. As set forth in Mr. Fyk's Complaint, that page concerned "take the piss funny pics and videos" and had approximately 4,300,000 followers. ER 14.

56(c); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The so-called "public urination fact" has no bearing on whether CDA immunity applies in this case, which is why neither Facebook nor the District Court mentioned that "fact" in the analysis of CDA § 230 (c)(1).

D. Even if Facebook Did Not Enjoy CDA Immunity, Mr. Fyk's Complaint Fails to State a Claim.

Although the District Court did not reach Facebook's second basis for dismissal— namely, that Mr. Fyk has failed to state a cause of action for any of his individual claims—this Court "may affirm the district court on any basis supported by the record." *Kohler v. Bed Bath & Beyond of California, LLC*, 778 F.3d 827, 829 (9th Cir. 2015). Because Facebook's second independent basis for dismissal is fully supported by the record,[15] this Court may affirm on this basis as well.

---

15 *See* ER 97-103 (Mot. to Dismiss); 116-121 (Reply i/s/o Mot. Dismiss).

CONCLUSION

The District Court correctly held that all of Mr. Fyk's claims are barred by CDA § 230(c)(1) because each treats Facebook as the publisher or speaker of Mr. Fyk's own content. Facebook's role in allegedly displaying the exact same content after Mr. Fyk sold his pages does not transform Facebook into a "developer" of content. And the District Court's decision to apply CDA § 230(c)(1) rather than CDA § 230(c)(2) comports with a long line of Ninth Circuit cases, as well as the text of the statute itself.

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

KEKER, VAN NEST & PETERS LLP

By: /s/ William S. Hicks
Paven Malhotra
William S. Hicks

Attorneys for Respondent-Appellee
Facebook, Inc.

Dated: November 18, 2019

STATEMENT OF RELATED CASES

Counsel for Appellee is not aware of any related cases pending in this Court.

KEKER, VAN NEST & PETERS LLP

By: /s/ William S. Hicks
Paven Malhotra
William S. Hicks

Attorneys for Respondent-Appellee
Facebook, Inc.

Dated: November 18, 2019

CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(A) because it less than 30 pages.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

KEKER, VAN NEST & PETERS LLP

By: /s/ William S. Hicks
Paven Malhotra
William S. Hicks

Attorneys for Respondent-Appellee
Facebook, Inc.

Dated: November 18, 2019

APPELLANT'S REPLY BRIEF
(JANUARY 3, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC.

Defendant-Appellee.

No. 19-16232

On Appeal from Dismissal with Prejudice and Judgment of the United States District Court for the Northern District of California, No. 4:18-cv-05159-JSW (Hon. Jeffrey S. White)

Callagy Law, P.C.
Sean R. Callagy, Esq.
scallagy@callagylaw.com
Michael J. Smikun, Esq.
msmikun@callagylaw.com
650 From Rd., Ste 565
Paramus, NJ 07652
(201) 261-1700 (o)
(201) 261-1775 (f)

Jeffrey L. Greyber, Esq.
jgreyber@callagylaw.com
1900 N.W. Corporate Blvd., Ste 310W
Boca Raton, FL 33431
(561) 405-7966 (o)
(201) 549-8753 (f)

Putterman Yu, LLP
Constance J. Yu, Esq.
cyu@plylaw.com
345 California St., Suite 1160
San Francisco, CA 94104
(415) 839-8779 (o)
(415) 737-1363 (f)

Attorneys for Plaintiff-Appellant

[TOC & TOA Omitted]

I. Summary of Reply Brief

This case is not about objectionable content. This case is not about content-based publication decisions, as evidenced by Defendant-Appellee, Facebook, Inc. ("Facebook"), restoring Plaintiff-Appellant's, Jason Fyk's ("Fyk"), identical information for his competitor because Fyk's competitor better compensated Facebook and had special privileges. This case is not about "Good Samaritan" blocking or screening of offensive materials. This case is not about content. This case exemplifies Facebook's "bad faith," "gross negligence," and "wanton and willful misconduct." This case is about whether Facebook acted as a "Good Samaritan" when it conspired with Fyk's competitor to revalue his information only if his competitor owned his business. This case is about Facebook's fraud, extortion, unfair competition, and tortious interference with

Fyk's business. This case is about the development of Fyk's own information for Fyk's competitor. This case is about Facebook's lawless misconduct to compensate itself to Fyk's detriment.

The heart of Fyk's appeal is whether Facebook is a "passive" "interactive computer service" when it takes discretionary "action" to discriminatorily and/or selectively "enforce" the CDA (offensive content) against Fyk, while ignoring the identical purported "problematic" content (Fyk's) for Fyk's competitor who Facebook is commercially incentivized to support. Facebook's selective application of the CDA as pretext to tortiously interfere with Fyk's business amounts to unfair competition. Facebook is not "passively" displaying content and uniformly enforcing the CDA as to all content providers, it is "actively" developing winners (Fyk's competitor) and losers (Fyk) based on Facebook's own financial compensation. Fyk contends that where (as here) Facebook's application of the CDA is purposeful commercial activity, Facebook enjoys no (c) immunity per (f)(3) and cases properly interpreting same. *See, e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

Facebook destroyed Fyk's business for its own financial gain. As framed by Fyk's Opening Brief [D.E. 12], this appeal asks whether (c)(1) immunizes Facebook from its own active[1] participation in (1)

---

[1] *Fair Housing*, 521 F.3d at 1162 ("A website operator can be both a service provider and a content provider: If it *passively* displays content that is created entirely by third parties [*i.e.*, if it is relatively 'inactive' in relation to a third party's content], then it is only a service provider with respect to that content. But as to content that it . . . is 'responsible, in whole or in part'

unlawfully destroying/devaluing the subject businesses/pages just because the businesses/pages were then owned and operated by Fyk;[2, 3] (2) unlawfully orchestrating the distribution of the subject businesses/pages to Fyk's former competitor and then revaluing (developing) the businesses/pages the moment they were owned and operated by someone else who compensated Facebook more than Fyk;[4] and (3) discriminatorily allowing (for compensation) this new owner to operate the businesses/pages with the exact same content Facebook had previously declared violative of the CDA/Community Standards and the basis for restricting access to or availability of materials when owned by Fyk.

II. Summary of Facebook's Answering Brief

In Facebook's Brief [D.E. 17], two important things must be highlighted at the outset and are addressed comprehensively below. First, neither this Court nor the District Court may rely on Facebook's misleading rewrite of Fyk's allegations. *See, e.g.*, *Disability Rights*

---

for . . . *developing*, the website is also a content provider," emphasis added).

2 Such destruction/devaluation was effectuated unlawfully and discriminatorily. *See* [D.E. 12] at n. 6.

3 Facebook's discrimination against Fyk is no different than "Sorry, sir, but I can't show you any listings on this block because you are gay/female/black/a parent." *Fair Hous.* at 1167. Here, Facebook's saying "Sorry, sir, these businesses/pages cannot be on Facebook's block because you are Fyk with the 'wrong' or 'disfavored' political affiliation, speech, or view and/or just do not pay us enough money."

4 Such destruction/devaluation was effectuated unlawfully and discriminatorily. *See* [D.E. 12] at n. 8.

Montana, Inc. v. Batista, No. 15-35770, 2019 WL 3242038, *4 (9th Cir. Jul. 19, 2019) ("We must 'take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party,'" internal citations omitted). Facebook's Brief relies on proof-texting to invoke CDA immunity by isolating content of Fyk's Facebook pages without providing the context, and simultaneously hiding Facebook's discriminatory (and unlawful) application of the CDA. The most egregious example of Facebook's confabulation of Fyk's allegations is: "Fyk asserts that CDA § 230(c)(1) does not apply because Facebook somehow 'developed' the content when . . . a 'competitor' who purchased [ ] Fyk's pages allegedly published those pages on the Facebook platform." [D.E. 17] at 9.

In reality, Fyk alleges that Facebook itself was directly involved in the quid-pro-quo agreement with the third-party and published the content for that third-party. *See, e.g.,* Complaint, ER 9 at ¶ 6, 13 at ¶ 20, 15 at ¶ 23, 22-24 at ¶¶ 42-46. In other words, the third-party cannot re-publish content created by Fyk without Facebook's direct involvement and development. This is the gravamen of Fyk's Complaint and appeal—Facebook is directly involved as an information content provider (namely, a "developer" per (f)(3)). Facebook misrepresents that Fyk raises this argument for the first time on appeal, *see* [D.E. 17] at 2 and 10, but Fyk raised this issue in the District Court. *See* Resp. to Mot. to Dismiss, ER 50-52.

Any challenge to the sufficiency of Fyk's factual allegations may not be raised in this appeal.[5]

Second, Facebook's statutory construction requires this Court to conflate (c)(1) and (c)(2) immunity, which is neither supported by law nor logic nor canons of statutory construction. Facebook's untenable theory is laid bare in its Brief, *see* [D.E. 17] at 17, because Facebook adds terms to the CDA to accomplish in argument what the statute does not contain in reality, amounting to: "well, (c)(1) covers everything we do; but, if not, (c)(2) covers everything we do, but we added 'interactive computer service' to it. Then, if we even edit or 'develop in part' information defined under (f)(3), (c)(1) covers that too; but, if not, then (c)(2) covers that as well. Meaning, (c)(1) means the same thing as (c)(2), and (f)(3)'s definitional distinctions are meaningless. And, so, yeah, we are entitled to (c)(1) immunity for everything including actions more fitting of (c)(2)(A) and actions more fitting under (f)(3)'s development distinction."

Fyk's briefing and this appeal unpack the differences in CDA immunity, and challenge Facebook's assertion that it is immunized in relation to the four claims for relief in Fyk's Complaint let alone *carte blanche* (c)(1) immunized.[6] Facebook's effort to contort

---

[5] Fyk fully incorporates herein by reference the discussion from his response to Facebook's motion to dismiss wherein he explains that Facebook's motion to dismiss should be treated as what it really is (a motion for summary judgment) and how the District Court should have accordingly converted it into a Rule 56 motion and allowed for discovery. *See* Resp. to Mot. to Dismiss, ER 42-43.

[6] As stated in Fyk's Opening Brief, if the alleged facts of this case had to be said to fit any CDA "Good Samaritan" protection

Fyk's "factual" allegations at the dismissal stage must fail per *Batista*. *See Batista*, 2019 WL 3242038, *4.

In his Opening Brief,[7] Fyk discussed the issue of CDA immunity distinguishing (f)(3) creation versus development as articulated by *Fair Housing* (among other cases) from third-party versus first-party views, an examination of defamation or false information cases of a third-party nature where (c)(1) is most commonly applied, canons of statutory construction views, and from equitable views. This brief analyzes CDA immunity from its "Good Samaritan" roots.

CDA immunity has various and distinct applications—and this appeal asks the Ninth Circuit to clarify those distinctions. Fyk contends that judicial construction of CDA immunity in cases like *Sikhs* or *Lancaster*, for examples, is misguided because tech giants (like Facebook) are exploiting the CDA confusion that they have deliberately created in order to profit from unfair business practices and interference with competing business. Instead, Fyk contends that judicial construction of CDA immunity in cases like *Fair Housing*, *Perkins*, and *Fraley*, for examples, is correct and provides the public with clarity on what conduct by the "enforcer" of the CDA (here, Facebook) is immunized.

---

paradigm, it would be the (c)(2)(A) paradigm, not the (c)(1) paradigm.

[7] *See* [D.E. 12] (wherein the bulk of Fyk's discussion focused on the *Fair Housing* Court's "development" versus "creation" distinction because such distinction is easy to understand and to apply here given the facts alleged by Fyk are the perfect example of "development," "in whole or in part," in the Subsection (f)(3) context).

III. Legal Analysis

A. Section A.1 of Answering Brief Is Errant—The District Court's Dismissal Order Never Examined "Development," It Wrongly Treated This as a Pure "Creation" Case

Facebook posits that the District Court did not err in failing to find that Facebook was not a "developer" of the subject content. *See* [D.E. 17] at 9. The District Court's dismissal order, however, never examined or considered the concept of "developer" in the CDA at all, much less in the context of *Fair Housing*. As previously described: "Facebook and the District Court 'ignored the nature of Plaintiff's allegations, which accuse Defendant not of [(de-) creating tortious content, but rather . . . of [tortiously] developing' Fyk's businesses/pages (and, necessarily, the supposed violative content therein) for Fyk's competitor." [D.E. 12] at 26. The dismissal order completely ignored the critical "development" versus "creation" distinction in wrongly treating Fyk's case as a pure "creation" case. *See* Section V.B of Fyk's Opening Brief.[8]

B. Section A.2 of Answering Brief—Facebook's Tortured View of CDA Immunity Is Untenable

Facebook argues that under this Court's decision in *Barnes*, (c)(1) provides immunity for "all publication

---

[8] Facebook again misses the mark with the cases it cites on pages 11-13 (and footnote 4) of its Brief. This case is not about Facebook's "proliferation and dissemination" of Fyk's content, let alone across other non-Facebook search engines. Again, this case is about Facebook being an active hand in commandeering Fyk's content and developing same for someone else.

decisions, whether to edit, to remove, or to post." *See* [D.E. 17] at 14-15. But in *Barnes* (and other cases cited at footnote 6 of Facebook's Brief), distinguishable in myriad respects, discrimination between one preferred party who paid Facebook a lot of money and another lower paying (and, thus, non-preferred) party was not at play as it is here. The District Court's dismissal order did not distinguish these cases and Fyk contends that the *Barnes* opinion, which refers to (c)(1) as "shield[ing] from liability all publication decisions," was not intended to apply to circumstances where (as here) Facebook cherry-picked which parties to censor via the CDA (lower paying, non-preferred parties like Fyk) and not to censor (higher paying, preferred parties like Fyk's competitor), while simultaneously ignoring the same content (Fyk's own content) from preferred publishers who paid Facebook lots of money. This Court should not allow CDA immunity to be misused when it is not a shield from liability but a sword to vanquish a non-paying (or lesser paying) participant to enhance Facebook's profit.

Whereas Fyk's Opening Brief contains a lengthier discussion of the *Fair Housing* Court's well-articulated "development"/"action" versus "creator" distinction under (f)(3), this brief will show how Facebook's Brief continues to rewrite Fyk's allegations and misdirect CDA immunity. The District Court endorsed Facebook's skewed interpretation of the CDA (based on a distorted interpretation of Fyk's allegations, improper in a motion on the pleadings), resulting in legitimate concerns that (1) the purpose of the CDA would be hijacked for commercial exploitation, (2) the additional havoc Facebook would wreak on Fyk in the meantime

would exacerbate the already significant damages he has suffered as a result of Facebook's tortious interference, fraud, extortion, and unfair competition, and (3) the havoc tech giants would wreak on the Internet community and free market in the meantime would be devastatingly insuperable.

This Court simply cannot take Facebook's bait, especially with so much on the line for Fyk and the Internet community. Accordingly, this brief focuses on what this case is really about (as actually pleaded by Fyk) and what the law really is (as actually espoused by this Court in at least *Fair Housing* and/or as made clear by the germane CDA subtitle itself—*Protection for "Good Samaritan" Blocking And Screening Of Offensive Material*).

Subsection (c) of the CDA, which is what the early stages of this litigation have entirely revolved around, is entitled *Protection for "Good Samaritan" Blocking and Screening of Offensive Material.* And, so, we look to California's Health and Safety Code for the meaning of "Good Samaritan," providing, in pertinent part, as follows:

> (a) No person who in good faith, and not for compensation, renders emergency medical or nonmedical care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission . . . .
>
> (b) . . .
>
> (2) Except for those persons specified in subdivision (a), no person who in good faith, and not for compensation, renders emergency medical or nonmedical care

> or assistance at the scene of an emergency shall be liable for civil damages resulting from any act or omission other than an act or omission constituting gross negligence or willful or wanton misconduct. . . .

Cal. Health & Safety Code § 1799.102 (emphasis added).

Per California's Health and Safety Code, "Good Samaritanism" involves one of two things: "act[ion]" or a failure to act ("omission"). If a person's action or omission is grounded in good faith, unrelated to compensation, and does not constitute gross negligence or willful/wanton misconduct, such action or omission will not subject that person to civil damages.

Again, Subsection (c) of the CDA is entitled *Protection for "Good Samaritan" Blocking and Screening of Offensive Material.* The Legislature does not do things for the heck of it. For example, in Fyk's Opening Brief, we discussed the surplusage canon of statutory construction to underscore that the Legislature could not have intended (c)(1) to mean the same thing as (c)(2)(A) as Facebook contends.[9] The Legislature placed emphasis on the phrase "Good Samaritan" (quotation marks) to draw a parallel between Subsection (c) and "Good Samaritan" laws/concepts.

"Good Samaritan" assistance laws (*e.g.*, California Health & Safety Code § 1799.102) revolve around the concept of (in)action. And so too do the "Good Sam-

---

9 Facebook's Brief, [D.E. 17] at 17, asserts that (c)(1) covers everything, but, if not, (c)(2) somehow picks up the slack.

aritan" Internet content policing laws (CDA, Title 47, United States Code, Section 230(c)). If Jane walks by a burning vehicle with John inside and pulls John out of the vehicle, the "Good Samaritan" (Jane) is free from any liability arising out of such *action* (*e.g.*, if John's arm is broken when pulled out) if Jane's actions were done in good faith and did not otherwise constitute gross negligence or willful/wanton misconduct. Same with Subsection 230(c)(2)(A), which is the action prong ("any action taken") of the Internet's "Good Samaritan" content policing law (the CDA).

Not-so-coincidentally, (c)(2)(A) has the words "action," "good faith," and "voluntary" (*i.e.*, free from compensation) built right into it. Subsection 230(c)(2)(A) immunizes the "provider or user of an interactive computer service" from any liability associated with taking "good faith" "action" to rid ("block or screen") the Internet of filth, for example. This makes sense—the Internet "Good Samaritan" (*i.e.*, "provider or user of an interactive computer service") should be encouraged in such actions, not somehow be subjected to liability for same. That is, so long as such actions are done in good faith (not so here) and not motivated by compensation (not so here), which would strip the user or provider of the interactive computer service of any "Good Samaritan" protections he/she/it may have otherwise enjoyed. Having sorted out the simple meaning/intent/application of 230(c)(2)(A) within the precise (yet wonderfully simplified) "Good Samaritan" context that the Legislature plainly intended (as evidenced by Subsection (c)'s emphasized title), we now turn to the "Good Samaritan" analysis of (c)(1).

Subsection 230(c)(1) offers some immunity to those who do not act; *i.e.*, omit. In most jurisdictions, unless a caretaker relationship exists or the "Good Samaritan" caused the peril, no person is required to give aid to someone in need. That is what the Legislature recognized in relation to 230(c)(1) of the Internet's "Good Samaritan" law. Subsection 230(c)(1) recognizes that a "provider or user of an interactive computer service" who is a mere "passive conduit" (to borrow *Fair Housing* language) to "any information provided by another information content provider" is immune from liability arising out of the information provided by another. That makes sense—it would not be fair to task Facebook with extinguishing every car fire that arises on its interactive computer service and/or rescuing every individual trapped within the burning car; hence, (c)(1) which does not hold Facebook liable for information provided by another. That is, so long as Facebook has nothing to do with the content (*e.g.*, is not a "developer," "in whole or in part," of the content) and Facebook's inaction decision is not motivated by its own compensation, neither of these situations being present here.

As to the concept of development (captured by (f)(3)), a "Good Samaritan" is not somebody who "develops" the burning vehicle by, for example, pouring gasoline on same. Nor is a "Good Samaritan," as another example, somebody who "develops" the situation by extracting the helpless/immobile individual from the burning vehicle and laying him/her in the middle of the busy highway to be runover. That is where (f)(3) steps in.

Per (f)(3)-recognized development (and the *Fair Housing* decision, for example, fleshing out the meaning

of development and how such falls outside of any CDA immunity) the provider or user of the "interactive computer service" becomes an "information content provider" with no "Good Samaritan" immunity/protection the moment the provider or user engages in the "development" of information, "in whole or in part." The passerby of the burning vehicle does not enjoy "Good Samaritan" immunity/protection for some action taken unrelated to the "Good Samaritanism" (*e.g.*, pouring gasoline on the burning car, akin to what Facebook did with Fyk's "car" after Facebook itself set his car on fire—extinguished the fire, steered the car to someone else, and refurbished the car for its financial compensation) and ordinary "Good Samaritan" laws (like California's version, *supra*) reinforce this reality by making clear that any gross negligence and/or willful/wanton misconduct does not enjoy "Good Samaritan" immunity.

Here, as discussed in Fyk's Opening Brief, in the absence of any affirmative act of commercial preference, Facebook might have been entitled to (c)(2)(A) "Good Samaritan" immunity as to its pre-October 2016 destruction of Fyk's businesses/pages if it had demonstrated that such destruction flowed from mere "good faith" content policing/regulation.[10] But these are issues of fact that should not be summarily adju-

---

[10] In addition to Facebook's not being able to establish (c)(2)(A) good faith in relation to its pre-suit crippling of Fyk on purported (c)(2)(A) grounds because there is no way Fyk's content could have been CDA-violative for him and not for his competitor, Facebook's arbitrary treatment in general of what purportedly constitutes spam/obscene content that purportedly violates its community policy also renders the tech giant unable to establish good faith.

dicated on a motion on the pleadings. *See, e.g.*, *Spy Phone Labs, LLC v. Google, Inc.*, No. 15-cv-03756-KAW, 2016 WL 6025469, *8 (N.D. Cal. Oct. 14, 2016) (a (c)(2)(A) immunity defense "cannot be determined at the pleading stage[,]" but may be raised "at a later stage, such as summary judgment"). Fyk is entitled to demonstrate Facebook was not acting in "good faith" (because, again, there is nothing "good faith" about deeming Fyk's content violative of (c)(2)(A) while in his possession and not violative while in his competitor's possession). On this appeal, what matters is Fyk's Complaint alleges Facebook's post-October 2016 misconduct (of a willful/wanton nature motivated by commercial gain) was targeted and intended to injure Fyk's businesses/pages, removing Facebook from any "action-" oriented (c)(2)(A) "Good Samaritan" protection and any "inaction-" oriented (c)(1) "Good Samaritan" protection per (f)(3) (and case law properly applying same; *e.g.*, *Fair Housing*, *Fraley*, *Perkins*).

Facebook took *action* in tortiously interfering with Fyk's businesses/pages. Facebook took *action* by conspiring with Fyk's competitor to revalue and develop Fyk's information (without his consent) before, during, and after the fire sale of his businesses/pages in order to augment its own compensation. Fyk is not treating Facebook as the publisher, speaker, or creator of his own content, which such treatment (if present, which it is not) could perhaps enjoy some (c)(1) immunity. Rather, Fyk alleges that Facebook was a "developer" of Fyk's information "in whole or in part" (for Fyk's competitor, and for Facebook's own enrichment because the competitor was/is Facebook's valued participant and advertising partner), rendering Face-

book an "information content provider" per (f)(3) ineligible for "Good Samaritan" protection/immunity under (c). Put differently, Fyk alleges Facebook took action (motivated in bad faith and/or in money) as to his businesses/pages that rose far above a "Good Samaritan" nature, thereby divesting Facebook of any "Good Samaritan" immunity/protection rights under the Internet's "Good Samaritan" law—Subsection 230(c) of the CDA.

C. Section B of Answering Brief—Facebook's Bait and Switch Should Be Estopped and Fyk's Reliance on Fair Housing Was Not Somehow Waived in the Process

Fyk thoroughly analyzed estoppel in his response to Facebook's motion to dismiss, *see* Resp. to Mot. to Dismiss, ER at 49-50, and in abbreviated form in his Opening Brief, *see* [D.E. 12] at Section V.D, both of which such discussions are incorporated fully herein by reference.

Facebook oddly posits that Fyk somehow waived an argument that he expressly articulated in the District Court. *See, e.g.*, [D.E. 17] at 2 ("Mr. Fyk did not advance the [development] argument in the proceedings below and so it was waived") and 10 ("to the extent this tardy argument has not been waived"). Facebook's assertion is untrue. First, there was plenty said in Fyk's response to Facebook's motion to dismiss about Facebook's own conduct (*i.e.*, its "developing") rendering it an "information content provider" by (f)(3) definition subject to no CDA immunity whatsoever per *Fair Housing*. *See* [D.E. 12] at 17-18 (discussing the motion to dismiss response's discussion of *Fair Housing, inter alia*); *see also, e.g.,* Resp. to Mot. to

Dismiss, ER 46-49. Second, any Facebook argument that Fyk purportedly said too little on a particular topic at any stage in prior briefing is disingenuous given, among other things, the District Court's dismissal order declined to discuss the merits, instead relying on the application of a blanket immunity without analysis.

Facebook obfuscates the facts actually alleged by Fyk and confuses interpretation of CDA immunity. All of Facebook's pre-suit representations to Fyk were that the content displayed on Fyk's businesses/pages was purportedly violative of (c)(2)(A). In an about-face, Facebook's motion to dismiss pointed to (c)(1) and advanced an even more audacious position—that (c)(1) purportedly *carte blanche* immunizes any Facebook conduct (including intentional and discriminatory conduct for profit) and subsumes (c)(2)(A) as well as renders (f)(3) worthless fluff. *See* [D.E. 17] at 17.

Regardless of Facebook's morphing positions, neither position is supported by the applicable authorities or the facts as alleged in Fyk's Complaint. *Fair Housing*, 521 F.3d 1157.

D. Section C of Answering Brief—the District Court Erred When It Permitted Facebook to Mischaracterize "Facts" and Create an Unprecedented Expansion of CDA Immunity

The legal standard the District Court was required to apply is: "[w]e must 'take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party.'" *Batista*, 2019 WL 3242038, *4. Despite this standard, Facebook's Brief compounds its dismissal motion practice in continuing

to rewrite Fyk's allegations with no support. Contrary to Facebook's Brief, the facts (as alleged by Fyk) actually are:[11]

- Facebook's Brief nakedly asserts that it is a figment of Fyk's imagination that Facebook destroyed Fyk's businesses/pages in order to make room for its own sponsored (compensated) advertisements and to strong-arm him into paying to advertise. [D.E. 17] at 1.
    - Wrong. That is not Fyk's imagination, that is Fyk's well-founded allegations. *See, e.g.,* Complaint, ER 20-21, at ¶¶ 35-40.
- Facebook's Brief nakedly asserts that Fyk "contends that Facebook had no valid basis to block his content because Facebook did not block similar content on other users' Facebook pages." *Id.* at 2.
    - This is a half-truth, which is a half lie. The half lie is that "similar content" is not Fyk's only contention; rather, Fyk's prior filings make abundantly clear that Facebook

11 Section V.A of Fyk's Opening Brief speaks more to Facebook's interjection of fudged "facts," and is incorporated fully herein by reference. *See* [D.E. 12] at 12-16. Moreover, Section E of Fyk's Response in Opposition to Motion to Dismiss (ER 50-52) speaks more to Facebook's interjection of fudged "facts," and is incorporated fully herein by reference. In sum, Facebook's dismissal effort has always been a thinly veiled premature motion for summary judgment and needs to be treated as such. *See* Resp. to Mot. to Dismiss, ER 42-43 (explaining when a motion to dismiss needs to be converted to a motion for summary judgment and how, necessarily, discovery needs to unfold before adjudication can occur).

blocked "identical content" on other pages and on his own pages.

- Facebook's Brief nakedly asserts that the competitor who Fyk was forced to fire sell the businesses/pages to due to Facebook's crippling same "republished some of the pages on the Facebook platform." *Id.* Facebook spends a great deal of time trying to convince the Court that it was a mere "passive conduit" as to the competitor's supposed voluntary re-publishing of Fyk's businesses/pages that Facebook had steered to the competitor. *Id.* at 9-13.
    - Wrong. Fyk's well-founded allegations are that Facebook actively developed the businesses/pages (as an "information content provider" by (f)(3) definition) before, during, and after they went to the competitor. *See, e.g.,* Complaint, ER 22-24, at ¶¶ 42-46. The competitor could not have re-published the businesses/pages, it was Facebook only that did so. There is nothing about the Complaint that remotely suggests Facebook was a mere passive conduit in relation to the competitor's re-publication of the subject businesses/pages. Everything about the Complaint is that Facebook had the lion's share of responsibility for getting the businesses/pages to a higher paying competitor of Fyk's and full responsibility in actively restoring the businesses/pages (not just sitting back and watching the competitor do it) once the businesses/pages were with the competitor.

- Facebook's Brief nakedly asserts that Fyk is trying to hold it liable for "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Id.* at 7, 14-16.
    - This is a half-truth, which is a half lie. First, part of what is false about this statement is Fyk is suing in a first-party posture, so he is not accusing Facebook of third-party activities. Second, part of what is half true about this statement is that Fyk is holding Facebook accountable for its pre-October 2016 actions. But the half lie is that Fyk is not seeking to hold Facebook accountable under (c)(1) (which has nothing to do with content policing) but instead under (c)(2)(A) because nothing about Facebook's pre-October 2016 wanton misconduct was "good faith." Third, there is Facebook's view that this case is about content. Wrong, that completely misses the thrust of the lawsuit, which is Facebook's post-October 2016 "development" of Fyk's businesses/pages for a higher Facebook paying competitor of Fyk's. Facebook's chatter about *Barnes*, *Sikhs*, *Riggs*, *et cetera* could not be further amiss. The situations underlying Facebook-cited case law are not our situation. This is not a situation where Fyk is trying to hold Facebook accountable for what the content *is*. Rather, again, Fyk is suing Facebook for taking the extra (and illegal) development-oriented actions related to his businesses/pages (namely in conjunction with the

Los Angeles competitor of Fyk), thereby removing Facebook from any CDA immunity according to (f)(3) and cases appropriately applying same (again, like *Fair Housing* where it was recognized that an "interactive computer service" can lose immunity by going too far in its actions). Fyk is seeking to hold Facebook accountable for throwing gas on the proverbial fire for its own financial compensation. Again, the District Court (and this Court) are to accept Fyk's allegation as true, not accept as true Facebook's bald statement that this case is all about Facebook's decision to remove or "passively" host Fyk's posts (again, which would only even relate, at best, to the pre-October 2016 conduct discussed in the Complaint, not the post-October 2016 conduct that represents the heart of Fyk's case).

- Facebook's Brief, distilled, asserts that (c)(1) "by itself" immunizes any action or illegality in its entirety, but if not, (c)(2) does so as well even if it develops the information. *Id.* at 17.
    - Wrong. This is the epitome of circular rubbish that further bolsters Fyk's Opening Brief point that Facebook is absurdly viewing (c)(2) as mere surplusage to (c)(1), which contravenes canons of statutory construction. Facebook's cobbling together pieces of cases to come up with the absurd proposition set forth on page seventeen of its Brief is, well, absurd. The Legislature intended very different things of (c)(1) and

(c)(2)(A), and Fyk has amply laid out the differences in his Opening Brief and in this brief within the confines of dumb-downed "Good Samaritan" concepts tracking the "Good Samaritan" title of 230(c). And (f)(3) makes clear that (c) immunity has its bounds, ending when someone is converted into an "information content provider" *via* development/active hand relating to the subject content. Facebook's wild notion on page seventeen of its Brief would gut (f)(3) and case law (*e.g.*, *Fair Housing*) saying all CDA immunity is lost once one is deemed to develop and converts oneself into an information content provider.

E. Section D of Answering Brief—"Failure to State a Claim" Was Not Decided Below and Is Not the Crux of This Appeal

In the one paragraph that Facebook's Brief dedicates toward rejuvenating its "failure to state a claim" dismissal chatter, it cites *Kohl v. Bed Bath & Beyond of Cal., LLC,* 778 F.3d 827, 829 (9th Cir. 2015) for the notion that this Court can consider its "failure to state a claim" arguments in this appeal. *See* [D.E. 17] at 20. Although the *Kohl* case is off-base in context, we do not quarrel with the notion that this Court, although "[t]here is no bright line rule," *may* rule on an issue not ruled on by the District Court if such issue was "raised sufficiently for the trial court to rule on it." *See In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (internal citations omitted).

Here, the "failure to state a claim" issue was fully briefed in the underlying dismissal motion practice. *See, e.g.,* Resp. to Mot. to Dismiss, ER 52-55. In the event that this Court, in its discretion, wishes to venture outside what is truly at issue in this appeal and in the District Court's dismissal order (CDA immunity), then Fyk stands on the "failure to a state a claim" briefing found in his response to Facebook's motion to dismiss. *See id.*

IV. Conclusion

We respectfully request that this Court put an end to the complexity and confusion that tech giants (like Facebook) have worked into the CDA over the years. The CDA is easy, it is just the Internet's "Good Samaritan" law with three very simple outcomes: (1) "Good Samaritan" action, as to content, is taken and enjoys (c)(2)(A) immunity so long as (a) the action is grounded in good faith, (b) the action is not compensation driven, and (c) the action is not infected by gross negligence and/or willful/wanton misconduct,[12] (2) inaction/omission as to content "unfolds" and enjoys some (c)(1) immunity so long as (a) the inaction/omission is grounded in good faith, (b) the inaction/omission is not compensation driven, and (c) the inaction/omission is not infected by gross negligence and/or willful/wanton misconduct,[13] or (3) action as

---

[12] This is content policing/regulation whereby an "interactive computer service" affirmatively restricts content it deems filthy (for example), which such "action" can enjoy (c)(2)(A) immunity so long as such is done in "good faith."

[13] This is the "passive conduit" recognized by *Fair Housing, inter alia*. In other words, for example, when an "interactive computer service" *does nothing* when John is accusing Jane of a defamatory

to content unfolds that is not of "Good Samaritan" ilk and/or develops the situation underlying the "Good Samaritan" assistance (*e.g.*, pouring gasoline onto the burning car).[14]

And yet Facebook's Brief would have the Court prescribe to the circular madness punctuated on page seventeen of its Brief.

When considering 230(c), protections for "Good Samaritan" blocking and screening of offensive material, we must ask whether Facebook's actions were that of a "Good Samaritan?" No. Were Facebook's actions done in "good faith?" No. Were Facebook's actions done for its own financial compensation? Yes. Were Facebook's *actions* negligent or wanton and willful misconduct? Yes. Was this really about content or really about Facebook's strategy to unlawfully destroy less valuable participants (like Fyk) in order to develop more valuable participants (like Fyk's competitor)? The latter. Facebook's own manager, Tessa Lyon, said it clearly: " . . . so, going after actors and domains (like Fyk) and reducing their distribution, removing their ability to monetize, removing their ability to advertise is part of our strategy." Is this "strategy" about blocking or screening offensive content

---

post on the "interactive computer service," the "interactive computer service" can enjoy (c)(1) immunity because its "inaction" cannot be said to morph it into an "information content provider."

[14] This is the "developer" recognized by *Fair Housing, inter alia*. In other words, when the "interactive computer service" actively engages in someone's content, the "the interactive computer service" is rendered an "information content provider" subject to no CDA immunity.

or about Facebook's unlawful behavior underlain by its own compensation motivations? The latter.

For all of the foregoing reasons, whether considered separately or together, Fyk respectfully requests this Court's reversal of the Dismissal Order and remand to the District Court for resolution on the merits.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32 (a)(7)(B)(ii) because the type-volume limitation does not exceed 6,500 words (exclusive of this certificate, cover pages, signature block, and certificate of service). This Reply Brief includes 6,499 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Respectfully Submitted,

/s/ Michael J. Smikun, Esq
Sean R. Callagy, Esq.
Callagy Law, P.C.
650 From Rd., Ste 565
Paramus, NJ 07652
msmikun@callagylaw.com
scallagy@callagylaw.com
(201) 261-1700 (o)
(201) 261-1775 (f)

Jeffrey L. Greyber, Esq.
Callagy Law, P.C.
1900 N.W. Corporate Blvd., Ste 310W
Boca Raton, FL 33431
jgreyber@callagylaw.com
(561) 405-7966 (o)
(201) 549-8753 (f)

Constance J. Yu, Esq.
Putterman Yu, LLP
345 California St., Ste 1160
San Francisco, CA 94104-2626
cyu@plylaw.com
(415) 839-8779 (o)
(415) 737-1363 (f)

Attorneys for Plaintiff-Appellant, Fyk

Dated: January 3, 2020

PETITION FOR REHEARING EN BANC (JULY 26, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC,

Defendant-Appellee.

No. 19-16232

On Appeal from Dismissal with Prejudice and Judgment of the United States District Court for the Northern District of California, No. 4:18-cv-05159-JSW (Hon. Jeffrey S. White)

(Before: M. SMITH and HURWITZ, Circuit Judges, and EZRA, District Judge; Opinion filed June 12, 2020)

Callagy Law, P.C.
Sean R. Callagy, Esq.
scallagy@callagylaw.com
Michael J. Smikun, Esq.
msmikun@callagylaw.com
650 From Rd., Ste 565
Paramus, NJ 07652
(201) 261-1700 (o)
(201) 261-1775 (f)

Callagy Law, P.C.
Jeffrey L. Greyber, Esq.
jgreyber@callagylaw.com
1900 N.W. Corporate Blvd., Ste 310W
Boca Raton, FL 33431
(561) 405-7966 (o)
(201) 549-8753 (f)

Putterman Yu, LLP
Constance J. Yu, Esq.
cyu@plylaw.com
345 California St., Suite 1160
San Francisco, CA 94104
(415) 839-8779 (o)
(415) 737-1363 (f)

Attorneys for Plaintiff-Appellant

[TOC & TOA Omitted]

STATEMENT OF COUNSEL IN SUPPORT OF REHEARING *EN BANC*

On May 28, 2020, a fortnight before the Ninth Circuit ruled on Appellant Fyk's appeal from the District Court's dismissal of his action (without leave to amend), a historic event occurred without mention by the Panel—President Trump entered an Executive Order ("EO") challenging Social Media companies' ability to shield their conduct behind purported CDA Section 230 immunity.

In conjunction with this EO (which Fyk acknowledges is not controlling on the Ninth Circuit), the Attorney General of the United States said:

> In the years leading up to Section 230, courts had held that an online platform that

> passively hosted third-party content was not liable as a publisher if any of that content was defamatory, but that a platform would be liable as a publisher for all its third-party content if it exercised discretion to remove any third-party material.
>
> [* * *]
>
> At the same time, courts have interpreted the scope of Section 230 immunity very broadly, diverging from its original purpose. This expansive statutory interpretation, combined with technological developments, has reduced the incentives of online platforms to address illicit activity on their services and, at the same time, left them free to moderate lawful content without transparency or accountability. The time has therefore come to realign the scope of Section 230 with the realities of the modern Internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services. (emphasis added).

In Section I, we discuss the impact of this EO and AG Barr's analysis on Fyk's case and how the Panel's Opinion used an unprecedented expansive, statutory application of the CDA to allow Facebook immunity from liability without a requisite showing of good faith while Facebook engaged in all manner of anticompetitive and abusive actions that in any other commercial context would give rise to actionable tort claims. Conversely, the Panel Opinion (in)directly employed an inappropriately restrictive interpretation of "development," in contravention of Ninth Circuit

authority; *e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) and *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019). The Ninth Circuit's ruling in Fyk's case creates a dissonance in the Ninth Circuit's statutory interpretation of the CDA, which Judge Fisher in *Zango* presciently warned in 2009 would problematically permit CDA immunity to advance an anticompetitive agenda. (*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1178 (9th Cir. 2009).) This is what precisely happened here.

In Section II, we discuss how Facebook did not act as a Good Samaritan when Facebook: (1) restricted Fyk's information in bad faith; and (2) took action to solicit a new higher paying participant (Fyk's competitor), and materially contributed to the development of Fyk's information for Fyk's competitor for commercial profit. Fyk's case is about Facebook's development of Fyk's information for a competitor for which Facebook is paid by that competitor. Fyk's case seeks to hold Facebook responsible for fraud, extortion, unfair competition, and tortious interference with Fyk's economic advantage based on Facebook's anticompetitive animus.

This case is not about free speech, the offensive nature of content, or about holding an interactive service provider liable for statements of "the" publisher. Instead, to fit this square peg into a round hole, the Panel Opinion created confusion about the interaction between 230(c)(1) and 230(c)(2). Fyk's appeal distinguishes Facebook's liability as "a" publisher for its unlawful actions from Facebook's immunity as "the" publisher (relative inactions) for defamation purposes,

thereby avoiding any statutory redundancy between 230(c)(1) and 230(c)(2).

Importantly, regardless of whether Facebook was "a" publisher or "the" publisher, the protections of 230(c)(1) are unavailing to Facebook because its actions are inconsistent with 230(c) "Good Samaritan." Fyk identified, and the Panel Opinion accurately acknowledged, "Facebook allegedly took its actions for monetary purposes." This allegation, taken as true as it must be on a motion to dismiss, results in Facebook losing its immunity, consistent with the position of the Ninth Circuit in *Enigma.* A Ninth Circuit panel originally recognized this limitation in its September 12, 2019, *Enigma* opinion (946 F.3d at 1051). Even after vigorous opposition by Defendant Malwarebytes in a Petition for Rehearing *En Banc*, the Ninth Circuit rejected that effort, and the Panel issued an amended opinion reaffirming the good-faith limitation on the "Good Samaritan" provision of Section 230. The Ninth Circuit has already found that Section 230 does not immunize blocking and filtering decisions that are driven by "anti-competitive animus." Accordingly, the Panel's ruling on Fyk's appeal is untenable under existing Ninth Circuit precedent, and now, with the Executive Order and Attorney General's analysis. Exhs. A (Panel Ruling); B (Executive Order); and C (AG's Analysis).

In Section III, we discuss the additional facts that Fyk could have argued to overcome Plaintiff's Section 230 Immunity if leave to amend his original complaint was not summarily denied by the District Court.

Accordingly, this case is appropriate for *en banc* consideration because: consideration by the full Court

is necessary to secure uniformity of the Court's decisions and the proceeding involves a question of exceptional importance.

I. The Panel's Opinion Overlooked the EO Entered by President Trump on May 28, 2020, and the Analysis by Attorney General William Barr That Comports with Appellant Fyk's Analysis

The President of the United States' recent EO 13925 accurately identified the same issue Fyk has raised in this case. The EO, entitled "Executive Order on Preventing Online Censorship," states, in pertinent part, as follows:

> When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.
>
> (i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available

and does not address the provider's responsibility for its own editorial decisions;

(ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are:

a. deceptive, pretextual, or inconsistent with a provider's terms of service;

EO 13925 (emphasis added). This EO could have been drafted by Fyk based off of Fyk's circumstances.

Facebook's selective application of the CDA as a pretext for tortious interference and unfair competition with Fyk's business is not the type of conduct that would qualify as "good faith." Facebook was not "passively" displaying content and uniformly enforcing the CDA as to all content providers; it was "actively" developing winners (like Fyk's competitor) and losers (Fyk) based on Facebook's financial motivations. Like the President, Fyk contends that where Facebook's application of the CDA is a purposeful commercial activity, Facebook enjoys no (c)(1) or (c)(2)(A) immunity whatsoever. *See also, e.g.*, *Fair Housing* and *Enigma*.

Here, Facebook is attempting to hide behind its role of a service provider while hiding its true function as a developer. The *Batzel* Court indicated that the "development of information" that transforms one into an "information content provider" is "something more substantial than merely editing portions of an email and selecting material for publication." *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

Both creation and development are publishing functions which have been conflated terms. The idea of "the" publisher is "the" creator who brought the content into existence; *i.e.*, the originator; *i.e.*, the person who took action.[1] Where, for example, the creator is the "writer" and the service provider is the "publication," the publication would be liable for what the writer created because the action to publish the information was taken by the publication. If the publication does not take any action with regards to the creation (or development) of the information provided entirely by the writer, the publication cannot be held liable for what the writer has created. In the Internet context, this is the protection of 230(c)(1). However, in the interest of preventing offensive content being passively hosted on the publication, 230(c)(2) provided the publication the ability to take action to restrict what the writer published without fear of liability. No other actions taken by the publication are immunized including republication, promoting, or developing information based on quality or value.

Had Facebook not taken any action to solicit a new owner or contribute to Fyk's information in any way, Facebook would have remained a "passive" host exercising its discretion to uniformly restrict materials and 230 immunity would apply. But where (as here) a website acts as a developer of the information, it is

---

[1] Of note, the majority opinion in *Fair Housing* spent a great deal of time explaining the difference between "creation" and "development" and criticizing the dissenting opinion for the conflation of the terms. Here, it seems the Panel Opinion (at least as it concerns "creation" versus "development") was inappropriately more aligned with the *Fair Housing* dissent than with the majority.

"a" publisher, even if it is not the originator; *i.e.*, "the" publisher of the content. Facebook became a developer by way of materially contributing to the growth and distribution of Fyk's published materials for Fyk's competitor predicated on the contingent removal of Fyk.

How does a factfinder determine where creation stops and development begins? As explained in *Batzel*, the party responsible for putting information online may be subject to liability, even if the information originated with a user. *See Batzel*, 333 F.3d at 1033. That is the case here. Fyk is not seeking to treat Facebook as "the" publisher, such as in the context of a defamation action. Rather, Fyk is seeking to treat Facebook as "a" publisher, responsible for its own action as a content provider, manipulating Fyk's information in order to compensate itself through the solicitation of a higher value participant. Actions taken by a service provider (Facebook) are not immune when they develop a user's (Fyk's) information, as such turns the service provider into a content provider.

This is where the confusion with the District Court(and the Panel) apparently exists. Section 230 distinguishes between "passive" or engaging in "good faith" restrictions under (c)(2)(A) and active republishing, making available, (re)creation, origination, solicitation, advancement or promoting growth of content. These actions transform a service provider into a content provider. Said differently, restricting materials without discrimination is the only "active" publishing action protected under 230(c), "passive" hosting is inaction and is protected by 230(c)(1), and any other actions set forth above are not protected activity under Section 230.

Over time, the disparate application of the CDA immunity has created a shield for anti-competitive behavior as AG Barr noted. *See* Exhibit C: DOJ Review of CDA. Congress enacted Section 230 in part to resolve this quandary by providing immunity to online platforms both for third-party content on their services [(c)(1)] or for removal of certain categories of content [(c)(2)].

Here, the Panel in Fyk's case ignored CDA distinctions. (*See*, DOJ's Memo, Ex. C). Courts around the nation have provided expansive interpretations of the CDA that has afforded service providers protections not provided for by law who, like here, went well beyond a passive hosting service, restricting offensive materials in "good faith." (*e.g.* for financial incentive). Worse, the Panel ignored Ninth Circuit precedent and sanctioned Facebook's pre-textual abuse of the CDA.

II. The Ninth Circuit's Analysis of the CDA Immunity Is Untenable under Its Own Holding in Enigma and Canons of Statutory Interpretation

The Panel's decision is untenable under the analysis and underlying predicate legal and factual conclusions used to reach the holding in *Enigma*.[2] *See id.* In principle, *Enigma* provides that defendants are not entitled to CDA 230(c) immunity for anticompetitive conduct, the factual and legal basis for Fyk's Complaint against Facebook. Albeit distinguishable

---

[2] The *Enigma* Panel's decision was published on September 12, 2019, a mere six days before Fyk filed his opening brief in this Court and the amended opinion on rehearing denial was issued on December 31, 2019, just a few weeks before Fyk filed his reply brief.

in certain respects, which could (but should not) result in a default rejection of the discussion in this section, *Enigma* provides substantial support for rehearing and careful reconsideration of this matter.

As a threshold matter, the Panel Opinion disregarded a critical distinction that underscores why *Enigma* was unique for the Ninth Circuit: like the *Enigma* litigants, Fyk and Facebook were direct competitors. As articulated in Fyk's complaint, Facebook promised users (like Fyk) free reach and distribution in return for their data if they joined and built their audience on Facebook's service platform. Unlike most websites, Facebook did not advertise on the sides or top of the page, instead Facebook offered News Feed space for sale which directly displaces its own users for profit. Facebook in partnership with advertisers became a direct competitor with its own users and was incentivized to remove lower value "organic" participation (Fyk's) in favor of higher value "quality" participants who better compensate Facebook (like Fyk's competitor).

Moreover, like Fyk here, Plaintiff Enigma's complaint accused Defendant Malwarebytes of deceptive business practices, tortious interference with business, and contractual relations in violation of state and common law. *See id.* at 1048.

As emphasized in Fyk's opening and reply briefs, this case is about anti-competitive activity by Facebook. It is not about free speech, the offensive nature of content, or holding an interactive service provider liable for statements of "the" publisher. As the *Enigma* Panel noted, the concurring opinion by Judge Fisher in *Zango,* warned that extending immunity beyond the facts of that case could "pose serious problems"

where a provider is charged with using § 230 immunity to advance an anticompetitive agenda. (*Zango,* 568 F.3d at 1178). This 2009 opinion proved remarkably prescient, as Facebook's sharp practices, unchecked, have become more brazen over time despite Congressional and law enforcement inquiries (*see* EO, DOJ memorandum (Exhs. B, C)), focused on tech giant abuses such as the abuses Facebook inflicted on Fyk.

Judge Fisher further stated that an "unbounded" reading of the phrase "otherwise objectionable" would allow a content provider to "block content for anticompetitive purposes or merely at its malicious whim." *Id.* That is exactly Facebook's pre-text for their anti-competitive and tortious behavior.

As the Panel in *Enigma* noted:

> We must today recognize that interpreting the statute to give providers unbridled discretion to block online content would, as Judge Fisher warned, enable and potentially motivate Internet-service providers to act for their own, and not the public, benefit. *See* 568 F.3d at 1178 (Fisher, J., concurring). Immunity for filtering practices aimed at suppressing competition, rather than protecting Internet users, would lessen user control over what information they receive, contrary to Congress's stated policy. *See* § 230(b)(3) (to maximize user control over what content they view) . . . Users would not reasonably anticipate providers blocking valuable online content in order to stifle competition. Immunizing anticompetitive blocking would, therefore, be contrary to another of the statute's express policies:

> "removing disincentives for the utilization of blocking and filtering technologies." *Id.* § 230(b)(4).

Enigma Software Grp., 946 F.3d at 1051. We agree.

Section 230(c), which is entitled "Protection for "Good Samaritan" Blocking and Screening of Offensive Material," is what the early stages of this litigation have entirely revolved around.

Looking to the Health and Safety Code for the State of California—which is simply a proximate analog—"Good Samaritanism" involves one of two fundamental things: ("act[ion]") or a failure to act ("omission"). So long as a person's action or omission is grounded in (a) good faith, (b) unrelated to compensation, and (c) does not constitute gross negligence or willful/wanton misconduct, such action or omission will not subject that person to civil damages.

The analogous language of 230(c)(2)(A), which is the action prong ("any action taken") of the Internet's "Good Samaritan" content policing law (the CDA). Unsurprisingly, 230(c)(2)(A) has the words "action," "good faith," and "voluntary" (*i.e.*, free from compensation) expressly stated. 230(c)(2)(A) immunizes the "provider or user of an interactive computer service" from any liability associated with taking "good faith" "action" to rid ("block or screen") the Internet of filth, for example. This is consistent with Congressional Intent as noted by *Enigma*, specifically, that the Internet "Good Samaritan" should be encouraged in such actions, not somehow be subjected to liability for such actions. That is, of course, so long as such actions are not done in bad faith, uniformly applied, and not motivated by competitive motive like in

Enigma and Fyk's case. This animus voids any "Good Samaritan" protections it may have otherwise enjoyed.

230(c)(1) offers immunity to those who do not act, or omit. No person is required to give aid of any sort to someone in need absent a special relationship. 230(c)(1) recognizes that a "provider or user of an interactive computer service" who is a mere "passive conduit" to "any information provided by another information content provider" is immune from any liability arising out of the information provided by another. Hence, 230(c)(1) does not hold Facebook liable for what information is spoken by "another," so long as Facebook took no action with regards to the creation or development of the content of the "another" (*e.g.*, is not a "developer" or "a" publisher, "in whole or in part," of the content) and so long as Facebook's inaction decision is not motivated by its own compensation. Neither situation applies here.

This is where the definition of a content provider defined in 230(f)(3) becomes pertinent. Facebook materially contributed to Fyk's peril by discriminatorily unpublishing and developing his information for profit. Facebook rendered actions in bad faith, for its own compensation and did not act as a Good Samaritan.

Once Facebook "perhaps developed in part" Fyk's information, immunity is lost. 230(f)(3) recognized development, even in part, where the provider or user of the "interactive computer service" becomes an "information content provider," "This grant of immunity [230(c)] applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of'

the offending content. *Id.* § 230(f)(3)." *Fair Hous.*, 521 F.3d at 1162.

As discussed in Fyk's Opening Brief, in the absence of any affirmative act of commercial discrimination, Facebook might have been entitled to (c)(2)(A) "Good Samaritan" immunity, but that is not the case with Fyk. Under the correct interpretation of section 230, any action or omission by the service provider must be taken in Good Faith, not for compensation, devoid of gross negligence or wanton and willful misconduct. If any (in)action meets the criteria of 230(c) "Good Samaritan," we then look to 230(c)(1). 230(c)(1) protects a service provider when it takes "no action" and only "passively" hosts materials entirely created, originated and or developed by "the" publisher (another). If a service provider takes "any action" voluntarily and in "Good Faith," as a "Good Samaritan" to restrict offensive content, we then look to 230(c)(2). A service provider is protected under 230(c)(2)(A) for its own actions to restrict materials or 230(c)(2)(B) for enabling a user to restrict materials. If a service provider takes "any" action as a publisher to create or develop any information in whole or in part it shall lose immunity with the exception actions protected by 230(c)(2).

Fyk is not asking this Court to take any action except allowing for rehearing to secure a reversal, and remand to the District Court to allow for Fyk to amend his Complaint. Fyk is entitled to add factual allegations to demonstrate that Facebook would not have qualified as acting in "good faith" because, most glaringly, there is nothing "good faith" about deeming Fyk's content violative of (c)(2)(A) while in his possession and not violative while in the possession of his

competitor. In the instant appeal, what matters is that Fyk's Complaint alleges Facebook's post-October 2016 misconduct, which was motivated by commercial gain, was targeted and intended to injure Fyk, removing Facebook from any "action-oriented" (c)(2)(A) "Good Samaritan" protection, and any "inaction-oriented" (c)(1) "Good Samaritan" protection per 230(f)(3).

III. The Panel Erroneously Asserted That Fyk Could Not Raise Facts in His Complaint That Would Overcome Section 230 Immunity

In addition to the preceding challenges with the Panel's Opinion is the fact that the Panel asserted, without any basis, that Fyk could not raise facts in his Complaint that would overcome purported Section 230 Immunity. This is simply not true.

Facebook targeted Fyk's business through conduct that supports a finding of tortious, fraudulent, extortionate, and anti-competitive activity. The purpose of a Complaint is not to set forth each and every fact, and anticipate every single argument, but to provide notice of the causes of action and, with regard to certain causes of action, state them with specificity.

Notwithstanding, had Fyk been given an opportunity to articulate additional facts, the Panel could not ignore the following instances of conduct by Facebook that would give rise to Facebook's loss of immunity:

- On January 4, 2019, Mark Zuckerberg stated it was Facebook's purpose, "to dramatically increase the distribution and if successful, the monetization to high quality participants." He went on to say, "[b]uild a

service that is contributing to high quality journalism through increasing monetization." Translated, Facebook materially contributes to the development of information by way of increased distribution and monetization of participants Facebook deems to be quality. Here, the "quality" standard was the relative monetary value to Facebook. As a result, his content was eliminated through the pre-text of it being offensive. Later, that exact same content was deemed not offensive in the hands of a "high-quality" participant (Fyk's competitor).

- On April 13, 2013, Tessa Lyons, Facebook Newsfeed manager, explained Facebook's underlying strategy in a public forum: " . . . so going after actors who repeatedly share this type of content [financially motivated] and reducing [low quality participants] distribution, removing their ability to monetize, and removing their ability to advertise is part of our strategy." Translated, Facebook's strategy is not based on restriction of offensive materials in "good faith," it is based on reducing the financial incentives (*i.e.*, tortious interference) that low value/low quality participants have to create content in the first place. Facebook's strategy is proactive, not reactive, and targets economics. The rules change however if you pay more.

- On April 13, 2013, Tessa Lyons confirmed Facebook's proactive behavior: "For the financially motivated actors, their goal is to get a lot of clicks so they can convert people to

> go to their websites, which are often covered in low quality ads, and they can monetize and make money from those people's views, and if we reduce the spread of those links, we reduce the number of people who click through and we reduce the economic incentives that they have to create that content in the first place." Translated, Facebook does not want people to make money so Facebook can demand money from its users. But this is contrary to what was promised to users.
>
> • Per an April 16, 2019, NBC report, Chris Daniels, a Facebook business development director, wrote the following in an August 2012 email: "Today the fundamental trade is 'data for distribution' whereas we want to change it to either 'data for $' and/or '$ for distribution'." Translated, Facebook is selecting which businesses get developed and which businesses get restricted, not based on offensive content but based on profit motives.

The above facts, and a multitude of others, show that Facebook's conduct was not motivated by removing offensive or obscene materials, but was driven entirely by proactive development and "anti-competitive animus." Facebook's publicly admitted strategy is to proactively reduce the financial incentives publishers have to create content in order to displace their content (like Fyk's) and materially contribute to the development of content for higher quality, higher paying participants.

CONCLUSION

In his Complaint and all underlying briefing (at the District and Ninth Circuit Court levels), Fyk detailed Facebook's "bad faith" content restriction decisions predicated on Facebook's own monetary purposes. The Courts should never have entertained a 230(c)(1) defense, as it is inapplicable because Fyk does not seek to treat Facebook as "the" publisher/speaker/creator/originator of his own content. Fyk seeks to hold Facebook liable as "a" publisher/developer for its own legally repugnant and unimmunized actions. Facebook did not act as a "Good Samaritan" and Facebook was responsible, at least in part, for its action to solicit Fyk's competitor with the promise of materially contributing to the development of Fyk's information for Fyk's competitor.

The conceptual dissonance of the Panel's Opinion and existing Ninth Circuit authority on the inapplicability of CDA immunity for anticompetitive conduct, compels granting this petition for rehearing *en banc*.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 and Ninth Circuit Rule 40-1, undersigned counsel certifies that this document complies with the word limitation because it does not exceed 4,200 words. It includes 4,196 words, not including the first three pages or this certificate. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Respectfully Submitted,

/s/ Michael J. Smikun, Esq.
Michael J. Smikun, Esq.
Sean R. Callagy, Esq.
Callagy Law, P.C.
650 From Rd., Ste 565
Paramus, NJ 07652
msmikun@callagylaw.com
scallagy@callagylaw.com
(201) 261-1700 (o)
(201) 261-1775 (f)

Jeffrey L. Greyber, Esq.
Callagy Law, P.C.
1900 N.W. Corporate Blvd., Ste 310W
Boca Raton, FL 33431
jgreyber@callagylaw.com
(561) 405-7966 (o)
(201) 549-8753 (f)

Constance J. Yu, Esq.
Putterman Yu, LLP
345 California St., Ste 1160
San Francisco, CA 94104-2626
cyu@plylaw.com
(415) 839-8779 (o)
(415) 737-1363 (f)

Attorneys for Plaintiff-Appellant, Fyk

VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL (AUGUST 22, 2018)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 3:18-cv-05159-JSW

Plaintiff, Jason Fyk ("Fyk"), respectfully brings this action for damages and relief against Defendant, Facebook, Inc. ("Facebook"), and alleges as follows:[1]

NATURE OF THE ACTION

1. This case asks whether Facebook can, without consequence, engage in brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent practices that caused the build-up (through years of hard work and entrepreneurship) and subsequent destruction of Fyk's multi-million dollar business with over

[1] As litigation and discovery progress, Fyk reserves the right to amend this complaint should additional causes of action manifest.

25,000,000 followers merely because Facebook "owns" its "free" social media platform. So as to put in perspective just how large Fyk's following was, one source ranked Fyk's primary business/page as the fifth most active page on Facebook, ranking one spot ahead of CNN, for example.

2. Fyk, believing in Facebook's promise of a "free" social media platform to connect the world, was a remarkable success story. Fyk created and posted humorous content on Facebook's "free" social media platform. Fyk's content was extremely popular, as evidenced by over 25,000,000 followers. The success of Fyk's Facebook pages resulted in these pages becoming business ventures, generating hundreds of thousands of dollars a month in advertising and/or web trafficking earnings flowing from Fyk's valuable high-volume fan base.

3. Fyk developed a significant "voice" in reliance on Facebook's inducement to build his businesses on its "free" social media platform. Fyk invested tremendous time, energy, and resources in reliance on Facebook's promises. Facebook's promises made it one of the most lucrative and valuable economic and influential forces in the world.

4. Facebook has broken its promise to everyone and committed significant wrongs specific to Fyk. Facebook's systemic and specific wrongs are both wrongs with remedies.

5. More specifically, Facebook induced many (including Fyk) to build the Facebook empire and then, in a classic bait and switch, stole the value for its own commercial gain by changing its operating system and forcing itself into the business arenas

others had developed. Fyk suffered damages as a result of this bait and switch. So as to put in perspective just how much Facebook damaged Fyk, former Fyk competitors (who were smaller and/or less successful than Fyk before Facebook destroyed Fyk's businesses/pages) have been valued between $100,000,000.00 and $1,500,000,000.00.

6. Amidst its bait and switch, Facebook damaged Fyk (and likely many others) by pretextually wielding the Communications Decency Act ("CDA"), Title 47, United States Code, Section 230(c)(2), against Fyk in order to unfairly and unlawfully destroy and/or severely devalue Fyk's businesses/pages. This case asks whether Facebook can manipulate its users' content and direct preferential treatment to certain users to the detriment of other users by applying discretionary "enforcement" policies and practices (under the guise of the CDA, for example) because Facebook exercises plenary control over its "free" social media platform. So as to put in perspective just how different Facebook's treatment of Fyk was compared to others, Facebook flew representation to Los Angeles, California to aid and abet a Fyk competitor in the competitor's Facebook-driven acquisition of the Fyk businesses/pages that Facebook had destroyed.

7. In stark contrast to its public claims (before Congress, for example) of freely and openly connecting the world, Facebook is unlawfully silencing people (including Fyk) for its own financial gain.

8. Despite Facebook's claims of being able to fully and completely control anything and everything that occurs on its "free" social media platform, Facebook is not above the law and must be held accountable for its wrongs.

9. Our system of justice is what prevents the strongest and most powerful in our nation from trampling on those who are weaker and less powerful. It would be hard to imagine a clearer illustration of why our justice system must protect the weak from the powerful than this case where the mighty (Facebook) has destroyed the weaker's (Fyk's) businesses and American Dream. This is a true case of David versus Goliath.

PARTIES

10. At all material times, Fyk was/is a citizen and resident of Cochranville, Pennsylvania.

11. Upon information and belief and at all material times, Facebook was/is a company incorporated in the State of Delaware, with its principal place of business in Menlo Park, California. While there is some question as to whether the California forum selection and choice of law provisions embedded in Facebook's terms of service are applicable to this action (which does not relate to the terms of service akin to a breach of contract), Fyk does not wish to squander time and resources (his or the Court's) quarreling with venue.

JURISDICTION AND VENUE

12. This Court possesses original jurisdiction pursuant to Title 28, United States Code, Section 1332, as the parties are diverse and the amount in controversy exceeds $75,000.00 exclusive of fees, costs, interest, or otherwise.

13. Venue is proper in the Northern District Court of California pursuant to Title 28, United

States Code, Section 1391(b), since this judicial district is where Facebook maintains its principal place of business, since various events or omissions which give rise to and/or underlie this suit occurred within this judicial district, and/or since the (in)applicability of the forum selection and choice of law provisions in Facebook's terms of service are not worth fighting about.

COMMON ALLEGATIONS

14. For a period of many years, Fyk maintained businesses/pages on Facebook's purportedly "free" social media platform. That is until Facebook unilaterally, systematically, systemically, and/or capriciously (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) changed the Facebook "free" social media platform model almost overnight and pursuant to corporate greed, playing judge, jury, and executioner as to the continued existence of businesses/pages of those like Fyk who had developed a livelihood on the platform.

15. Fyk's businesses were made up of many Facebook pages, with over 25,000,000 viewers/ followers/audience at their peak. These businesses/ pages were humorous in nature, designed to get a laugh out of Fyk's viewers/followers audience. The intended nature of the subject businesses/pages worked–at his peak, Fyk's primary business/page was, according to some ratings, the fifth largest Facebook viewership presence in the entire world (ahead of competitors like BuzzFeed, College Humor, and Upworthy, for examples, and ahead of other large media presences like CNN, for example) and making hundreds of thousands of

dollars a month in advertising and/or web trafficking earnings.

16. Indeed, the primary source of income generated by Fyk's businesses/pages was through advertisement earnings and/or web traffic to other sites (for valuable increased fanbase)–naturally, companies were inclined to pay Fyk to associate with his pages consisting of millions of viewers/followers.[2]

17. For many years in the 2010-2016 range (or thereabouts), Facebook had systematically and systemically welcomed folks into the seemingly warm waters of making a living on the "free" Facebook social media platform.

---

[2] Companies that paid Fyk to advertise and/or traffic their companies (that is, before Facebook destroyed such economic relationships) included, but were not necessarily limited to, the following: (a) College Humor, (b) Guff, (c) Memez, (d) Mylikes, (e) Smarty Social, (f) Diply, (g) Top Ten Hen, (h) LOLWOT, (i) Cybrid Media, (j) PBH Media, (k) Liquid Social, (l) Red Can, (m) Ranker, (n) Bored Panda, and (o) Providr. And, then, there were many other realistic ways in which Fyk could have increased his economic advantage (*i.e.*, made money) but for Facebook's wrongdoing, which such realistic ways would have included, but not necessarily been limited to, the following: (a) an application called APPularity, further discussed below, (b) a TV series and/or movie, and (c) a book. Facebook was/is well aware that Fyk had business relations with companies like these, as Facebook's new mission is to demonetize folks like Fyk out of these relations by crushing folks like Fyk under the guise of CDA, filtering of purportedly low-quality content. *See, e.g.*, footnote 11, *infra*; *see also, e.g.*, June 22, 2016, https://www.c-span.org/video/?411573-1/facebook-coo-sheryl-sandberg-discusses-technological-innovation; July 1, 2015, http://fortune.com/2015/07/01/facebook-video-monetization; and Tessa Lyons' April 13, 2018 (https://www.youtube.com/watch?v=X3LxpEej7gQ).

18. Upon information and belief, it was towards the latter part of the aforementioned 2010-2016 timeframe that Facebook unilaterally, systematically, systemically, and/or capriciously (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) decided to implement an "optional" paid for reach program, rather than the organic reach program (*i.e.*, "free" Facebook social media platform) that Fyk and many other Facebook businessmen and businesswomen had been part of for years. Why? Because Facebook all-of-a-sudden no longer cared to continue to make business smooth for those who declined the "optional" paid for reach program. Why? Because Facebook was now of the unilateral, systematic, systemic, and/or capricious mindset (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) that it was time to make its "free" social media platform profitable at the expense of those like Fyk upon whose backs the "free" Facebook social media platform succeeded and notwithstanding nothing explicitly making the "optional" paid for reach program "mandatory."[3] What did this create for Fyk and likely the myriad other businessmen and businesswomen on Facebook's "free" social media

---

[3] Although there is nothing explicitly making the "optional" paid for reach program "mandatory" that we are presently aware of sans the benefit of discovery, the threat is there that if people do not pay Facebook, they will not play with Facebook. For example, some news outlets report that Facebook (through the likes of Facebook's head of global news partnerships, Campbell Brown) is advising behind "closed doors" that Facebook will put people on "hospice" if people do not work with Facebook; *i.e.*, if payments are not received. *See, e.g.*, August 14, 2018, https://www.thesun.co.uk/news/7014408/facebook-threatens-press-saying-work-with-us-or-end-up-in-hospice.

platform? Fear. Fear (analogized in averments twenty-five through thirty-five, *infra,* to "claim jumping") that if Fyk did not engage in Facebook's new "optional" paid for reach program, he would be blacklisted in the form of having his businesses heavily curtailed or altogether eliminated. And, for Fyk, this fear was heightened when a high-ranking Facebook executive advised him that his business was not one Facebook much cared to work with when compared to other businesses (specific names intentionally omitted from this public record) who relented to Facebook's new "optional" paid for reach program to the tune of tens of millions of dollars in payments a year to Facebook.

19. So, with the very real fear hanging over him of losing his businesses/pages and the incredibly hard work that went into same in the spirit of the American Dream (most likely like many other Americans/administrators who, like Fyk, had built their businesses/pages on the premise that Facebook was indeed what it proclaimed and/or held itself out to be—a "free" social media platform), Fyk attempted to placate Facebook (and accordingly avoid putting his businesses/pages at risk of Facebook-created destruction) by entering Facebook's new "optional" paid for reach program for a period of time, investing approximately $43,000.00 into Facebook's "optional" paid for reach program. Such Fyk investment was underway and ongoing until Facebook unilaterally, systematically, systemically, and/or capriciously (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) deactivated Fyk's "ads account," making it such where Fyk could no longer be a protected or chosen one under Facebook's "optional"

paid for reach program. Because of Facebook, Fyk was left with no reasonable alternative other than to return to an organic reach model. Then Facebook's interference, unfair competition, civil extortion, and/or fraud increased—starting in small increments and escalating into destruction and/or severe devaluation of at least eleven of Fyk's businesses/pages (discussed further below).

20. Facebook's misconduct (again, implemented gradually by Facebook so as to not be so obvious) included, for examples, unilateral, systematic, systemic, and/or capricious (pretty much overnight) page and content outlawing, Facebook Messenger disconnection, page and content banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, deletion of individual Facebook administrative profiles, and/or splitting of posts into four categories (text, picture, video, and website links) and systematically directing its tortious inference the hardest at links because links were what made others (like Fyk) the most money and Facebook the least money. This misconduct was grounded, in whole or in part, in Facebook's overarching desire to redistribute reach and value (*e.g.*, wiping out Fyk and orchestrating the handing over of his businesses/pages to a competitor, discussed in greater detail below) through the disproportionate implementation of "rules" (*e.g.*, treating Fyk's page content differently for Fyk than for the competitor to whom Fyk's content was redistributed). Part and parcel with Facebook's disproportionate implementation of "rules" was a disproportionate implementation of Facebook's appeal and/or customer

service programs for Fyk (discussed in greater detail in the following averment, and punctuated by things like Facebook arranging meetings between its representatives and other businessmen and businesswomen, not named Fyk, in order to assist them but not Fyk). Of course, inoperable pages consisting of millions of viewers who are no longer engaged in such pages due to the inoperativeness of same does not make for an environment in which high paying advertisers and/or web traffickers (from whom Fyk and his employees had made a living) were interested in continuing to be a part of.

21. Not thinking much of Facebook's misconduct early on (again, Facebook's misconduct unfolded gradually and covertly), Fyk availed himself time and time again of the appeal and/or customer service programs supposedly in place at Facebook to remedy incorrect page and content outlawing, Facebook Messenger disconnection, page and content banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, and/or deletion of individual Facebook administrative profiles. These programs worked for Fyk for a period of time; *i.e.*, Facebook would capriciously breathe life back into Fyk's businesses/pages, conceding in the process that its page and content outlawing, Facebook Messenger disconnection, page and content banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, and/or deletion of individual Facebook administrative profiles was, in fact, incorrect. Fyk's

businesses/pages would operate relatively smoothly for a while, until Facebook meddled again with Fyk's businesses/pages (with millions of viewers, reach in the billions, and hundreds of thousands of monthly advertisement and/or web trafficking earnings at issue). Then, Fyk would appeal and/or work with customer service again. Then, Facebook would breathe life back into the subject businesses/pages. Then, Facebook would meddle again. Then, Facebook would breathe life back into the subject businesses/pages. So on and so forth for years, not tipping Fyk off as to what he was truly experiencing (or what Facebook's ulterior motives were, which such motives are still not entirely known sans the benefit of discovery) until Facebook's meddling culminated with the complete destruction and/or severe devaluation of eleven of Fyk's businesses/pages in October 2016 and unresponsiveness to Fyk's subsequent pleas for appeal and/or customer service.

22. More specifically, in October 2016, Facebook destroyed and/or severely devalued eleven of Fyk's pages (made up of over 25,000,000 viewers/followers), sending his millions of viewers and hundreds of thousands of dollars of monthly advertisement and/or web trafficking earnings down the proverbial drain. More specifically, the Fyk businesses/pages that Facebook destroyed and/or severely devalued (along with the viewer/follower count associated with each) were as follows: (a) Funniest pics–approx. 2,879,000, https://www.facebook.com/FunniestPicsOfficial, (b) Funnier pics–approx. 3,753,000, https://www.facebook.com/FunnierPics, (c) Take the piss funny pics and videos–approx. 4,300,000,_https://www.facebook.com/takeapissfunny, (d) She ratchet–approx. 1,980,000,

https://www.facebook.com/sheratchetwtf, (e) All things Disney–approx. 1,173,000, https://www.facebook.com/Smilingloveyou, (f) Cleveland Brown–approx. 2,062,000, https://www.facebook.com/ClevelandBrownsfans, (g) Quagmire–approx. 1,899,000, https://www.facebook.com/quagmirefans, (h) Peter Griffin–approx. 532,000, https://www.facebook.com/petergriffinfans, (i) WTF Magazine–approx. 2,600,000, https://www.facebook.com/wtfmagazine, (j) Truly Amazing–approx. 1,800,000, https://www.facebook.com/trulyamazingpage, and (k) APPularity–approx. 2,200,000, https://www.facebook.com/appularity. These page URL addresses were the original addresses, they may have subsequently changed, and they may accordingly not direct to the original locations.

23. Facebook's professed "justification" for its destruction and/or severe devaluation of Fyk's eleven businesses/pages was that the content of such businesses/pages was supposedly violative of the CDA. We now illustrate the ludicrousness of Facebook's CDA-related basis for destroying and/or severely devaluing Fyk's businesses/pages and interfering with his prospective economic advantage/relations (*e.g.*, advertisement and/or web trafficking earnings). As discussed in greater detail below, Facebook selectively "enforced" the CDA against Fyk by, for example, deeming identical content CDA-violative as it related to Fyk but not CDA-violative as it related to a Fyk competitor.

24. In or around the end of 2016, Facebook deleted one of Fyk's pages (with millions of viewers and thousands of advertising and/or web trafficking earnings at issue) because, for example, it contained a posted screenshot from the Disney movie *Pocahontas*. Facebook claimed that this screenshot (from a Disney

children's movie) was racist and accordingly violative of the CDA; *i.e.*, to use Facebook terminology, the *Pocahontas* screenshot post constituted a "strike" (the "strike" notion is discussed in greater detail at footnote 8, *infra*). Meanwhile, for comparison's sake, Facebook allowed other businesses/pages at that same time (in or around the end of 2016) and thereafter for that matter to maintain, for examples, a posted screenshot of a mutilated child or instant article Facebook advertisements (moneymakers for Facebook) of things like sexual activities, among other things that really were violative of the CDA.[4] And, for purposes of a public record, these are "benign" examples com-

[4] Fyk even reported the disgusting posted screenshot of the mutilated child to Facebook and in December 2016 Facebook advised Fyk that such disgusting post was perfectly ok. Of note, Fyk has routinely reported unsavory content to Facebook in an effort to keep Facebook a "safe and welcoming" community. More specifically as to Fyk's reporting of the mutilated child post, Facebook advised Fyk as follows: "Thank you taking the time to report something that you feel may violate our Community Standards. Reports like yours are an important part of making Facebook a safe and welcoming environment. We reviewed the photo you reported for being annoying and uninteresting and found it doesn't violate our Community Standards." An example of a BuzzFeed (a Fyk competitor) post that Facebook apparently deemed perfectly ok was BuzzFeed's July 23, 2017, post entitled *27 NSFW Movie Sex Scenes That'll Turn You The Fu[$#] On.* Ironically, "NSFW" stands for "Not Safe for Work," and remember that Facebook was purportedly concerned with maintaining "a safe and welcoming environment." Other examples (and the list could go on) of BuzzFeed posts that Facebook deemed "safe and welcoming" amidst its "Community Standards" include: *12 Sex Positions Everyone In A Long-Term Relationship Should Try* on May 7, 2016, *Here's How Most People Have Anal Sex* on April 25, 2017, *These Insane Sex Stories Will Blow Your Fu[$#]ing Mind* on May 12, 2017, and *15 Sex + Poop Horror Stories That'll Make You Feel Better About Yourself* on August 11, 2017.

pared to the other examples we have. And, meanwhile, for comparison's sake within Fyk's own businesses /pages, Facebook allowed other Fyk businesses/pages (of incredibly similar nature to the business/page with the *Pocahontas* screenshot post) to stand. Translated, there was absolutely positively nothing about Fyk's pages violative of the CDA warranting Facebook's crippling of Fyk's livelihood (and the livelihood of his employees), certainly no "good faith" basis for Facebook's wreaking havoc on Fyk under the pretext of the CDA, which such "good faith" language is straight out of Section 230(c)(2) of the CDA. But the best proof in the "there was nothing CDA violative about Fyk's businesses/pages" pudding is set forth in averments forty-two through forty-six, *infra*, in relation to Fyk's fire sale of eight of his businesses/pages (out of the subject eleven businesses/pages noted above) to a similar (if not identical) competitor because of Facebook's irrational and unwarranted tortious interference, unfair and anti-competitive conduct, extortion, and/or fraud leaving him with no other reasonable alternative.

25. Another way to properly classify and better illustrate Facebook's conduct (when one properly disregards Facebook's wayward CDA contention) is "claim jumping," which is more of a lay description of tortious interference with prospective economic advantage/relations.

26. A locally rooted example of "claim jumping" in this country's history was California gold mining. Analogous to Facebook's conduct here, centuries ago in California a small percentage of smalltime miners struck gold/staked claims. Then, it was not uncommon for a stronger, richer mining company to swoop in

and "jump the claim" of the smalltime miner. Put differently, it was not uncommon for the stronger, richer mining company to make the smalltime miner an offer he or she could not refuse (often backed by direct or indirect threat for livelihood, striking fear in the miner), strong-arming the smalltime miner out of his or her realized economic advantage (or prospective economic advantage associated with the extraction of the found gold) developed by his or her hard work in the vein of the American Dream.

27. Here, the land that was/is replete with resources was/is the worldwide web. Facebook does not own the worldwide web, Facebook manages/ services a space on the worldwide web (called a platform) in which people (like Fyk) can stake claims (create pages, *see* averment number twenty-two, *supra*). Staking a claim first involves the discovery of a valuable "mineral" in quantity. Here, the "mineral" (gold) that Fyk discovered on the land (the worldwide web) was advertising earnings, distribution value, news feed space, and/or the like. Fyk prudently invested time and resources in recovering the "mineral" and otherwise staked claims within Facebook's "free" social media platform through the development of boundaries (*i.e.*, development of businesses/pages, web URLs, page identity numbers).

28. Facebook (worldwide web manager/servicer) realized there was a lot of money to be made in the "gold mining" (advertising and web trafficking spaces), so Facebook began mining gold for itself in tortious, unfair, extortionate, fraudulent competition with claim stakeholders like Fyk. Most of the best gold claims (pages, news feeds), however, had been staked by people like Fyk. With past being prologue, Facebook

wanted more and more and more . . . and, then, some more. And, so, Facebook (the land manager/servicer turned mining company) changed its strategy to suppress the resources of the larger claim stakeholders (Fyk). Facebook did not want to get caught sapping the resources of other claim stakeholders, so Facebook came up with "rules and regulations" to be disproportionately implemented/enforced depending on whether or not the claim stakeholder (Fyk) was favorable to or preferred by the land manager/servicer (Facebook). The rules and regulations that Facebook made up were so nebulous in nature that any and all types of gold mining effectively became violative of the land manager's/servicer's new rules and regulations, justifying the Facebook "claim jumping" that ensued in "we can do whatever we want because we are Facebook" fashion.

29. Facebook's "claim jumping" was effectuated by Facebook's doing a variety of things, for examples (a) closing the mine gates (Fyk's businesses/pages) until the land management/service company (Facebook) was paid more by the claim stakeholder (Fyk)—unpublishing pages so as to tortiously interfere, unfairly compete, and/or extort, (b) closing the mine down or cancelling the claim—deleting pages so as to tortiously interfere, unfairly compete, and/or extort, (c) cutting off resources to the mine—reducing reach/distribution so as to tortiously interfere, unfairly compete, and/or extort, (d) replacing individual miners with management/service company (Facebook) miners—replacing Fyk news feeds with Facebook ads so as to tortiously interfere, unfairly compete, and/or extort, and/or (e) imposing regulations that made the mine financially unsound with the intent to usher in

a new mining company (Fyk competitor) who paid the management/servicing company (Facebook) a higher percentage—unpublishing, reducing reach, deleting pages, and assisting a competitor in purchasing the pages so as to tortiously interfere, unfairly compete, and/or extort.

30. As Facebook CEO, Mark Zuckerberg, has proclaimed, Facebook is a "platform for all ideas" (just as California land was once a platform for all gold miners).[5] Land management/servicing was Facebook's business, whereas mining the land was Fyk's business. Once Facebook saw how lucrative Fyk's business was, Facebook jumped the claims that Fyk had staked. Like big mining companies did to the little gold miner in California centuries ago, Facebook crushed Fyk who had staked successful claims through hard work and had not volunteered himself to being crushed.

---

[5] Mr. Zuckerberg disingenuously proclaimed at his Harvard commencement speech last summer, Facebook "understand[s] the great arc of human history bends towards people coming together in greater even numbers—from tribes to cities to nations—to achieve things we couldn't on our own . . . . This is my story too—a student at a dorm connecting one community at a time and keeping at it until one day we connect the whole world." Mr. Zuckerberg's disingenuous lip service also included this: "Finding your purpose isn't enough. The challenge for our generation is to create a world where everyone has a sense of purpose." Sounds so rosy, sounds so nice . . . but, alas, Facebook talks that talk and then walks the Fyk walk. Fyk found his sense of purpose, Facebook destroyed it. Facebook disconnected Fyk, rather than connected Fyk. Facebook is destroying and/or disconnecting businesses/pages (like Fyk's) that generate advertising and/or web trafficking earnings so that Facebook can bleed away such monies for itself in legally untenable ways.

31. One key common denominator between "claim jumping" (like the gold mining example) and Facebook's conduct here is the involuntariness of same–the crushed little guy in each instance (including Fyk here) had no choice or alternative in the business world other than to swallow the difficult pill that the mighty (here, Facebook) had force-fed. Here, Facebook welcomed Fyk (as well as many others, for that matter) into a "free" social media platform and lurked around until someone became the so-called miner who found gold on the Facebook platform; *i.e.*, until someone like Fyk did tremendously well on the "free" Facebook social media platform by building his assets/economic advantage (*e.g.*, audience and distribution, akin to the aforementioned gold). Then, Facebook swooped in with an "optional" paid for reach program (*i.e.*, an offer people were not supposed to refuse), devalued and redistributed Fyk's economic advantage without Fyk volunteering himself or his businesses to same.

32. Fyk had hardly anything to his name when he launched his businesses/pages on Facebook's "free" social media platform. More specifically, Fyk was facing bankruptcy and eviction when he joined the "free" Facebook social media platform in the hopes of experiencing the American Dream and building a future for his family. He dedicated all the money he had on building a Facebook audience, rather than buying food and other household necessities for him and his family. Kudos to Fyk for building successful businesses/pages through very hard work in the vein of the American Dream.

33. Then, Facebook sent Fyk's American Dream up in smoke, pretty much overnight, without Fyk

volunteering himself or his businesses to same. What is next if Facebook's conduct is allowed to stand? Will fast food restaurant franchisors, for example, lurk around to find the most successful franchisees (built upon the hard work of the franchisee prescribing to the American Dream) and swoop in to "jump the claim;" *i.e.*, steal or destroy the franchisee's restaurant and redistribute the franchisee's restaurant to the franchisor mothership or some other franchisee who the franchisor likes better as Facebook did to Fyk here? Those are not the pillars upon which this country and the associated American Dream were built.

34. "Claim jumping" (predicated on force exerted by the mighty that the little guy could not reasonably evade in the business world) is not the economic model upon which this country has functioned since its existence, as "claim jumping" makes for a highly unstable economy. Thankfully, in today's legal world the little guy has legal recourse to rectify the wrongful forced conduct experienced at the hands of the mighty in the business world. Today, we call this kind of legal recourse claims for relief, *infra*, which sound in Facebook's tortious interference with prospective economic advantage/relations (First Claim for Relief), unfair competition (Second Claim for Relief), civil extortion (Third Claim for Relief), and/or fraud (Fourth Claim for Relief). As noted in averment numbers one through nine, *supra*, these legal actions are designed to protect the weaker from the stronger; *i.e.*, meant as legal checks and balances to the unbridled "we can do anything we want because we are stronger" mentality of those like Facebook.

35. Another way to view one of Facebook's seeming motivations for jumping the claims of those

(like Fyk) who did well for themselves on the "free" Facebook social media platform was/is to steal the advertising and/or web trafficking earnings generated on successful pages like Fyk's pages; *i.e.*, take the Fyk-built reach from which the advertising and/or web trafficking monies enjoyed by Fyk flowed and redistribute same to other "sponsors."

36. One need only look to one's Facebook news feed to see examples of such. There stands a good chance that there will be a post on one's news feed from an unknown source; *i.e.*, from somebody or some company unknown to the user of the news feed. This unknown, mystery post will likely have the word "sponsored" in light print. The "sponsor" is a paid advertiser on Facebook.

37. Facebook is now making money in the advertising space (like Fyk did) by unilaterally, systematically, systemically, and/or capriciously replacing Fyk with "sponsors." In order to clear space for Facebook's advertising efforts, Facebook had to clear out posts on Facebook user news feeds that the users actually wanted to see. For example, users wanted to see Fyk's content—that is why he had over 25,000,000 viewers across the subject eleven businesses/pages. Accordingly, Fyk's posts would take up a sizable portion of users' news feeds. So, in order for users to see the random Facebook-sponsored posts that they did not care to see, Facebook had to eliminate (or heavily curtail) the posts that people liked seeing on their news feeds (*e.g.*, Fyk's posts) and force Facebook-sponsored posts onto user news feeds whether the user wanted that or not.

38. In an effort to insulate itself from this misconduct, Facebook initially forced out folks like Fyk

under the guise that Fyk's content was "spam." Per Merriam-Webster's Dictionary, "spam" is defined as "unsolicited usually commercial messages (such as . . . Internet postings) sent to a large number of recipients or posted in a large number of places."[6] Fyk's audience chose to be his audience at the threshold and then had to choose to click on any content website link found in Fyk's businesses/pages which would then lead to content on the website in which an advertisement could be seen that would earn Fyk money; *i.e.*, there was nothing "unsolicited" about Fyk's businesses/pages and associated content website links. Put differently, there was nothing "spammy" about Fyk's businesses/pages and associated content website links upon which Facebook could have legitimately justified muscling him out under the guise of "spam."

39. By way of this misconduct, Facebook was/is making money from whatever advertisers and/or web traffickers are associating themselves with the random Facebook-sponsored posts it is forcing onto user news feeds while strong-arming out user-friendly news feed posts like Fyk's. What Facebook is doing (the forced removal of Fyk-like posts on user news feeds and the forced insertion of Facebook-sponsored posts) is the definition of "spam."[7]

---

[6] https://www.merriam-webster.com/dictionary/spam

[7] As another example of Facebook's forcing itself upon users in "spammy" fashion, when a user scrolls through their news feed and has their audio setting set to "off," some advertisements will mysteriously pop up and disregard the user's audio "off" setting (*i.e.*, force the user's audio setting to "on"). This kind of mystery advertisement, of course, is a Facebook-sponsored advertisement and Facebook is blatantly and unilaterally disregarding the user's settings so as to loudly announce (literally)

40. So, as best we can presently tell sans the benefit of discovery, Facebook's effort to crush the American Dream of hard workers like Fyk who built a life for themselves (and their employees, since laid off in Fyk's case due to Facebook's crippling) on the "free" Facebook social media platform all boils down to Facebook's crooked corporate greed: (a) Muscle out (through interference, unfair competition, extortion, fraud, and/or *et cetera*) those who do not wish to (or could no longer, in Fyk's case) partake in Facebook's "optional" paid for reach program, and (b) Delete the news feed posts that Facebook users want to see and inject news feed Facebook-sponsored posts (*i.e.*, "spam") that Facebook users do not want to see and/or have the ability to avoid. The methods by which Facebook is accomplishing such amount to unfair competition, extortion, and fraud, which badly interferes with the prospective economic advantage/relations of hard working Americans who built lives for themselves, their families, their employees, and their employees' families around Facebook's false promises of a "free" social media platform.

41. In relation to Facebook's October 2016 destruction and/or severe devaluation of Fyk's eleven

---

something that makes Facebook money. Facebook's manipulation of users' news feeds hurts the user just as much as the content provider and, to call a fig a fig, amounts to censorship. In lay terms, Facebook is no longer allowing the user to *see* what he/she wants to see and hear what he/she wants to hear. Many "loved" that they could watch videos with sound off, *see, e.g.*, July 1, 2015, http://fortune.com/2015/07/01/facebook-video-monetization, that is until Facebook unilaterally force-changed users' preferences. This Facebook force-feeding as it relates to the user cripples the content provider (like Fyk) in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion.

businesses/pages, Fyk's efforts to unravel Facebook's misconduct (akin to the procedure set forth in averment twenty-one, *supra*) was regrettably to no avail–Facebook had now officially decided it was time to completely destroy Fyk's business and interfere with his prospective economic advantage/relations. Facebook's interference and unfair competition even went so far as to lock Fyk out of his advertisement account; *i.e.*, not allowing Fyk to continue his participation in the "optional" paid for reach program.

42. After a few months of Fyk's inability to breathe life back into the businesses/pages that Facebook had destroyed and/or severely devalued (eleven pages consisting of over 25,000,000 viewers/ followers) and after Fyk regrettably had to lay off employees due to Facebook's crippling interference, Fyk was left with no reasonable alternative other than to fire sell eight of his crippled pages (realistically valuated by some in the nine figure range) for a relatively nominal approximate $1,000,000.00 in January 2017 to a competitor located in Los Angeles, California with that competitor already having been advised by Facebook that Facebook would breathe life back into the subject eight pages only if such were purchased by the competitor. This proves, among other things, that there was nothing CDA violative about these eight Fyk businesses/pages that Facebook crippled, as further discussed below.

43. Facebook offered the competitor customer service before, during, and after the fire sale of Fyk's eight business/pages so as to effectuate the fire sale (*i.e.*, so as to redistribute Fyk's economic advantage) to the competitor. In fact, the Facebook customer service offered to the competitor (but never to Fyk at

any such level, or, really, at any meaningful level) rose to the level of Facebook flying representation down to Los Angeles to meet with the competitor to make sure the Facebook-induced redistribution of Fyk's economic advantage (fire sale of the audience and reach that made up the subject eight businesses/pages) went through.

44. Reason being, Facebook plainly wanted to play a direct role in ushering Fyk out of the Facebook "free" social media platform business world in favor of Fyk's competitor. Facebook made clear that the subject eight Fyk businesses/pages that Facebook had black-listed would have no chance of having life breathed back into them until the sale of the businesses/pages was completed with Fyk's competitor—indeed, this is what Facebook represented to the Fyk competitor out of Los Angeles. Facebook worked with the competitor to orchestrate and carry out the sale.

45. Almost immediately after the fire sale to the Fyk competitor went through (thanks, in whole or in part, to Facebook's interactions with the competitor before, during, and after the fire sale process), the supposedly CDA violative Fyk businesses/pages that were fire sold were magically reinstated by Facebook within days of the fire sale's consummation (*i.e.*, contract completion between Fyk and the competitor) with no appreciable change (if any change) in the content of the pages that were supposedly violative of the CDA. Meaning, again, there was absolutely nothing CDA violative about Fyk's businesses/pages . . . Facebook just wanted to steer Fyk's businesses/pages (a/k/a assets, a/k/a economic advantage) to a competitor and otherwise eliminate Fyk by any means necessary. Facebook did so–it severely devalued Fyk's eleven

businesses/pages (economic advantage) to the point of Fyk having no reasonable alternative other than to fire sell eight of the businesses/pages for a relatively low sum and then it revalued the same businesses/pages for the Fyk competitor to whom the businesses/pages were sold.[8]

---

[8] The three businesses/pages that Fyk still maintains (Truly Amazing, WTF Magazine, APPularity) are valueless from advertising and/or web trafficking perspectives (which were the real moneymakers) because of Facebook. Though these three businesses/pages were crippled by Facebook along with the other eight businesses/pages in October 2016, Facebook's more recent disproportionate implementation and/or shell-gaming of "rules" pertaining to branded content is what is causing the current advertising and/or web trafficking valuelessness of these three pages. To further illustrate Facebook's discriminatory treatment of Fyk, the chronology concerning Facebook's new branded content rules is noteworthy. Facebook was to roll out its new branded content "rules" starting March 1, 2018, and yet further crippled one of Fyk's remaining three pages prior in February 2018 for two posts purportedly violative of Facebook's new branded content "rules." A certain number of "violations" (called "strikes" by Facebook) on a page could result in the page being banned (lost), Facebook does not tell folks how many such strikes are afforded until there is a ban, and Facebook has kept arbitrarily levying strikes against Fyk (still to this day on his remaining three pages) until it accomplishes what it wants–Fyk's being banned, which cripples his reach. *See* https://newsroom.fb.com/news/2018/08/enforcing-our-community-standards/. The writing is on the wall as to this vicious circular cycle predicated on Facebook whim. Moreover as to Facebook's continued wrongdoing related to Fyk's remaining three businesses/pages, Facebook is still treating Fyk unlike others. For example, on August 13, 2018, Fyk's WTF Magazine business/page received a post ban by Facebook. Fyk's profile was subsequently banned for thirty days due to the purported inappropriate content of the aforementioned post, which such post was doing quite well for Fyk until Facebook's interference. So, Fyk went to the original post of the aforementioned post (on another's page where he originally

46. And the timing of Facebook's ultimate Fyk crippling in October 2016 is no coincidence to the timing of the Facebook-aided fire sale of Fyk's business/pages to the Fyk competitor who was in Facebook's good, paying graces. Put differently, the proximity of this cause and effect further demonstrates the relevant connection to Facebook's wrongdoing (interference with prospective economic advantage/relations, unfair or deceptive practices, unfair competition, civil extortion, and/or fraud)

47. Fyk was wrongly singled out by Facebook, even per the admission of a high-ranking Facebook employee (Chuck Rossi, director of engineering at Facebook) kind enough to communicate reality to Fyk because Mr. Rossi seemingly does not share Facebook's devious and publicly harmful agendas.[9]

---

found the post) and reported that identical post to Facebook. Facebook found the identical post acceptable for another. More specifically, by message dated August 15, 2018, Facebook advised Fyk as follows as to the identical post on another's page that Fyk reported to Facebook: "Thanks for letting us know about this. We looked over the photo, and though it doesn't go against one of our specific Community Standards, you did the right thing by letting us know about it. . . . " Moreover as to damages, Fyk built the APPularity business/page to support an application called APPularity and Fyk personally invested approximately $50,000.00 (and countless hours) in this ap endeavor. Facebook's crippling (again, still to this day) of APPularity (which, again, is one of the three businesses/pages Fyk still maintains) has rendered the APPularity application worthless; *i.e.*, robbed Fyk of his approximate $50,000.00 investment and all the future monies (*i.e.*, prospective economic advantage) he would have doubtless enjoyed from same.

[9] In October 2016, Fyk's Peter Griffin business/page had been unpublished by Facebook. Mr. Rossi helped Fyk restore the Peter Griffin business/page that had been wrongfully unpublished by

Indeed, Mr. Rossi, whether known to Facebook or not, administers a group dedicated to restoring businesses/pages that Facebook has wrongly shut down. Such singling out of Fyk by Facebook might rightly be characterized as discrimination

48. In sum, Facebook's actions with Fyk were unlawful.

FIRST CLAIM FOR RELIEF—INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE/RELATIONS

49. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

50. Facebook intentionally interfered with economic relationships between Fyk and his various advertising companies and/or web traffickers (*see* footnote 2, *supra*, for a non-exhaustive list of such companies) associated with the aforementioned eleven businesses/pages that Facebook intentionally interfered with, which such economic relationships would have doubtless continued to result in an economic benefit/advantage to Fyk.

51. Facebook knew of Fyk's advertising and/or web trafficking relationships . . . advertising and/or web trafficking in general on the Facebook "free" social media platform is no secret, that is how most (if not all) businesses/pages make money through the Facebook social media platform. In fact, Facebook was/is so aware of advertising and/or web trafficking relationships and the lucrativeness of same that Facebook

---

Facebook. Regrettably, very soon thereafter, Facebook again shut Peter Griffin down.

has muscled its way into that line of work while muscling out the very folks who cultivated that line of work all the way back in the days when Facebook was akin to baron land or an unchartered frontier. Recall, Facebook is not that old,[10] and it needed worker bees (like Fyk) to make it what it is today over a relatively short period of time–that is until the honey was produced and Facebook figured it would kill the bees and take the honey and/or redistribute the honey to other worker bees.

52. Facebook engaged in wrongful conduct separate from the interference with Fyk itself. For example, as discussed in the above common allegations and below other causes of action, Facebook implemented its interference with Fyk *via* the separately wrong conduct of civil extortion (*e.g.*, coercing Fyk to pay approximately $43,000.00 towards worthless "optional" paid for reach amidst threat and fear that his businesses/pages would be crippled if he did not and then not allowing Fyk to continue in the "optional" paid for reach program). As another example, as discussed in the above common allegations and below other causes of action, Facebook implemented its interference with Fyk *via* the separately wrong conduct of unfair competition (*e.g.*, unilaterally deleting Fyk posts from users' news feeds that garnered significant advertising and/or web trafficking monies so as to begin forcing random "spammy" Facebook-

---

[10] Although Facebook is so interwoven into the fabric of our society (to the point of obsession, in particularly with society's youth) that one might think it has been around since Creation or the Big Bang (depending on belief systems), it has only been around since February 4, 2004, the same day the United States government (Darpa) nixed its LifeLog program.

sponsored posts into users' news feeds). And, no, there is no competition privilege at play here somehow justifying Facebook's conduct—that privilege only applies when the competition is by fair play; *i.e.*, devoid of independently wrongful conduct. Put differently and for example, there was, in theory, nothing wrong with Facebook entering the advertising and/or web trafficking realms on its platform if that is all Facebook had done side-by-side, mano-a-mano with other advertising and/or web trafficking competitors; but, Facebook did not just enter the advertising and/or web trafficking realms in side-by-side, mano-a-mano competition with other companies earning advertising and/or web trafficking income (like Fyk), Facebook instead engaged in a calculated, systematic, systemic campaign to eliminate its competition by, for examples, (a) unilateral deletion of competitors' news feed posts and unilateral force-placing of "spammy" Facebook-sponsored posts into the news feeds of users who did not invite same (at least not consciously, since so much of the Facebook paradigm is cryptic beyond ordinary comprehension or recognition), (b) deletion of competitor businesses/pages (to which advertisements and/or web trafficking were tied) under misrepresentative pretext like CDA violation, and (c) splitting of posts into four categories (text, picture, video, and website links) and systematically directing its tortious inference the hardest at links because links were what made others (like Fyk) the most money and Facebook the least money.

53. Facebook, in engaging in the aforementioned interference *via* myriad methods of conduct wrongful in and of itself, either intended or knew that the advertising and/or web trafficking disruption expe-

rienced by Fyk (not to mention other lost economic opportunities set forth in footnote 2, *supra*) was certain or substantially certain to occur as a result of such interference.

54. Fyk's relationships with myriad advertising and/or web trafficking companies was significantly disrupted (in fact, eliminated) due to Facebook's interference. Again, Fyk had to fire sell eight businesses/pages (out of the eleven Facebook had crippled) to a competitor amidst Facebook's direct involvement in effectuating that sale; *i.e.*, amidst Facebook's steering of competition.

55. Facebook has deprived Fyk of hundreds of millions of dollars (if not billions of dollars–case in point, BuzzFeed, a Fyk competitor, now being worth approximately $1,500,000,000.00 according to some sources) by way of Facebook's interference and disruption of his advertising and/or web trafficking monies. At a peak and prior to Facebook's interference, Fyk earned approximately $300,000.00 in one month in advertising and/or web trafficking monies, for example. There was no realistic end in sight to Fyk's economic gain before Facebook's interference; rather, all signs pointed towards Fyk earning even more advertising money but for Facebook's interference. to illustrate, competitors who have survived Facebook's onslaught and were far less successful than Fyk at the time of Facebook's devastating interference (*i.e.*, had millions less followers and accordingly earning significantly less advertising earnings than Fyk) have, upon information and belief, had their businesses on Facebook's platform professionally valuated in the hundreds of millions to billions of dollars range. And, yet, Fyk had to fire sell eight of his hard-earned

businesses/pages for many zeros less than what they should have been worth but for Facebook's interference; *i.e.*, for a relatively nominal approximate $1,000,000.00 due to Facebook's interference.

56. Not only was Facebook's conduct a substantial factor in Fyk's significant loss of business income and prospective economic advantage, it was the only factor. Facebook's interference with Fyk's economic advantage imposes liability on Facebook for improper methods of disrupting or diverting Fyk's business relationships (*e.g.*, advertising and/or web trafficking companies, *see* footnote 2, *supra*) outside the boundaries of fair competition. In actuality, one of Facebook's motives (collecting "optional" paid for reach monies on a purportedly "free" social media platform) amounts to extortion, which, in turn, has a chilling effect on fair competition. When it comes to Facebook's desire to take over the advertising and/or web trafficking businesses through forced and unwanted Facebook-sponsored "spammy" posts on users' news feeds by muscling out the posts users want (like Fyk posts), that is where glaring unfair competition comes into play. Users cannot avoid the forced, "spammy" Facebook-sponsored posts, and Facebook is no longer the "free," "give the people a voice" social media platform it purports to be;[11] rather, it, again, has

---

11 "Purports" because of the kind of false rhetoric Facebook disseminates to the public with a brainwashing aim based, in part (sans the benefit of discovery), on supposed feedback from mystery Facebook focus groups. *See, e.g.*, Tessa Lyons' April 13, 2018 (https://www.youtube.com/watch?v-X3LxpEej7gQ), May 23, 2018 (https://www.bloomberg.com/news/videos/~2018-05-23/facebook-s-fight-against-misinformation-and-fake-news-video), and June 21, 2018 (https://www.youtube.com/watch?v-DEVZeNESiqw). Ms. Lyons is Facebook's product manager; *see also, e.g.*, June 22, 2016,

become a platform predicated on redistribution of assets (through legally untenable means) developed by folks (like Fyk) under the pillar of our society that is the American Dream.

57. Tortious interference with prospective economic advantage/relations is intended to protect stable economic relationships; again, the United States of America was built on fostering stable economic relationships developed in the spirit of the American Dream. Facebook's conduct with Fyk (and many others, for that matter) frustrates such stability and the underlying American Dream, akin to the crooked "claim jumping" scheme set forth above.

WHEREFORE, Plaintiff Jason Fyk respectfully requests the entry of judgment against Defendant Facebook, Inc. for damages including, but not necessarily limited to, (a) compensatory damages well in excess of the $75,000.00 amount in controversy threshold, (b) punitive damages, (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable (*e.g.*, injunction), just, and/or proper.

SECOND CLAIM FOR RELIEF—VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTIONS 17200-17210 (UNFAIR COMPETITION)

58. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

---

https://www.c-span.org/video/?411573-1/facebook-coo-sheryl-sandberg-discusses-technological-innovation.

59. California Business & Professions Code Section 17203 provides, in pertinent part, as follows:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

60. California Business & Professions Code Section 17201 provides, in pertinent part, as follows: "As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."

61. California Business & Professions Code Section 17200 provides, in pertinent part, as follows: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ."

62. California's unfair competition law affords a private right of action where (as here) the conduct is predicated on "unfair" conduct.

63. Here, there was nothing fair about Facebook's steering Fyk's business/pages to the competitor to whom Fyk had to fire sell eight businesses/pages due

to Facebook's leaving Fyk with no reasonable alternative. Such is the epitome of unfair competition, conducive of economic instability and antithetical to the American Dream.

64. Again, Facebook wished to eliminate one competitor (Fyk) in favor of another competitor (the company Fyk was forced to fire sell to because of Facebook) because, for example, the other competitor paid Facebook lucrative sums under Facebook's "optional" paid for reach program. Again, Facebook's excuse for eliminating Fyk was of course not its preference to steer his businesses/pages to a competitor who paid Facebook lots of money notwithstanding a purportedly "free" social media platform, but was instead the nonsense about the content of Fyk's businesses/pages being violative of the CDA (mainly, supposedly "spammy"). But, again, as discussed in greater detail above, this was a lie as evidenced by the fact that Facebook immediately reinstated the supposedly CDA violative pages for the competitor who Fyk was forced to sell to because of Facebook without any appreciable change, if any change, in the content of the subject pages.

65. And there is more to Facebook's unfair competition. Facebook wished to enter into the lucrative advertising and/or web trafficking businesses for itself once it saw how successful those businesses had become for folks like Fyk. Facebook did not fairly enter into competition with Fyk in this regard, such as by building a massive fanbase as Fyk did from the ground up and then reaping the benefits of the advertising and/or web trafficking earnings that flowed from such hard work in the vein of the American Dream. Rather, Facebook imposed its might in anti-

competitive fashion by muscling out the Fyk-related posts from user news feeds that users actually wanted and muscling the "spammy" Facebook-sponsored posts into user news feeds that users had not asked for. This is the epitome of unfair competition.

66. Moreover, Facebook's unfair competition contravenes its own policies–for examples, Facebook has policies of public neutrality in filtering content, giving people a "voice" (as Ms. Lyons, for example, disingenuously proclaims, *see* footnote 11, *supra*), and "connecting" people (as Mr. Zuckerberg, for example, disingenuously proclaims, *see* footnote 5, *supra*). Where (as here) there is, for example, no neutrality employed in content filtering so as to filter out a competitor (Fyk) and his businesses/pages, predicated on Facebook's false advertising (among other things), California law geared towards safeguarding fair competition is turned upside down. Facebook should be held (whether that is legally, equitably, or both) to its professed policies of public neutrality, voice, and connection; *i.e.*, Facebook should not be allowed to arbitrarily throw its professed public policies aside so as to engage in case-by-case unfair competition that singles out and destroys one person (Fyk) both by unfairly steering the hard work of one competitor (Fyk) to another competitor (*e.g.*, Facebook's aiding and abetting the fire sale of eight Fyk businesses/pages to another competitor), by muscling Fyk's advertisement-backed posts off of users' news feeds and muscling in unwanted random "spammy" Facebook-sponsored posts laced with advertising money, and who knows what else sans the benefit of discovery.

WHEREFORE, Plaintiff Jason Fyk, pursuant to California Business & Professions Code Section 17203,

respectfully requests the entry of judgment against Defendant Facebook, Inc., for damages including, but not necessarily limited to, (a) restitution in an amount appropriate to restore Fyk's loss of advertising and/or web trafficking monies at the hands of Facebook's unfair competition (*e.g.*, restore Fyk for every bit of lost advertising and/or web trafficking money associated with every one of his posts on user news feeds that Facebook unilaterally supplanted with its "spammy" sponsored news feed posts), (b) an order enjoining the methods, acts, or practices complained of in this complaint (*e.g.*, Facebook's unsubstantiated banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, deletion of individual Facebook administrative profiles, and/or the like of Fyk businesses/pages), (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable, just, and/or proper.

THIRD CLAIM FOR RELIEF—CIVIL EXTORTION

67. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

68. Facebook implemented its "optional" paid for reach program, in out-of-the-blue fashion for those (like Fyk) who had functioned under an organic reach program on the purportedly "free" Facebook social media platform for years, backed by a transparent "threat" that those who did not engage in the "optional" paid for reach program would suffer (*see, e.g.,* averment number eighteen, *supra*, in regards to the high-ranking Facebook representative advising Fyk that one has

to pay Facebook in order to play with Facebook). Then, to boot, Facebook would not even allow Fyk to continue participating in the "optional" paid for reach program beyond his approximate $43,000.00 investment into same.

69. In so implementing, Facebook knew its "threat" was wrongful or had no basis in fact. Facebook's unilateral "optional" paid for reach program was anything but "optional," as Fyk learned the hard way after his approximate $43,000.00 investment in the "optional" paid for reach program proved worthless and Facebook subsequently kicked him out of the "optional" paid for reach program. "The hard way" because, not-so-coincidentally, Facebook's elimination of Fyk from the "optional" paid for reach program coincided with the financially detrimental merry-go-round that Facebook then subjected him to as outlined in averment number twenty-one, *supra*, and culminating in Facebook's October 2016 destruction and/or severe devaluation of eleven of Fyk's very lucrative businesses/pages and the Facebook-aided fire sale of eight of Fyk's business/pages to a Fyk competitor in January 2017.

70. The "threat" that was the "optional" paid for reach program was coupled with an express demand for money. Fyk reasonably feared for the sustainability of his business/pages if he did not relent to Facebook's "optional" paid for reach program "threat." Because of that fear, Fyk relented to the "optional" paid for reach program for a period of time (to the tune of approximately $43,000.00) in an effort to placate Facebook; *i.e.*, in an effort to inspire Facebook not to meddle with (or eventually crush) this businesses/pages. Again, Fyk noticed no appreciable increase in

his already sizable viewership. Again, then Facebook excluded Fyk from the "optional" paid for reach program. And, again, this is when "threat" and related fear became very real. Once Fyk's "optional" payments to Facebook went away, Facebook's "threat" materialized into what Fyk had feared—the very real hardships outlined in the preceding averment and detailed throughout this complaint.

71. Again, as with all of the Facebook misconduct set forth in this complaint, Facebook's civil extortion undermines the pillars upon which America was built–hard work invested by the proverbial little guy like the gold miner (here, Fyk) to accomplish the American Dream and economic stability crushed (*via* extortion or otherwise) by the powerful like big mining (here, Facebook) bent on snuffing out the little guy's American Dream.[12]

WHEREFORE, Plaintiff Jason Fyk respectfully requests the entry of judgment against Defendant Facebook, Inc., for damages including, but not necessarily limited to, (a) Facebook's reimbursement to Fyk of the approximate $43,000.00 Fyk paid to Facebook in conjunction with Facebook's "optional" paid for reach program, (b) punitive damages, (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable, just, and/or proper.

---

[12] Public record reflects that the vast majority of Facebook's shareholder population is made up of institutions rather than individuals.

FOURTH CLAIM FOR RELIEF— FRAUD/INTENTIONAL MISREPRESENTATION

72. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

73. Facebook made myriad false representations to Fyk that harmed him. For example, Facebook represented to Fyk that the "free" organic reach program was perfectly acceptable when, in reality, only the "optional" paid for reach program is acceptable (*see, e.g.,* footnote 3, *supra*). As another example, Facebook represented to Fyk that he was welcomed to participate in the "optional" paid for reach program when, in reality, that was false. As another example, Facebook represented to Fyk that the businesses/pages Facebook crippled in or around October 2016 were violative of the CDA when, in reality, there was nothing CDA violative about such businesses/pages.

74. Facebook either knew its representations to Fyk (exemplified in the preceding averment) were false or Facebook made such representations to Fyk recklessly and without regard for the truth of such representations

75. Facebook intended for Fyk to rely on its representations. For example, Facebook wished to bait Fyk into the "optional" paid for reach program knowing that it would be quick to pull that rug out from underneath Fyk, and Fyk relied on Facebook's representations that he was welcomed in the "paid for" reach program to the tune of a $43,000.00 investment into same. As another example, Facebook wished for Fyk to rely on its representation that his businesses/pages were violative of the CDA knowing such representation to be false, and Fyk relied on

Facebook's representation that his businesses/pages were CDA violative in fire selling eight of same to the competitor who Facebook steered the fire sale towards.

76. Fyk's reliance on Facebook's representation was reasonable, especially considering the unequal balance of power between the parties. Fyk had no reasonable alternatives other than to try the "optional" paid for reach program and fire sell eight of his crippled businesses/pages, for example.

77. Fyk was harmed by his reliance. For example, Fyk's $43,000.00 investment into the "optional" paid for reach program proved useless. As another example, Fyk's fire sale of eight pages for a relatively nominal approximate $1,000,000.00 to a competitor when competitors (once smaller and/or less successful than Fyk) are now valued anywhere from hundreds of millions of dollars to billions of dollars.

78. Fyk's reliance on Facebook's misrepresentations was not only a substantial factor in Fyk's losing substantial economic advantage (realized and prospective), we submit it was the only factor.

WHEREFORE, Plaintiff Jason Fyk respectfully requests the entry of judgment against Defendant Facebook, Inc., for damages including, but not necessarily limited to, (a) compensatory damages well in excess of the $75,000.00 amount in controversy threshold, (b) punitive damages, (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable (*e.g.*, injunction/enjoinder), just, and/or proper.

JURY DEMAND

Fyk hereby demands jury trial on all matters so triable as a matter of right.

Respectfully submitted,

PUTTERMAN LANDRY + YU LLP

By: /s/ Constance J. Yu

and

CALLAGY LAW, P.C.
Sean R. Callagy, Esq.
Pro Hac Vice Application Pending
Michael J. Smikun, Esq.
Pro Hac Vice Application Pending
msmikun@callagylaw.com
Jeffrey L. Greyber, Esq.
Pro Hac Vice Application Pending
jgreyber@callagylaw.com

Attorneys for Plaintiff

VERIFICATION

I, Jason Fyk declare:

I am the plaintiff in the above-entitled matter.

I have read the foregoing Verified Complaint and know the contents thereof. The same is true of my own knowledge, except as to those matter which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare (or certify) under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed on August 22, 2018.

/s/ Jason Fyk

CONFORMED RESPONSE IN OPPOSITION TO DEFENDANT'S NOVEMBER 1, 2018, MOTION TO DISMISS (DECEMBER 14, 2018)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:18-CV-05159-JSW

Conformed Response in Opposition to Defendant's November 1, 2018, Motion to Dismiss

Hearing: Feb. 1, 2019, 9:00 A.M.

Before: Hon. Jeffrey S. WHITE, United States District Judge.

Location: Oakland, Ct. 5, Fl. 2

SEAN R. CALLAGY *(Pro Hac Vice Admitted)*
Email: scallagy@callagylaw.com
MICHAEL J. SMIKUN *(Pro Hac Vice Admitted)*
Email: msmikun@callagylaw.com
CALLAGY LAW, P.C.

650 From Rd., Suite 565
Paramus, NJ 07652
Telephone: (201) 261-1700
Facsimile: (201) 261-1775

JEFFREY L. GREYBER *(Pro Hac Vice Admitted)*
Email: jgreyber@callagylaw.com
CALLAGY LAW, P.C.
1900 N.W. Corporate Blvd., Suite 310W
Boca Raton, FL 33431
Telephone: (561) 405-7966
Facsimile: (201) 549-8753

CONSTANCE J. YU (SBN 182704)
E-mail: cyu@plylaw.com
PUTTERMAN LANDRY+ YU LLP
345 California Street, Suite 1160
San Francisco, CA 94104-2626
Telephone: (415) 839-8779
Facsimile: (415) 737-1363

Attorneys for Plaintiff
JASON FYK

[Table of Contents and Table of Authorities Omitted]

ADDITIONAL ONE PAGE SUMMARY OF ARGUMENT

Facebook's Motion to Dismiss ("M2D") is based on an untenable theory that its actions are entitled to blanket, unbridled "just because" immunity under 47 U.S.C. § 230(c)(1) ("CDA"). But the express language

of the CDA (and case law, *see* Section C, citing *Nemet, Barnes, Levitt, Jurin, Perfect 10, Carafano, Song Fi, e-ventures, Atl. Recording Corp., Fraley, Fair Hous. Council, Batzel, Perkins*) makes clear that Subsection (c)(1) only immunizes a "provider . . . of an interactive computer service" (Facebook) from third-party liability concerning information (*i.e.*, content) published or spoken by "another information content provider" on the "interactive computer service('s]" platform. 47 U.S.C. § 230(c)(1) (emphasis added). This is not a third-party case where (1) someone else is suing Facebook over Fyk publications or speeches found on the Facebook platform, or (2) Fyk is suing Facebook over something someone else published or spoke. Subsection (c)(1) (and case law) says that Facebook is not liable for "information provided by another information content provider" simply because "another" publishes or speaks on the Facebook platform because, again, the language of Subsection (c)(1) does not classify Facebook as the *per se* publisher or speaker of "another's" content. Subsection (c)(1) does not, however, immunize Facebook from first-party liability concerning content published or spoken by the "content provider" (Fyk)—this case is first-party.

And Facebook is estopped from advancing and/or has waived its ability to advance its wayward Subsection (c)(1) theory given the sole pre-suit "basis" for its destruction of Fyk's businesses/pages was Subsection (c)(2)(A); *i.e.*, Facebook "Community Standards" or "terms." *See* Section D.[1] *See* [D.E. 20] at n. 1. To

---

[1] The nature of "information provided"/content is what Subsection (c)(2)(A) pertains to. Facebook's suggestion that there was something "filthy" about Fyk's businesses/pages *via* its glancing

allow such a shift would work an injustice/inequity. Moreover, the Court should deny the Subsection (c)(1) aspect of the M2D (1) pursuant to Rules 12(c) and 12(d) (see Section 8), and (2) since a lot of what is said in the M2D is false, misrepresentative, misleading, and/or incoherent (*see* Section E).

As for the Rule 12(b)(6) aspect of the M2D, there are plenty of supportive averments in the Complaint (*see* Section F). *See, e.g.*, [D.E. 1] at ¶¶ 1-2, 14-16, 18, 20, 22-23, 25-34, 42-47, 49-57 (1st Claim for Relief); ¶¶ 6, 14, 18, 20, 35-41, 43-45, 47, 58-66 (2d Claim for Relief); ¶¶ 14, 18-20, 37-40, 67-71 (3d Claim for Relief); ¶¶ 4-7, 14, 17-18, 20-21, 23-24, 30, 35-40, 45-47, 72-78 (4th Claim for Relief).

STATEMENT OF RELEVANT FACTS

On August 23, Fyk filed his Verified Complaint (the "Complaint"), [D.E. 1], detailing Facebook's brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent practices that caused the destruction of his multi-million dollar business with over 25,000,000 followers, *Id.* at ¶ 1. Facebook's November 1 Motion to Dismiss ("M2D"), [D.E. 20], is disingenuous and inapposite because this lawsuit is about the "content provider" (Fyk) pursuing an "interactive computer service" (Facebook) in a first-party posture for destruction of his livelihood. On December 7, Fyk filed his M2D Response [D.E. 25], inadvertently tracking Local Rule rather than Standing Order page limitations; thus, this conformed brief.

---

reference to a takeapissfunny page, *see* [D.E. 20] at 1, is misplaced, inaccurate, and out-of-context; *i.e.,* is not "good faith."

Fyk's businesses/pages at their height were generating him hundreds of thousands of dollars a month, and his growth potential was limitless. *See, e.g.*, [D.E. 1] at ¶¶ 1-2, 15-16, n. 2 and n. 8. Competitors who Facebook did not cripple, as it did Fyk, are now valued in the hundreds of millions to billions of dollars range. *See, e.g.*, [D.E. 1] at ¶ 5. The M2D argues that Facebook is immune under Subsection (c)(1) of the CDA, omitting that such immunity is available when another "content provider" sues Facebook in a third-party posture (*e.g.*, car manufacturer suing a consumer website, Consumer Affairs, for hosting third-party consumer reviews about their car).[12] Again Fyk is suing in a first-party posture

---

[1] Legislative intent is critical for understanding Facebook's misuse of the CDA. The CDA was enacted in 1996 to regulate internet pornography. *See, e.g.*, 141 Cong. Reg. 88088 (1995) (" . . . the heart and soul of the [CDA] is to provide much-needed protection for families and children"); 66 N.Y.U. Ann. Surv. Am. L. 371, 379 (2010) (same); 35 Hastings Comm. & Ent. L.J. 455, 456 (2013) (same, adding that "Section 230 was added to support and encourage the proliferation of information on the Internet"). At Mr. Zuckerberg's April 10, 2018, Congressional Testimony, Senator Ted Cruz acutely and accurately pointed out to Mr. Zuckerberg that "the predicate for Section 230 immunity under the CDA is that you are a neutral public forum." But Facebook is anything but neutral—Facebook's Tessa Lyons, for example, publicly states the polar opposite of Senator Cruz's correct statement, yet further evidencing Facebook's misunderstanding, misapplication, and/or systemic abuse of the CDA: "And we approach integrity in really three ways. The first thing that we would do is we remove anything that violates our Community Standards," which such Facebook "Community Standards" are found nowhere in the express language of the CDA, which such legislation Facebook conflates with its own de-neutralizing business decisions aimed at re-distributing the hard-earned money of others (like Fyk) to Facebook and/or Fyk competitors who pay Facebook a lot more money than Fyk (*see*

over Facebook's own extensive wrongdoing. The M2D's CDA nonsense is flawed procedurally (Section B), legally (Section C), equitably (Section D), and factually (Section E). Facebook's Rule 12(b)(6) nonsense is legally, procedurally, and factually flawed (Section F). The M2D must be denied.

STATEMENT OF ISSUES TO BE DECIDED

Legally, equitably, procedurally, and/or factually speaking, can Facebook somehow enjoy the limited third-party immunity prescribed by Subsection 230(c)(1) of the CDA in this first-party action? And has Fyk somehow "fail[ed] to state a claim upon which relief can be granted" pursuant to Rule 12(b)(6)?

MEMORANDUM OF LAW

A. Legal Standards

Federal Rule of Civil Procedure 12(b) provides, in pertinent part, that " . . . a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted . . . " *Id.*; *see also Finkelstein, M.D. v. AXA Equitable Life Ins. Co.*, 325 F. Supp. 3d 1061 (N.D. Cal. 2018); *Cunningham v. Mahoney*, No. C 10-03211 JSW, 2010 WL 11575083 (N.D. Cal. Dec. 7, 2010). A Rule 12(b)(6) motion tests the formal sufficiency of a claim, it is not for resolving a fact/merit contest between the parties. *See, e.g.*, 5B

[D.E. 1] and below). A "neutral" thing is not something to wield against others in a non-neutral "immunity" fashion (as here).

2 This third-party understanding of Subsection (c)(1) immunity is so elementary that it finds its way into Wikipedia. *See* https://en.wikipedia.org/wiki/Communications_Decency_Act.

Wright & Miller, *Fed. Prac. & Proc. 3d* § 1356, 354. For brevity's sake, the CDA is attached as Exhibit A and incorporated herein.

B. Facebook's M2D Is a Thinly Veiled Pre-Discovery Motion for Summary Judgment (Fed. R. Civ. P. 12(c) and 12(d))

We assume the procedural underpinning of Facebook's Subsection (c)(1) dismissal effort is Rule 12(c), which brings Rule 12(d) into play. In stark contrast to a Subsection (c)(1) third-party posture, Fyk ("information content provider") is suing Facebook ("interactive computer service") in a first-party posture based on Facebook's wrongful destruction (actionable under all four claims for relief) of Fyk's businesses/pages (*i.e.*, destruction of Fyk's past and future publications or speeches) *via* banning, ads account blocking, domain blocking, unpublishing, and/or deleting of Fyk's businesses/pages, silencing his voice and/or eliminating his reach and distribution. Facebook's destruction of Fyk's businesses/pages was based on a pre-suit contention that Fyk's content violated "Community Standards" or "terms;" *i.e.*, violated Subsection (c)(2)(A).[3] *See* [D.E. 1] at ¶ 23. Because Facebook's novel

---

[3] Attached as Exhibit B (incorporated herein) is a representative sampling of screenshots of the written representations Fyk received from Facebook pre-suit in relation to its crippling of his businesses/pages. Exhibit B evidences that Facebook's "justification" for the crippling of the businesses/pages was that the content of same purportedly violated Facebook's "Community Standards"/"terms," which, if anything, implicates Subsection (c)(2)(A). There is no hint in Exhibit B that Facebook's crippling of Fyk's businesses/pages was based on Facebook being pursued by other third-parties based on the content of Fyk's businesses/pages. Facebook plainly cannot pull that off because, among other things, it re-established the (virtually) identical content of

Subsection (c)(1) argument is a "matter outside the pleadings," the Court should "exclude[ ]" the Subsection (c)(1) argument or treat the argument "as one for summary judgment under Rule 56 [and allow] [a]ll parties a reasonable opportunity [*i.e.*, discovery] to present all material that is pertinent to the motion [for summary judgment]." Fed. R. Civ. P. 12(d).[4]

C. Facebook's Interpretation/Application of Subsection (c)(1) "Immunity" Is Legally Amiss

The legal untenableness of Facebook's novel Subsection (c)(1) twist is twofold. First, it is readily apparent from even just Wikipedia (citing the *Harvard Journal of Law & Technology*), *see* n. 2, *supra*, that Subsection (c)(1) affords third-party immunity under some circumstances, but by no means first-party immunity. Second, Subsection (c)(1) does not immunize folks from themselves.

1. Subsection (c)(1) of the CDA Affords Some Third-Party Immunity, Not First-Party

Subsection (c)(1) and the well-settled case interpretation of same in no way immunizes Facebook from its destructive acts here. Subsection (c)(1) immunity is

---

Fyk's businesses/pages for the new owner of same after Fyk's Facebook-induced fire sale of same to a competitor who Facebook apparently liked better at the time. *See, e.g.*, [D.E. 1] at ¶ 45. "At the time" because, since this suit, Facebook is now making things very difficult for the new owner.

[4] *See also, e.g., Spy Phone Labs, LLC v. Google, Inc.*, No. 15-cv-03756-KAW, 2016 WL 6025469, at *8 (N.D. Cal. Oct. 14, 2016) (a CDA immunity defense, at least as to Subsection (c)(2)(A), "cannot be determined at the pleading stage[,]" but may be raised "at a later stage, such as summary judgment").

afforded to Facebook where (as not here) it is being pursued by someone else for Fyk's publications or speeches (*i.e.,* content/"information provided") or by Fyk for someone else's publications or speeches (*i.e.*, content/"information provided").

The cases cited in the M2D are inapposite or misconstrued by Facebook. In *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009), cited at page four of the M2D, Nemet Chevrolet, Ltd. was suing Consumeraffairs.com over consumer reviews that others had posted on the Consumeraffairs.com platform about Nemet Chevrolet, Ltd. Consistent with Fyk's interpretation of Subsection (c)(1), the district court in *Nemet Chevrolet, Ltd.* concluded (and the Fourth Circuit affirmed) that "the allegations contained in the Amended Complaint [d]o not sufficiently set forth a claim asserting that [Consumeraffairs.com] authored the content at issue." *Id.* at 253. In affirming, the Fourth Circuit held, in pertinent part, that Consumeraffairs.com was an "'information content provider' under § 230(f)(3) of the CDA," and, most critically, that "interactive computer service providers [are not] legally responsible for information created and developed by third parties." *Id.* at 254 (emphasis added) (citing *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc)). Instructively, the Fourth Circuit also held that "Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them." *Id.* at 254 (citing *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007)). *Nemet Chevrolet, Ltd.* further confirms reality—that Subsection (c)(1) immunity

pertains to third-party liability. The case *sub judice* is a first-party case.

Same with *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), cited at pages one, five, and seven of the M2D. In *Barnes*, the plaintiff sued over defendant's alleged failure to remove indecent posts of (or pertaining to) her made by her ex-boyfriend on the Yahoo!, Inc. platform. Barnes sought to remove Yahoo!, Inc. from Subsection (c)(1) immunity based on her arguments that Yahoo!, Inc. served as a "publisher" in relation to the subject indecent posts, which such removal is doable under certain circumstances (discussed below). The *Barnes* court concluded, however, that the "publisher" of the indecent posts was the third-party ex-boyfriend, thereby finding that Subsection (c)(1)'s third-party liability immunity applied to Yahoo!, Inc. Again, the case *sub judice* is a first-party case involving Facebook's wrongful destruction of Fyk's businesses/pages, not a third-party case against Facebook over some notion that someone else's post about Fyk on the Facebook platform was indecent and Facebook should have taken the third-party's post down.

This remains true for *Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011), *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010), *Perfect 10, Inc. v. CCBill, LLC*, 481 F.3d 751 (9th Cir. 2007)/*Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir. 2007), and *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003). This case is about the content of a first-party (Fyk) being wrongly destroyed by an "interactive computer service" (Facebook).

And there is more case law supportive of Fyk's position that Subsection (c)(1) is inapplicable here. For example, in *Song Fi, Inc. v. Google, Inc.*, 108 F. Supp. 3d 876 (N.D. Cal. 2015), the Court determined that YouTube was not immune under the CDA. In *Song Fi*, action was brought against operators of video-sharing website, alleging that the operators' decision to remove plaintiffs' music video from the publicly-accessible section of the website was inappropriate. The *Song Fi* court found that the phrase "otherwise objectionable" as used in Subsection (c)(2) did not extend so far as to make operators of video-sharing website immune from suit based on California-law . . . tortious interference with business relations claims by users in relation to operators' decision to remove users' music video from publicly accessible section of website. The *Song Fi* court went on to find that the "obscene, lewd, lascivious, filthy, excessively violent [and] harassing" material suggested lack of congressional intent to immunize operators from removing materials from a website simply because materials posed a "problem" for operators. Though Facebook viewed Fyk as some sort of "problem," that does not mean he violated the CDA.[5]

---

[5] Facebook's goal is to eliminate businesses and competition by labeling them as "problems." Ms. Lyons has publicly said so: "The second area is reducing the spread of problematic content, and if we can reduce the spread of those links we reduce the number of people who click through and we reduce the economic incentive that they have to create that content in the first place." Reducing the economic advantage of folks like Fyk is what the First Claim for Relief is all about. More on the point of Facebook's strategy to interfere with the economic advantage of the approximate 70,000,000 businesses on Facebook that Mr. Zuckerberg disingenuously says he wishes to promote (*see* n. 7,

Then there is *e-ventures Worldwide, LLC v. Google, Inc.*, 214CV646FTMPAMCM, 2017 WL 2210029, at *1 (M.D. Fla. Feb. 8, 2017) as another example, where, accepting as true e-ventures' allegations that Google's investigation and removal of e-ventures' content was motivated not by a concern over web spam, but by Google's concern that e-ventures was cutting into Google's revenues, the Court found Subsection (c)(1) did not immunize Google's actions. Then there is *Fair Housing Council*, 521 F.3d 1157 as another example, where Section 230 of the CDA was found inapplicable because Roomates.Com's own acts (posting surveys and requiring answers) were entirely Roomates.Com's doing. Then there is *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009), as another example, where it was found that where the interactive computer service was not acting as the information content provider and suit was based on state law claims of unfair business practices, the situation falls under the immunity carve out set forth in Subsection 230(e) of the CDA. *See* Ex. A.

As discussed in Section D and in the Complaint (and depicted in Exhibit B), the Subsection (c)(2) underpinning of *Song Fi* was the only pretext professed by Facebook when crippling Fyk's businesses/pages.

---

infra), Ms. Lyons has publicly stated as follows: "So going after the instances of actors who repeatedly share this kind of content and reducing their distribution, removing their ability to monetize, removing their ability to advertise is part of our strategy." And Mr. Zuckerberg hypocritically shares that sentiment, stating at his April 10, 2018, Congressional Testimony that " . . . advertisers and developers will never take priority . . . as long as I'm running Facebook." "Hypocritically" when compared to that set forth in footnote seven below.

Facebook's Subsection (c)(1) *carte blanche* blanket immunity about-face from Subsection (c)(2)(A) contravenes the CDA's content "proliferation" intent, *see* n. 1, *supra*, and Subsection (c)(1)'s well-settled application as a limited third-party immunity tool. Subsection (c)(1)'s limited third-party immunity is inapplicable in this pure first-party case. The M2D must be denied as a matter of law.

2. Subsection (c)(1) Was Not Meant to Immunize a Party from Itself When the Party Was Acting, in Whole or in Part, as the "Information Content Provider"

The legislature certainly did not enact Subsection (c)(1) to immunize bad actors from themselves. More specifically and for example, Facebook deleted some of Fyk's businesses/pages, which is different from Facebook's unpublishings, bannings, ads account blocking, domain blocking, for examples. For example, Facebook deleted (without explanation) the She Ratchet business/page, which was a business/page that consisted of approximately 1,980,000 viewers/followers at the time of Facebook's foul play. *See* [D.E. 1] at ¶¶ 20-24. Facebook's deletion cut Fyk off from the business/page but preserved his page content on its own and for itself (as evidenced by Facebook's later publishing the same She Ratchet content for the Los Angeles competitor to whom Fyk's Facebook-induced fire sale was made). Then the following occurred: (1) The competitor to whom Fyk would eventually fire sell the She Ratchet business/page to (along with other businesses/pages, as detailed in the Complaint, *see, e.g.*, [D.E. 1] at ¶¶ 22, 42-45) requested Facebook's assurance of recovering the business/page following the fire sale; and (2) Facebook restored the

value of the deleted She Ratchet business/page by publishing (yes, publishing) same for the Fyk competitor around the time the Facebook-induced fire sale of same went through, with the page content being (virtually) identical to that which it was when under Fyk's ownership. *See, e.g.*, [D.E. 1] at ¶ 45.

At the time of SheRatchet deletion, Facebook illegally acquired "ownership" of Fyk's content (*i.e.*, "information provided" by Fyk on the Facebook "interactive computer service" platform).[6] When Facebook published She Ratchet for the Fyk competitor to whom the Facebook-induced fire sale was made, Facebook became the independent "publisher"/"information content provider" of the same content it had stolen from Fyk. Facebook's theft and re-publishing of the (virtually) identical content Fyk had published was motivated by Facebook's desire to enrich Fyk's competition, thereby enriching Facebook as it enjoyed a far more lucrative relationship with that competitor than with Fyk . . . that competitor has paid Facebook millions whereas Fyk paid Facebook approximately $43,000.00. *See, e.g.*, [D.E. 1] at ¶¶ 19, 46, 52.[7]

---

[6] Facebook publicly recognizes Fyk as the "owner" of his content /"information provided." *See, e.g.*, https://www.facebook.com/communitystandards ("[y]ou own all of the content and information you post").

[7] These actions are in stark contrast to what Facebook's professed mission (or "social contract") supposedly is: "Our mission is all about embracing diverse views. We err on the side of allowing content, even when some find it objectionable, unless removing the content can prevent a specific harm. Moreover, at times we allow content that might otherwise violate our standards if we feel it is newsworthy, significant, or important to the public interest." *See* Facebook's public domain "Community Standards," https://www.facebook.com/communitystandards (emphasis added);

Moreover, in addition to indirectly interfering and competing with Fyk, Facebook is a direct competitor that is not entitled to CDA immunity. In addition to serving as an "interactive computer service" for which CDA immunity may apply (though not in this context), Facebook also serves as an "information content provider" (defined in CDA Subsection (f)(3), *see* Ex. A) at least with respect to its Sponsored Story Advertising News Feed scheme, and accordingly enjoys no CDA immunity. *See, e.g.*, *Fraley*, 830 F. Supp. 2d at 802-803. In this vein, Facebook directly interferes with the economic advantage of others who are doing nothing wrong (First Claim for Relief) in an unfairly and deceptively competitive manner (Second and Fourth Claims for Relief) directly for its own benefit. Mr. Zuckerberg stated in his April 10, 2018, Congressional Testimony that "what we allow is for advertisers to tell us who they want to reach and then we do the placement." (emphasis added). For context on Facebook's "placement," Fyk has blocked on his personal News Feed, for example, sites called NowThis and UNILAD, and yet Facebook keeps forcing those sites into Fyk's personal News Feed, further evidencing that the user has no control of the user's News Feed (contrary to Facebook's pronouncements about user control) and Facebook jams its sponsored unsolicited material (*i.e.*, "spam") into the user's News Feed anyway to make Facebook money (NowThis and UNILAD doubtless pay Facebook money). Judge Koh

---

see also Mr. Mark Zuckerberg's April 10, 2018, Congressional Testimony ("I am very committed to making sure that Facebook is a platform for all ideas, that is a very important founding principle of what we do"); *id.* ("For most of our existence, we focused on . . . and for building communities and businesses").

recognized or acknowledged as much too: "Although Facebook's Statement of Rights and Responsibilities provides that members may alter their privacy settings to 'limit how your name and [Facebook] profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us,' members are unable to opt out of the Sponsored Stories service altogether." *Id* at 792.

The "placement," in one form, is Facebook's steering/displacing of businesses that do not pay Facebook as much money (like Fyk's businesses/pages) to competitors who pay Facebook millions (like the Fyk competitor out of Los Angeles who was the benefactor in the Facebook-induced fire sale of Fyk's businesses), The "placement," in another form, is Facebook's manipulation of the News Feed to bring its sponsored posts (*i.e.*, posts in which Facebook is the money-making partner) to the top and shove other News Feed posts down where users are less likely to see same despite the News Feed supposedly being something wherein the user is allowed to read what he/she chooses . . . in Facebook's words:

> It is helpful to think about [News Feed] for what it is, which is a ranking algorithm . . . and the problem that the News Feed ranking algorithm is solving is what order should I show your stories in News Feed. The News Feed ranking algorithm prioritizes them . . . now we do this whole process for every story in your inventory . . . inventory is the collection of stories from the people that you friend and the pages that you follow . . . You're a lot more likely to see a story that's

> in the first spot on your News Feed than the one that's in the 3000th spot.

Ms. Lyons' public speech, uploaded on April 13, 2018. In that same public speech, Ms. Lyons elaborates on Facebook's direct competition mindset: "If [a News Feed post] says sponsored that means that someone spent money in order to increase its distribution." One of the benefactors of a sponsored News Feed post is the introducer/supporter/partner of the post (in many cases, Facebook), as Judge Koh recognized. *See Fraley*, 830 F. Supp. 2d at 790 ("Facebook generates its revenue through the sale of advertising [*i.e.*, sponsored ads with Facebook as the paid sponsor /partner] targeted at its users").

Facebook's unilateral placement of its "spam" News Feed material (from which Facebook profits) to the top of a user's News Feed, *see, e.g.*, [D.E. 1] at ¶¶ 35-40, and burying the News Feed material users' want/solicit (like Fyk's material) in the "3000th spot" (as Facebook's Tessa Lyons admits in the commentary cited above) is the epitome of the Second Claim for Relief (Unfair Competition) and quite deceitful in the vein of the Fourth Claim for Relief (fraud/ intentional misrepresentation), tying in directly to the destruction of economic advantage (the First Claim for Relief) of folks (like Fyk) who earn ad and web-trafficking monies through posts that users actually want to see . . . entitling Facebook to no immunity. *See, e.g.*, *Fraley* and *Fair Hous. Council*.

Subsection (c)(1) immunity is only afforded to an "interactive computer service" under some situations, not to the "publisher" (*i.e.*, "information content provider"). But Facebook's conduct as to the She Ratchet business/page and Sponsored Stories advertisements

News Feed scheme, for examples, took it outside the shoes of an "interactive computer service" and inside the shoes of "information content provider," in whole or in part; thus, Facebook is not Subsection (c)(1) immune. *See, e.g.*, *Fair Hous. Council*, 521 F.3d at 1165 ("the party responsible for putting information online may be subject to liability, even if the information originated with a user," citing *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003)); *Fraley*, 830 F. Supp. 2d 785 (denying the CDA motion to dismiss, as Facebook's being both an "interactive computer service" and an "information content provider" went beyond a publisher's traditional editorial functions when it allegedly took members' information without their consent and used same to create new content published as endorsements of third-party products or services); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1247 (N.D. Cal. 2014) (denying the CDA motion to dismiss wherein LinkedIn sought immunity as an interactive computer service, with the court endorsing, at least at the dismissal stage, plaintiffs' claim that LinkedIn provided no means by which a user could edit or otherwise select the language included in reminder emails and that true authorship of the reminder emails laid with LinkedIn); *Jurin*, 695 F. Supp. 2d at 1122 (holding, in part, that "[u]nder the CDA an interactive computer service qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue," citing *Carafano*, 339 F.3d at 1123). Facebook's attempt to distance itself from the "information content provider" role in have its cake and eat it too fashion translates to: "Accuse your enemy of what you are doing. As you are doing it to create confusion." ~

Karl Marx. The M2D must be denied as a matter of law.

D. Facebook's Subsection (c)(1) Litigation Arguments Must Be Estopped and/or Have Been Waived

Facebook is estopped from enjoying (or has waived) Subsection (c)(1) immunity. The United States Supreme Court counsels against allowing the kind of "bait and switch" that is Facebook's seismic shift from Subsection (c)(2)(A) to (c)(1), albeit within the phrase of art that is "Mend the Hold," which is legalese for estoppel and, to some extent, waiver.[8] *See, e.g., Railway Co. v. McCarthy*, 96 U.S. 258, 6 Otto 258, 24 L.Ed. 693 (1877). *See also Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 363 (a party's "hok[ing] up a phony defense . . . and then when that defense fails (at some expense to the other party) tr[ying] on another defense for size, can properly be said to be acting in bad faith"); *Tonopah & T.R. Co. v. Commissioner of Internal Revenue*, 112 F.2d 970, 972 (9th Cir. 1940); *Connally v. Medlie*, 58 F.2d 629 (2d Cir. 1932).

As Exhibit B illustrates, Facebook's professed "basis" to Fyk for destroying his businesses/pages was that the content of same purportedly violated Facebook's "Community Standards" or "terms," *see, e.g.*, [D.E. 1] at ¶ 23, which sounds in Subsection (c)(2)(A) (content-oriented). Fyk heavily relied, to his detriment in time and money, on Facebook's professed

---

[8] Glaringly applicable forms of estoppel include "estoppel," *see* Bryan A. Garner, *Black's Law Dictionary* 247 (2001 2d pocket ed.) (defining same), "equitable estoppel," *see id.* (defining same), "quasi-estoppel," *see id.* (defining same), and "estoppel by silence," *see id.* (defining same).

"basis" for its businesses/pages crippling,[9] which, again, such "basis" was content-oriented or intentionally nebulous so as to keep Fyk guessing as to why Facebook was destroying his livelihood. It would be improper to allow Facebook to cripple Fyk's businesses/pages on one ground (purported violation of "Community Standards"/"terms," implicating Subsection (c)(2)(A)) and try to avoid liability on different grounds (Subsection (c)(1)) when that ground is challenged (this suit).

Moreover, Facebook's inequitable recast from Subsection (c)(2)(A) to (c)(1) would still fail under

---

[9] As to "reliance," we point to the sale of the subject businesses/pages to a competitor, this lawsuit, and/or a pre-suit letter writing campaign with defense counsel, as examples. As to "monetary detriment," Facebook's Motion scoffs at our classification of the approximate $1,000,000.00 being "relatively nominal." *See*, *e.g.*, [D.E. 20] at 1-2. The "relatively nominal" nature of the monies recovered by Fyk in relation to his Facebook-induced fire sale of the subject businesses/pages, however, is very serious and real. There was no letup in sight of Fyk's impressive growth curve, *see, e.g.*, [D.E. 1] at n. 2, but for Facebook's unlawful destruction of his businesses/pages. The competitor who reaped the benefits of the Facebook-induced fire sale of the subject businesses/pages was smaller than/less successful than Fyk at the time of Facebook's destruction of the subject businesses/pages. It is believed that that competitor grew to a worth of ~ $100,000,000.00. *See* [D.E. 1] at ¶¶ 5, 15. As another example, it is believed that another Fyk competitor (BuzzFeed) who Facebook did not mess with like it did with Fyk and who Fyk was once bigger than/more successful than is presently valued at ~ $1,700,000,000.00. *See* [D.E. 1] at ¶¶ 5, 15, The range of Fyk's value (and, thus, some of his damages in this case) but for Facebook's wrongful destruction of his businesses/pages was between $100,000,000.00 and $1,700,000,000.00 (maybe more). So, put in proper perspective *(see, e.g.*, [D.E. 1] at ¶¶ 5, 42), the approximate $1,000,000.00 relating to Fyk's Facebook-induced fire sale (when Facebook had rendered the subject businesses/pages valueless) was, in fact, "relatively nominal."

ordinary statutory construction principles. If Facebook's interpretation of Subsection (c)(1) was correct (which it is not), Subsection (c)(1) and Subsection (c)(2)(A) would be the exact same thing under these circumstances (or perhaps altogether). The legislature would not put redundant law on the books; *i.e.*, our interpretation/application of Subsection (c)(1) (and related case law) is correct.

E. Facebook's M2D Is Replete with Skewed Statements

Here is a sampling of things said by Facebook in its M2D that are wrong:

Facebook's Representation
Facebook falsely suggests that the Complaint takes issue with Facebook not treating "similar" content of others (like Fyk competitors) the way it treated Fyk. *See, e.g.*, [D.E. 20] at p. 1, ln. 27; p. 3. ln. 6; p. 6, ln. 10.
The Truth
Actually, the Complaint speaks of Facebook not interfering with the content of others that was "identical" to Fyk's content; *i.e.*, wrongly discriminating against or singling out Fyk. *See, e.g.*, [D.E. 1] at p. 8, lns. 10-12; n. 8, p. 16, lns. 24-28-n. 8, p. 17, lns. 21-23; p. 16, lns. 3-8.
Facebook's Representation
Facebook implies Facebook is not a direct competitor, so as to try to capture this case in the CDA net it has cast in the entirely wrong direction. [D.E. 20] at p. 6, ln. 13 (calling itself, intentionally so, the "unidentified advertiser"); p.

6, ln. 23 (misrepresenting that Facebook did not create content).
The Truth
Actually, Facebook has acted as a direct competitor (or "information content provider"), and the Complaint says plenty about that reality. *See, e.g.*, [D.E. 1] at 18, ln. 23-p. 19, ln. 11; p. 9, ln. 13-p. 13, ln 1 (discussing Facebook's "claim jumping" scheme); p. 13, ln. 2-p. 14, ln. 20 (discussing Facebook's Sponsored Story advertisement News Feed scheme); p. 15, ln, 1-p. 17, ln. 6 (discussing Facebook's stealing and re-distributing of Fyk's businesses to a Los Angeles competitor who paid Facebook more money than Fyk); p. 20, lns. 10-19; p. 21, ln. 25-p. 23, ln. 7 (punctuating Facebook's direct competition schemes).
Facebook's Representation
Facebook misleads/downplays what it did to Fyk's content by calling itself a mere "moderator." [D.E. 20] at p. 4, ln. 7
The Truth
Actually, Facebook did not just "moderate" Fyk's content, it destroyed/devalued, stole, and/or re-distributed his content. *See*, *e.g.*, [D.E. 1] at p. 1, lns. 6-7; p. 1, lns. 23-26; p. 2, lns. 4-7, 15-16; p. 7. 3, lns. 16-20; p. 5, ln. 21-p. 6, ln. 2; p. 6, lns. 3-22; p. 7, lns. 11-16; p. 7, ln. 17-p. 9, ln. 12; p. 10, ln, 24-p. 11, ln. 7; p. 11, lns. 10-13-p. 12, ln. 3; p. 13, lns. 2-6, 16-19; p. 14, lns. 1-3, 9-20 and n. 7; p. 15, ln. 8-p. 17, ln, 12.
Facebook's Representation
Facebook misrepresents that Facebook "delet[ed]

content from [Fyk's] page," so as to downplay its destruction of Fyk. [D.E. 20] at p. 7, lns. 16-17.
The Truth
Actually, Facebook did not just delete some Fyk content on his businesses/pages, it crushed all of Fyk's businesses/pages. *See*, *e.g.*, [D.E. 1] at p. 7, ln. 17-p. 8, ln. 4; p. 15, ln. 8-p. 17, ln. 6
Facebook's Representation
Facebook misrepresents that Fyk's Facebook-induced fire sale of the subject businesses/pages was "voluntar[y]." [D.E. 20] at p. 11, ln. 19.
The Truth
Actually, the Complaint says what the M2D says a few sentences later, that Facebook left Fyk "with no reasonable alternative" other than to fire sell the subject businesses/pages that Facebook's wrongdoing had rendered valueless (for Fyk at least, but not for the Los Angeles competitor in Facebook's good graces at the time). *See, e.g.*, [D.E. 1] at p. 5, lns. 20-21; p. 9, lns. 7-12; p. 15, lns. 8-17; p. 16, lns. 8-14; p. 21, lns. 25-27; p. 26, lns. 1-4.
Facebook's Representation
Facebook misrepresents part of the fraud/intentional misrepresentation that the Complaint takes issues with, trying to take the sting out of the Fourth Claim for Relief by contending that Facebook never represented to Fyk that his participation in the Facebook paid for reach program extended into "perpetuity." *See* [D.E. 20] at p. 13, lns. 6-10.

The Truth
Actually, the fraud/intentional misrepresentation concerning the Facebook paid for reach program was, for examples, (1) the sham worthlessness (*i.e.*, fraud) of same, *see, e.g.*, [D.E. 1] at p. 18, lns. 12-17; p. 24, lns. 3-11; (2) the supposed optional nature of the not-so 17; p. 24, lns. 3-11; (2) the supposed optional nature of the not-so optional paid for reach program, *see, e.g.*, [D.E. 1] at p. 5, lns. 2-9; p. 5, n. 3, (3) Facebook's never telling Fyk (*i.e.*, misrepresentation) that it could at any time completely shut him out of his ads account, thereby disallowing his participation in the paid for reach program, and/or (4) never providing Fyk with an explanation (*i.e.*, misrepresentation) as to why he was shut out of his ads account, *see, e.g.*, [D.E. 1] at p. 5, ln. 19; p. 6, lns. 7, 27; p. 7, lns. 4-5; p. 15, lns. 5-7; p. 23, ln. 16.

It would be unjust (at minimum) to afford any relief to an untruthful, misrepresentative, misleading, and/or incoherent movant. The M2D must be denied as a matter of fact.

F. The Complaint's Averments Sufficiently Support Each Claim for Relief (Fed. R. Civ. P. 12(b)(6))

Preliminarily, it is important to note that the elements for each of the four claims for relief set forth in the Complaint are taken from the California Civil Jury Instructions and/or California Code.[10] There

---

[10] As to elements of the First Claim For Relief, *see*, *e.g.*, Cal. Civ. Jury Inst. 2202; Second Claim for Relief, *see, e.g.*, Cal. Code §§ 17200-17210; Third Claim for Relief, *see, e.g.*, Cal. Penal

are a wealth of supportive averments for each claim for relief in the Complaint, especially when viewed in a light most favorable to the complainant (which is the law). And there is far more Facebook wrongdoing; but, even amidst a *Twombly* backdrop, we did our best to adhere to Federal Rule of Civil Procedure 8(a)(2)—"a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* Per this Court's recitation of *Twombly* in *Cunningham* and *Finkelstein, MD.* (*see* Section A, *supra*), Fyk pleaded plenty "factual content t[o] allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Cunningham*, 2010 WL 11575083 at *2.

All of Facebook's arguments set forth in the M2D (at pages eight through fourteen) are the epitome of premature, unsubstantiated red-herrings. Facebook can someday try to persuade the Court that the facts of this case are analogous to whatever facts were present in the 12(b)(6) case law cited in the M2D; but, on a legal sufficiency motion, that time is not now. For now, *Twombly* is the measure, and the incredibly detailed Complaint has plainly stated causes of action upon which relief can someday be granted. But, to be safe, we now address the cause of action elements the M2D glossily claims are missing.

1. Civil Extortion (Pages 8-10 of the M2D)

Facebook claims that Fyk fails to state a Civil Extortion claim "because he does not and cannot allege that Facebook wrongly threatened to withhold

---

Code §§ 518-519 (also applies to civil extortion); Fourth Claim for Relief, *see*, *e.g.*, Cal. Civ. Jury Inst. §§ 1900-1902.

from him anything that he had a right to possess." [D.E. 20 at 8]. Onward in this vein, Facebook misrepresents that "the Complaint does not identify any contractual provision or any law giving him the right to maintain content on Facebook or to prevent Facebook from promoting the content of other Facebook users or advertisers." *Id.* at 9. Wrong—Facebook publicly admits Fyk's "ownership" of his content. *See* n. 6 *supra*; *see also* Mr. Zuckerberg's April 10, 2018 Congressional Testimony.[11] Facebook's own words (footnote six above and Mr. Zuckerberg's Congressional Testimony) would create a contract (at best) or work an estoppel (at worst), but, either way, Facebook cannot legitimately disclaim its own words in order to throw this lawsuit out.

Then, Facebook tries to delegitimize Fyk's "fear" and its "threat" by misrepresenting to the Court that the Complaint only contains a "vague allegation" about representations made to Fyk by a "high ranking Facebook executive." First, that is enough at the 12 (b)(6) stage and the fact that we were respectful enough not to include that individual's name in the Complaint by no means renders that individual's critical statement to Fyk "vague." Second, the Complaint is replete with detailed allegations of "fear" and "threat." *See, e.g.*, [D.E. 1] at ¶¶ 18-19, 25-

---

11 Senator Hatch: "Now, Mr. Zuckerberg, I remember well your first visit to Capitol Hill, back in 2010. You spoke to Senate Republican High-Tech Task Force, which I chair. You said back then that Facebook would always be free. Is that still your objective?" Mr. Zuckerberg: "Senator, yes."

35, 47, 67-71.[12] This 12(b)(6) aspect of the M2D must be denied.

2. Unfair Competition (Pages 10-12 of the M2D)

Perhaps the most instructive case to look at (not cited in the M2D) is *Fraley.* There, as discussed above, the unfair competition was in the form of Facebook's Sponsored Story advertisement News Feed scheme, and the *Fraley* court denied Facebook's attempt to dismiss the unfair competition aspect of that complaint. Here, the Complaint is replete with allegations as to that scheme and how that scheme crippled Fyk's ad and web-trafficking money-making abilities with Facebook burying his posts underneath its own sponsored posts contrary to and in disregard for users' preferences. *See, e.g.*, [D.E. 1] at ¶¶ 35-40. But, here, there is more to Facebook's unfair competition than that which was present in *Fraley.* Here, for example, the Complaint thoroughly avers that Facebook steered Fyk's businesses/pages to a Los Angeles competitor who paid Facebook more money.

---

[12] ¶ 18 (discussing Facebook's unilateral implementation of a not-so-optional "paid for reach program," creating Fyk's "[f]ear (analogized in averments twenty-five through thirty-five, *infra*, to 'claim jumping') that if Fyk did not engage in Facebook's new 'optional' paid for reach program, he would be blacklisted in the form of having his businesses heavily curtailed or altogether eliminated . . . "); ¶ 19 (discussing that Fyk's very real fear induced him into relenting to Facebook's extortion; *i.e.*, investing $43,000.00 into the worthless paid for reach program); ¶¶ 25-35 (discussing the very real fear/threat of Facebook's jumping Fyk's claim; *i.e.*, hijacking his businesses/pages); ¶ 47 (discussing Fyk's fear of or the threat of Facebook's singling him out); *id at* n. 3 (discussing how Facebook aimed to put folks on "hospice" who did not work with/pay Facebook—putting one on "hospice" equals fear); ¶¶ 67-71 (summary/punctuation).

See, e.g., [D.E. 1] at ¶¶ 16, 41-46, Then Paragraphs 58-66 of the Complaint thoroughly sum up or punctuate Facebook's unfair competition.

Oddly, the M2D tries to conflate the Second Claim for Relief (unfair competition, cognizable under California Business & Professions Code Sections 17200-17210) with anti-trust. The Complaint's Second Claim for Relief is not an anti-trust action. The *Fraley* court points out what an unfair competition cause of action is (which is not an anti-trust action):

> [The] UCL . . . does not prohibit specific activities but instead broadly prescribes 'any unfair competition, which means any unlawful, unfair or fraudulent business practice or act. The UCL is designed to ensure 'fair business competition' and governs both anti-competitive business practices and consumer injuries. Its scope is 'sweeping,' and its standard for wrongful business conduct is 'intentionally broad' . . . Each of the three UCL prongs provides a 'separate and distinct theory of liability' and an independent basis for relief.

Fraley, 830 F. Supp. 2d at 810 (internal citations, which include Ninth Circuit cases, omitted and emphasis added). Even the case cited by Facebook in its M2D (*Levitt II*) says that there can be an anti-trust undertone to a UCL claim, but that a UCL claim also (as here) deals with things that "otherwise significantly threaten[ ] or harm[ ] competition." [D.E. 20] at 10.[13] And then the M2D inappositely states

---

[13] And it is not just us talking about Facebook's unfair direct competitive tactics. *See* Exhibit C.

that a UCL claim has to be tied to some sort of legislative policy. Wrong—Facebook's own case (*Levitt II*) states, a UCL claim can also emanate from "actual or threatened impact on competition," which, again, is what the Second Claim for Relief of the Complaint is about. There being plenty of supportive averments in the Complaint for the UCL claim, the UCL being intentionally broad, and Facebook's twisting its case law in the wrong direction, this 12(b)(6) aspect of the M2D must be denied.

3. Fraud/Intentional Misrepresentation (Pages 12-13 of the M2D)

The M2D sparsely tries to focus the Court in on a small percentage of Complaint averments to create the misimpression that the Complaint is not specific enough. So, then, we show the Court how many averments support the Fourth Claim for Relief, though just about everything said about Facebook and what it has done to Fyk has a fraud/intentional misrepresentation undercurrent.[14] *See, e.g.*, [D.E. 1] at ¶¶ 14, 17, 19, ¶¶ 20-24, 30, 35-40, 42-45, 72-78 n. 4-5.[15] This 12(b)(6) aspect of the M2D must be denied.

---

[14] And it is not just us talking about Facebook's fraudulent/misrepresentative ways. *See* Exhibit D.

[15] ¶¶ 14, 17 (going to the purported "free" nature of Facebook, which such freeness was false); ¶ 19 (discussing Fyk's approximate $43,000.00 investment in a Facebook product, the paid for reach program, which was supposed to increase Fyk's reach and distribution, which proved false); ¶¶ 20-24 (discussing Facebook's Subsection (c)(2)(a) "justification" for crippling Fyk's businesses/pages, which such "justification" was the epitome of fraud and/or intentional misrepresentation because there was nothing Subsection (c)(2)(A) violative about Fyk's content); n. 4 (discussing Facebook's lies about the safe and welcoming nature

4. Intentional Interference with Prospective Economic Advantage/Relations (Pages 13-14 of the M2D)

The M2D sparsely states that because the Complaint's other three claims for relief fail (which they plainly do not), the "derivative" First Claim for Relief cannot stand. The Complaint is very detailed as to how Facebook has destroyed Fyk's economic advantage/relations (both actual and prospective). Whether Facebook's destruction of Fyk's economic advantage/relations was underlain by Facebook's civil extortion, unfair competition,[16] and/or fraud/ intentional misrepresentation, the First Claim for Relief must stand. The M2D does not quarrel with the fact that Facebook destroyed Fyk's economic advantage/relations—reason being, Facebook cannot genuinely do so . . . it undeniably destroyed Fyk's economic advantage/relations.[17] Rather, the M2D

---

of the disgusting content on other pages compared to Facebook's intentionally misrepresentative disproportionate treatment of Fyk's content); ¶ 30 and n. 5 (discussing Mr. Zuckerberg's misrepresentations about what Facebook supposedly is, whereas it was nothing of the sort when it came to Facebook's treatment of Fyk); ¶¶ 35-40 (discussing the purported misrepresentative "free" nature of Facebook, whereas the truth is that Facebook uses the platform to shift the hard-earned wealth of others into its pocket through myriad illegal methods or "strategies" as Facebook would call it); ¶¶ 42-45 (discussing Facebook's lies to Fyk that his content was supposedly CDA violative—"lies" because Facebook re-published the (virtually) identical content); ¶¶72-78 (summary/punctuation).

16 For more on the First and Second Claims for Relief squaring, *see* footnotes five and nine.

17 Facebook's intentional interference with Fyk's prospective economic advantage continues to this day—Facebook has stolen

simply says "well, we think the other three claims for relief fail, though we are not going to provide detail as to how that is so, so the First Claim for Relief has gotta go." Such docs not rise to the level of colorable argument, and it is pure argument nevertheless—no case (let alone one as serious as this) should be thrown out based on naked lawyer argument. This 12(b)(6) aspect of the M2D must be denied.

WHEREFORE, Plaintiff, Jason Fyk, respectfully requests entry of an order (1) denying the M2D [D.E. 20] filed by Defendant, Facebook, Inc., on November 1, 2018,[18] and (2) awarding any other relief to Fyk that the Court deems equitable, just, or proper.

/converted/embezzled two successful Instagram accounts (Instagram Account Nos. 522601519 and 2817831134, and Facebook owns Instagram) in which Fyk is a partner and re-distributed them to a person named Sommer Ray Beaty (who is making millions because of Facebook's re-distribution), then telling Fyk that action would not be taken "without a valid court order."

[18] To the extent the Court somehow finds that there are insufficient facts to support his claims for relief, Fyk respectfully requests leave to amend his Complaint pursuant to Federal Rule of Civil Procedure 15.

Respectfully submitted,

CALLAGY LAW, P.C.

/s/ Jeffrey L. Greyber
Pro Hac Vice Admitted
jgreyber@callagylaw.com

Sean R. Callagy, Esq.
Pro Hac Vice Admitted
scallagy@callagylaw.com

Michael J. Smikun, Esq.
Pro Hac Vice Admitted
msmikun@callagylaw.com

Attorneys for Plaintiff

and

PUTTERMAN LANDRY + YU, LLP
Constance J. Yu, Esq.
SBN 182704
cyu@plylaw.com

Dated: December 14, 2018

EXHIBIT A
TO CONFORMED RESPONSE IN OPPOSITION

EXHIBIT A, THE TEXT OF 47 U.S.C. § 230, IS NOT INCLUDED HERE, AS IT IS ALREADY REPRODUCED IN THE STATUTORY SECTION TO THE APPENDIX AT APP.16A

EXHIBIT B(1) TO TO CONFORMED RESPONSE IN OPPOSITION FACEBOOK SCREENSHOTS

EXHIBIT B(2) TO CONFORMED RESPONSE IN OPPOSITION

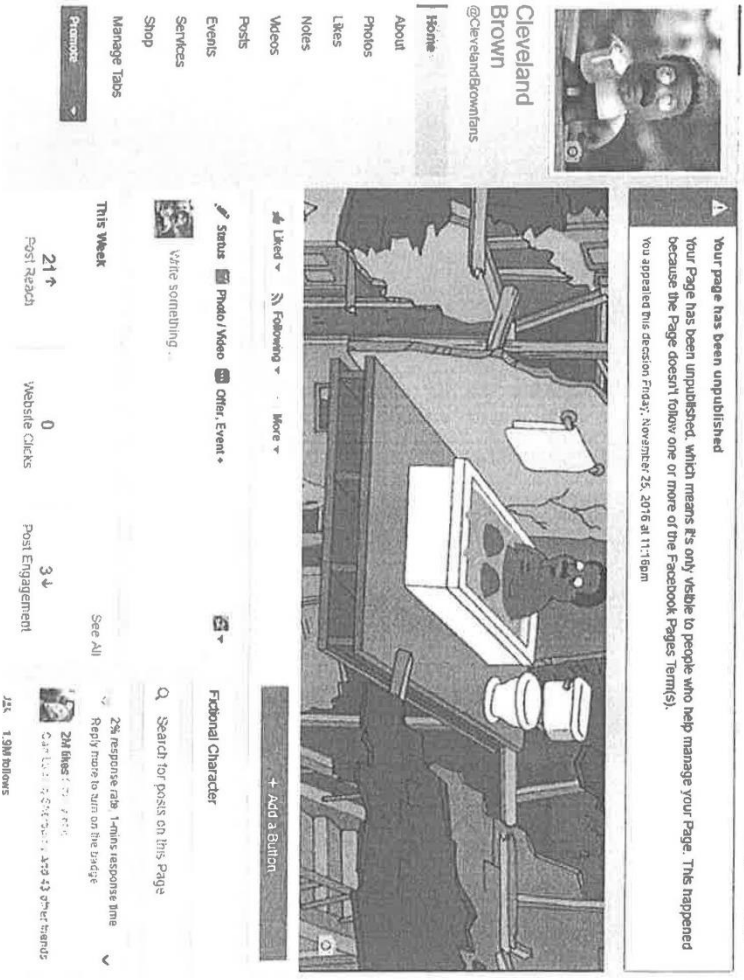


EXHIBIT B(3) TO CONFORMED RESPONSE IN OPPOSITION

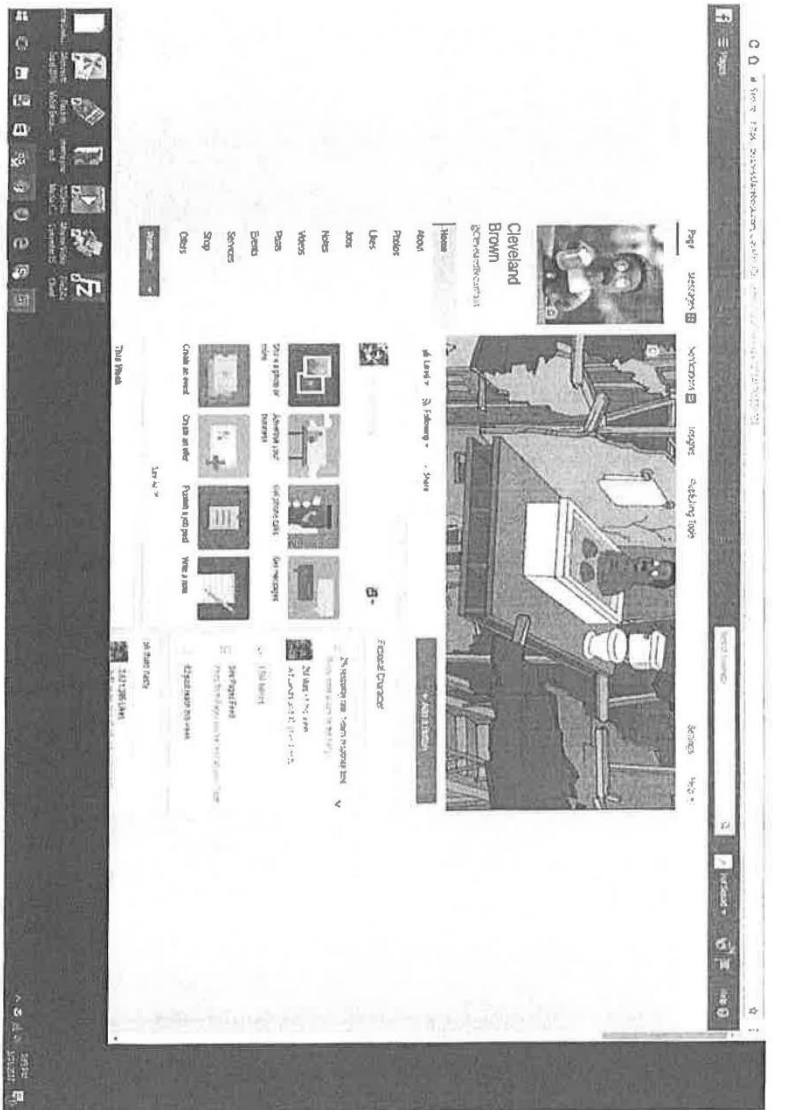


EXHIBIT B(4) TO CONFORMED RESPONSE IN OPPOSITION

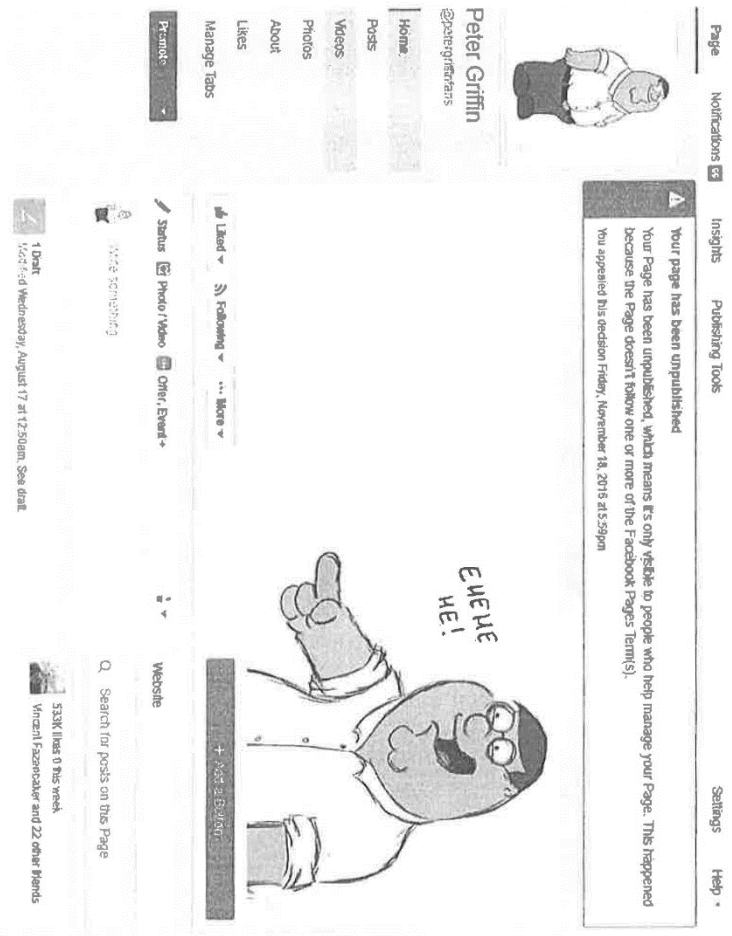


EXHIBIT B(5) TO CONFORMED RESPONSE IN OPPOSITION

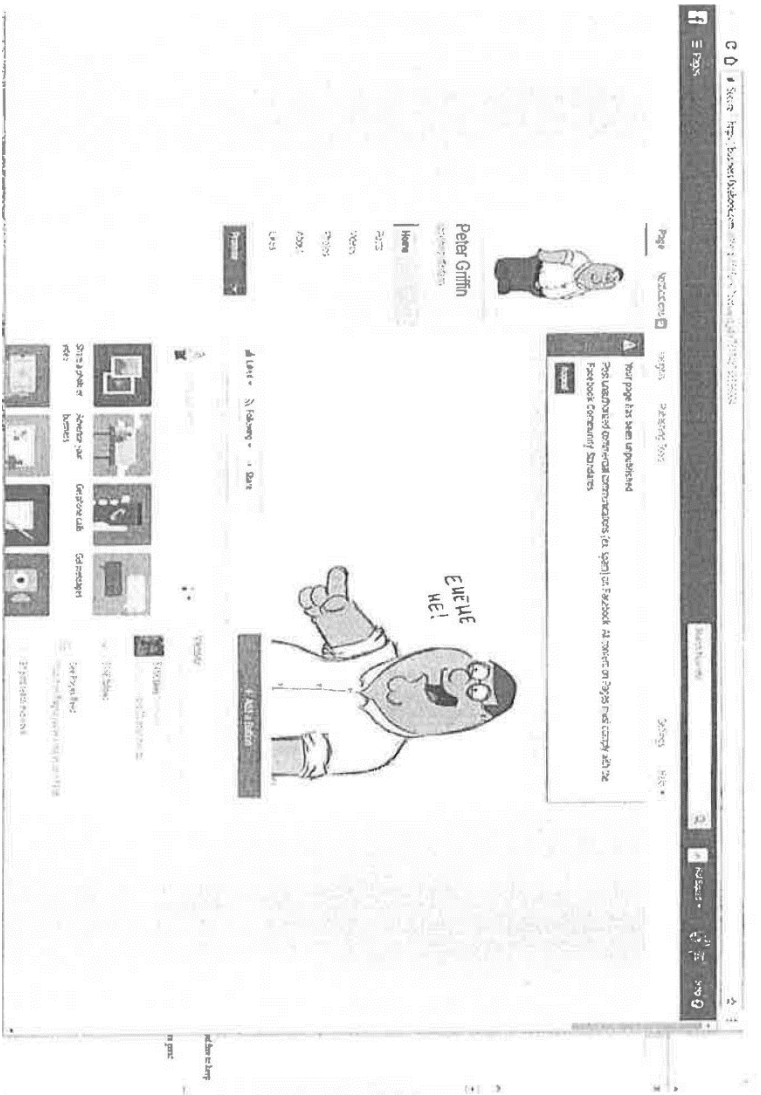


EXHIBIT C TO
CONFORMED RESPONSE IN OPPOSITION
FACEBOOK EMAILS SHOW ITS REAL MISSION: MAKING MONEY AND CRUSHING COMPETITION
(DECEMBER 5, 2018)

By Kevin Roose
New York Times
December 5, 2018

British lawmakers on Wednesday gave a gift to every Facebook critic who has argued that the company, while branding itself as a do-gooder enterprise, has actually been acting much like any other profit-seeking behemoth.

That gift was 250 pages' worth of internal emails, in which Facebook's executives are shown discussing ways to undermine their competitors, obscure their collection of user data and — above all — ensure that their products kept growing.

The emails, which span 2012 to 2015, were originally sealed as evidence in a lawsuit brought against Facebook by Six4Three, an app developer. They were part of a cache of documents seized by a British parliamentary committee as part of a larger investigation into Facebook's practices and released to the public on Wednesday.

It should not come as a surprise that Facebook — a giant, for-profit company whose early employees reportedly ended staff meetings by chanting "domination!" — would act in its own interests.

But the internal emails, a rare glimpse into Facebook's inner workings, show that the image the company promoted for years — as an idealistic enter-

prise more dedicated to "bringing the world closer together" than increasing its own bottom line — was a carefully cultivated smoke screen.

These emails reveal that in the formative years of Facebook's growth, the company's executives were ruthless and unsparing in their ambition to collect more data from users, extract concessions from developers and stamp out possible competitors.

"It shows the degree to which the company knowingly and intentionally prioritized growth at all costs," said Ashkan Soltani, a privacy researcher and former chief technologist of the Federal Trade Commission.

In a blog post on Wednesday, Facebook said the documents included in the lawsuit were a cherry-picked sample that "tells only one side of the story and omits important context."

Here are four revelations from the emails that detail Facebook's aggressive quest for growth:

1. The company engineered ways to collect Android users' data without alerting them.

In February 2015, Facebook had a privacy dilemma.

The company's growth team — a powerful force within Facebook — wanted to release an update to the Android app that would continually collect users' entire SMS and call log history. That data would be uploaded to Facebook's servers, and would help Facebook make better recommendations, such as suggesting new friends to Android users based on the people they'd recently called or texted. (This feature, called

"People You May Know," has been the subject of much controversy.)

But there was a problem: Android's privacy policies meant that Facebook would need to ask users to opt in to having this data collected. Facebook's executives worried that asking users for this data could bring a public backlash.

"This is a pretty high risk thing to do from a PR perspective but it appears that the growth team will charge ahead and do it," one executive, Michael LeBeau, wrote.

He outlined the nightmare scenario: "Screenshot of the scary Android permissions screen becomes a meme (as it has in the past), propagates around the web, it gets press attention, and enterprising journalists dig into what exactly the new update is requesting, then write stories about 'Facebook uses new Android update to pry into your private life in ever more terrifying ways.'"

Ultimately, Facebook found a workaround. Yul Kwon, the head of Facebook's privacy program, wrote in an email that the growth team had found that if Facebook's upgraded app asked only to read Android users' call logs, and not request other types of data from them, users would not be shown a permission pop-up.

"Based on their initial testing, it seems that this would allow us to upgrade users without subjecting them to an Android permissions dialog at all," Mr. Kwon wrote.

In a blog post on Wednesday, Facebook said that it collects call and text message logs only from Android users who opt in, and that as of 2018, it

keeps this information only temporarily, since "the information is not as useful after about a year."

2. Mark Zuckerberg personally approved cutting off a competitor's data access.

In January 2013, one of Mr. Zuckerberg's lieutenants emailed him with news about Twitter, one of Facebook's biggest competitors. The company had introduced a video-sharing service called Vine, which allowed users to create and post six-second video clips.

When new users signed up for Vine, they were given the option of following their Facebook friends — a feature enabled through Facebook's application program interface, or API. This feature was widely used, and had become a valuable tool for new apps to accelerate user growth. But in Vine's case, Facebook played hardball.

"Unless anyone raises objections, we will shut down their friends API access today," wrote the lieutenant, Justin Osofsky, now a Facebook vice president.

Mr. Zuckerberg, the chief executive, replied: "Yup, go for it."

On Wednesday, Rus Yusupov, one of Vine's cofounders, said on Twitter, "I remember that day like it was yesterday."

Facebook's decision to shut off Vine's API access proved fateful. Months later, Instagram released its own short-form video feature, which many saw as a further attempt by Facebook to hobble Vine's growth. Vine shut down in 2016, after stagnant growth and

heavy competition led many of its stars and users to go elsewhere.

On Tuesday, Facebook changed its developer policies, ending the prohibition on apps that competed with the company's own features.

3. Facebook used a privacy app to collect usage data about its competitors.

In 2013, Facebook acquired Onavo, an Israeli analytics company, announcing that Onavo's tools "will help us provide better, more efficient mobile products."

One of those tools, an app called Onavo Protect, was especially helpful in helping Facebook sniff out potential competitors. The app, which was billed to users as a way to keep their internet browsing private, also collected data about which apps those people used the most — including apps not owned by Facebook — and fed that information back to Facebook.

According to the emails released on Wednesday, Facebook executives received reports about the performance of rival apps, using data obtained through Onavo.

Sometimes, those reports revealed up-and-coming competitors. One report included in the email cache, dated April 2013, said that WhatsApp, the mobile messaging app, was gaining steam. According to Onavo's proprietary data, WhatsApp was being used to send 8.2 billion messages a day, whereas Facebook's own mobile app was sending just 3.5 billion messages daily.

Ten months later, Facebook announced that it was acquiring WhatsApp in a deal valued at $14 billion.

In August, Facebook pulled Onavo Protect from the App Store, after Apple reportedly said that it violated the company's privacy rules.

4. Facebook executives wanted more social sharing, as long as it happened on Facebook.

In November 2012, Mr. Zuckerberg sent a lengthy note to several top executives called "Platform Model Thoughts." It outlined how intensely he wanted Facebook to be the center of everyone's social life online.

The email addressed a debate that was raging inside Facebook at the time, about whether outside app developers should have to pay to connect their apps to Facebook's developer platform. Mr. Zuckerberg said that he was leaning away from a charge-for-access model, and toward what he called "full reciprocity" — giving third-party developers the ability to connect their apps to Facebook free, in exchange for those apps' giving data back to Facebook, and making it easy for users to post their activity from those services on their Facebook timelines.

By giving away access, Mr. Zuckerberg said, Facebook could entice more developers to build on its platform. And by requiring app developers to send data back to Facebook, it could use those apps to increase the value of its own network. He wrote that social apps "may be good for the world but it's not good for us unless people also share back to Facebook."

Facebook later put in place a version of this "reciprocity rule" that required developers to make it possible for users of their apps to post their activity to Facebook, but did not require them to send usage

data back to Facebook. (Not coincidentally, this "reciprocity rule" explains why for several years, it was virtually impossible to go on Facebook without seeing dozens of updates about what your friends were watching on Hulu or listening to on Spotify.)

In a Facebook post on Wednesday, after the emails were made public, Mr. Zuckerberg wrote that the company had tightened its developer policies in 2014 in order to protect users from "sketchy apps" that might misuse their data.

But back in 2012, the company's worry was not about data misuse. Instead, the company was chiefly concerned with how to use those developers' apps to spur its own growth.

Sheryl Sandberg, Facebook's chief operating officer, wrote back to concur with Mr. Zuckerberg's approach to data reciprocity.

"I think the observation that we are trying to maximize sharing on Facebook, not just sharing in the world, is a critical one," she wrote.

EXHIBIT D TO CONFORMED RESPONSE IN OPPOSITION *FACEBOOK INTERNAL EMAILS SHOW ZUCKERBERG TARGETING COMPETITOR VINE* (DECEMBER 5, 2018)

By Donie O'Sullivan and Hadas Gold
CNN Business
December 5, 2018

New York and London (CNN Business) Mark Zuckerberg and his colleagues were apparently concerned enough about Vine, a video app from Twitter, that on the day it launched in January 2013, they moved to restrict its access to Facebook user data, a trove of internal Facebook emails released by the U.K. Parliament on Wednesday shows.

The decision to restrict Vine's access to data, which would have allowed its users to invite their Facebook friends to join the app, was in line with a company policy at the time, Facebook told CNN on Wednesday. That policy restricted apps' access to Facebook data when the company deemed that the apps "replicated" Facebook's "core functionality." In other word, apps that Facebook thought might compete with them.

"Twitter launched Vine today which lets you shoot multiple short video segments to make one single, 6-second video," Facebook vice-president Justin Osofsky wrote to Zuckerberg and others the day Vine launched, according to the emails released by the UK Parliament.

"Unless anyone raises objections, we will shut down their friends API access today. We've prepared reactive PR," Osofsky added.

"Yup, go for it," Zuckerberg responded.

Facebook said Wednesday that Zuckerberg and his colleagues were only following Facebook's policy protecting against competitors. But the company changed the policy on Tuesday, one day before the emails were released.

"As part of our ongoing review we have decided that we will remove this out of date policy so that our platform remains as open as possible. We think this is the right thing to do as platforms and technology develop and grow," a Facebook spokesperson said Wednesday.

"We built our developer platform years ago to pave the way for innovation in social apps and services. At that time we made the decision to restrict apps built on top of our platform that replicated our core functionality," the spokesperson said, adding, "These kind of restrictions are common across the tech industry with different platforms having their own variant including YouTube, Twitter, Snap and Apple."

Vine, which allowed users to shoot and posts six second looped videos, shut down in 2017. Twitter did not immediately respond to a request for comment.

Apparently responding to Wednesday's revelations, Vine co-founder Rus Yusupov tweeted, "Competition sucks, right? No. It allows for products to improve, become available to more people, at lower costs. Strive to build new things that people want and influence other creators for the cycle to continue."

Zuckerberg talks

The email discussion about Vine is part of a trove of internal Facebook documents the company fought to keep secret.

The documents include conversations among senior Facebook executives.

The cache stems from a lawsuit brought against Facebook by a small app company called Six4Three. In a blog post Wednesday, Facebook said "The documents were selectively leaked to publish some, but not all, of the internal discussions at Facebook."

Zuckerberg himself posted on Facebook as well, writing, "I understand there is a lot of scrutiny on how we run our systems. That's healthy given the vast number of people who use our services around the world, and it is right that we are constantly asked to explain what we do. But it's also important that the coverage of what we do-including the explanation of these internal documents-doesn't misrepresent our actions or motives. This was an important change to protect our community, and it achieved its goal."

The Documents

A California judge had placed the documents under seal. But when Six4Three's CEO, Ted Kramer, was in London last month, he was escorted to Parliament and told to produce the documents or be held in contempt.

Six4Three — which had an app that allowed users to search for pictures of their friends in swimsuits — has accused the social media giant of having little regard for user privacy and claimed that Zuckerberg devised a plan that forced some of Facebook's rivals,

or potential rivals, out of business. Facebook says the lawsuit is without merit.

The UK parliamentary committee, led by Damian Collins, asked for the documents as part of a larger investigation into Facebook, fake news, disinformation and data privacy that has been going on for more than a year. The committee has repeatedly asked Zuckerberg to give evidence, but thus far he's avoided the committee, even when it brought together lawmakers from nine different countries for an unprecedented "International Grand Committee on Disinformation."

"I believe there is considerable public interest in releasing these documents. They raise important questions about how Facebook treats users data, their policies for working with app developers, and how they exercise their dominant position in the social media market," Collins said on Twitter. "We don't feel we have had straight answers from Facebook on these important issues, which is why we are releasing the documents."

A Facebook spokesperson said in a statement after the release of the documents, "As we've said many times, the documents Six4Three gathered for their baseless case are only part of the story and are presented in a way that is very misleading without additional context. We stand by the platform changes we made in 2015 to stop a person from sharing their friends' data with developers. Like any business, we had many of internal conversations about the various ways we could build a sustainable business model for our platform. But the facts are clear: we've never sold people's data."

EXHIBIT E TO
CONFORMED RESPONSE IN OPPOSITION
FACEBOOK EMAILS SUGGEST COMPANY EXPLORED SELLING PEOPLE'S DATA DESPITE PLEDGES NOT TO
(DECEMBER 5, 2018)

Jessica Guynn
USA TODAY
December 5, 2018

SAN FRANCISCO – Internal Facebook emails published online by U.K. lawmakers, some involving CEO Mark Zuckerberg, paint a picture of a company aggressively hunting for ways to make money from the reams of personal information it was collecting from users.

Wednesday's release of some 250 pages of emails from 2012 to 2015 – a period of dramatic growth for the newly publicly traded company – provides a rare glimpse into Facebook's internal conversations, suggesting the social media giant gave preferential access to some third-party app developers such as Airbnb, Lyft and Netflix, while restricting access for others. It also considered charging app developers for access to data, despite pledges that it would never do so.

There is no indication that Facebook went forward with a proposal to charge app developers for access to the personal information of Facebook users. On Wednesday, Zuckerberg denied Facebook ever sold or considered selling the data of its more than 2 billion users.

"Like any organization, we had a lot of internal discussion and people raised different ideas. Ultimately, we decided on a model where we continued to provide the developer platform for free and developers could choose to buy ads if they wanted," he wrote in a Facebook post responding to the release of the internal emails by U.K. lawmakers. "Other ideas we considered but decided against included charging developers for usage of our platform, similar to how developers pay to use Amazon AWS or Google Cloud. To be clear, that's different from selling people's data. We've never sold anyone's data."

According to some of the emails, Facebook discussed cutting off access to rival companies and giving app developers who bought advertising special access to data. It also provided access to app developers that encouraged Facebook users to spend more time on the social network.

The revelations that shed light on previously unknown Facebook practices were included in internal documents seized by U.K. lawmakers from the developer of a now-defunct bikini photo searching app, Pikinis, as part of an investigation into fake news. The emails were sealed in a California lawsuit filed by Six4Three. Six4Three sued Facebook in 2015, alleging the social network's data policies favored some companies over others.

"I've been thinking about platform business model a lot this weekend. . . . if we make it so (developers) can generate revenue for us in different ways, then it makes it more acceptable for us to charge them quite a bit more for using platform," Zuckerberg wrote in one email.

In another email in 2012, Zuckerberg seemed to shrug off concerns about the security of Facebook users' data. "I think we leak info to developers, but I just can't think of any instances where that data has leaked from developer to developer and caused real issue for us," he wrote.

Facebook called the Six4Three lawsuit "baseless" and says the company "cherrypicked" documents.

"The set of documents, by design, tells only one side of the story and omits important context," the company said in a statement.

Public trust in Facebook's handling of people's personal information has been shaken by a series of crises. Chief among them is Cambridge Analytica, a political consulting firm hired by Donald Trump's presidential campaign that has been accused of improperly accessing millions of Facebook accounts without users' consent.

A British researcher and his firm, Global Science Research, legitimately gained access to the personal data of Facebook users and their friends in 2013 while working on a personality app, and passed that data to Cambridge Analytica. Facebook began restricting app developers' access user data in 2014 and 2015.

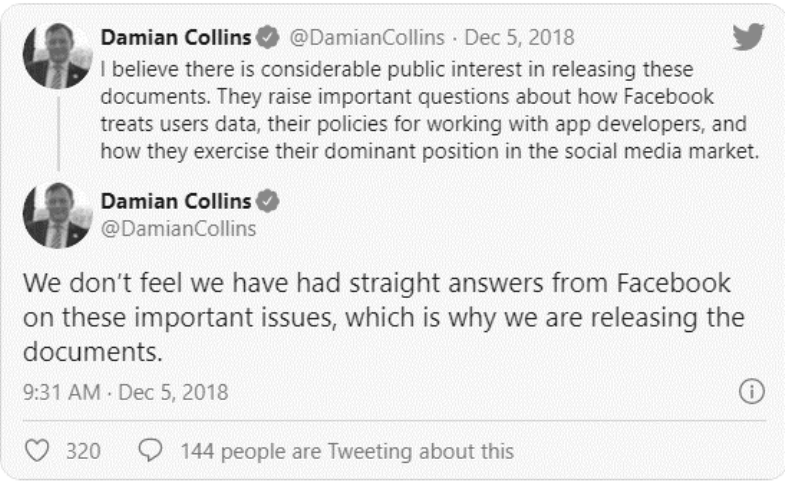
"We still stand by the platform changes we made in 2014/2015, which prevented people from sharing their friends' information with developers like the creators of Pikinis," Facebook said in a statement. "The extensions we granted at that time were short term and only used to prevent people from losing access to specific functions as developers updated

their apps. Pikinis didn't receive an extension, and they went to court."

Damian Collins, chairman of the digital, culture, media and sport parliamentary committee investigating Facebook, said lawmakers released the documents because "we don't feel we have had straight answers from Facebook on these important issues."

Last week, Collins announced he planned to release the emails after forcing Ted Kramer, the founder of Six4Three, to hand them over during a business trip to London. On Friday, California Superior Court Judge V. Raymond Swope ordered Kramer to turn over his laptop to a forensic expert after Kramer admitted he had turned over the Facebook documents to lawmakers.

"I believe there is considerable public interest in releasing these documents. They raise important questions about how Facebook treats users data, their policies for working with app developers, and how they exercise their dominant position in the social media market," he wrote in a Twitter post.



Among the details in the Facebook emails:

– Facebook staffers explored how to use access to Facebook users' data to get companies to spend more on advertising. In 2012, Facebook staffers debated removing restrictions on user data for developers who spent $250,000 or more on ads.

Facebook's response: "We explored multiple ways to build a sustainable business with developers who were building apps that were useful to people. . . . We ultimately settled on a model where developers did not need to purchase advertising."

– When competitor Twitter launched Vine in 2013, Facebook shut down access to keep the mobile video app from growing through friends on the platform and competing with Instagram, which it owns. "Unless anyone raises objections, we will shut down their friends API access today. We've prepared reactive PR," Facebook executive Justin Osofsky wrote to Zuckerberg. "Yup, go for it," Zuckerberg replied.

Facebook's response: "We built our developer platform years ago to pave the way for innovation in social apps and services. At that time we made the decision to restrict apps built on top of our platform that replicated our core functionality. These kind of restrictions are common across the tech industry."

– In 2015, the company began uploading call and text logs from Android phones. Collins' committee says Facebook tried to make it "as hard as possible" for users to understand that their calls and texts would be collected. At the time, a Facebook engineer said the practice was a "high-risk thing to do from a PR perspective." The data offered a comprehensive look into how users communicated on their mobile devices.

Facebook's response: The company says it allowed Facebook users to opt into giving the social network access to their call and text logs, but did it in the Facebook app, not on Android. "This was not a discussion about avoiding asking people for permission," it said.

– Facebook used its security app, Onavo, to gather information on how many people used certain apps and how often they used them to help Facebook decide which companies it should acquire, including messaging app WhatsApp for $19 billion, and which to view as a competitive threat.

Facebook's response: "We've always been clear when people download Onavo about the information that is collected and how it is used, including by Facebook. . . . People can opt-out via the control in

their settings and their data won't be used for anything other than to provide, improve and develop Onavo products and services."

ORDER DENYING DEFENDANT'S NOVEMBER 1, 2018, MOTION TO DISMISS (PROPOSED, UNSIGNED)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:18-CV-05159-JSW-KAW

Before: Hon. Jeffrey S. WHITE,
United States District Judge.

This cause having come before the Court on Defendant's November 1, 2018, Motion to Dismiss [D.E. 20] and related responsive briefing, and the Court having had the benefit of examination of the record and oral argument, the Court hereby denies Defendant's Motion to Dismiss and instructs Defendant to answer the Complaint within ___ days.

DONE AND ORDERED in Chambers on this ___ day of ___, 2019.

United States District Judge

DEFENDANT FACEBOOK'S MOTION TO DISMISS (NOVEMBER 1, 2018)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:18-CV-05159-JSW

Defendant Facebook's Motion to Dismiss

Date: December 14, 2018
Time: 9:00 a.m.

Before: Hon. Jeffrey S. WHITE,
United States District Judge.

Dept.: Courtroom 5

Date Filed: August 22, 2018

Trial Date: Not Set

KEKER, VAN NEST & PETERS LLP
PAVEN MALHOTRA-# 258429
pmalhotra@keker.com
MATAN SHACHAM - # 262348
msbacham @keker.com
WlLLLAM S. HICKS - # 256095
whicks@keker.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

Attorneys for Defendant
FACEBOOK, INC.

[Table of Contents and
Table of Authorities Omitted]

NOTICE OF MOTION AND MOTION

Notice is hereby given to Plaintiff Jason Fyk that Defendant Facebook, Inc. hereby moves the Court to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). This motion is noticed for hearing on December 14, 2018 at 9:00 a.m., in Courtroom 5, 2nd Floor, 1301 Clay Street, Oakland, California, 94612.

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF ARGUMENT

Plaintiff has filed a business tort case against Facebook that seeks to hold the company liable for actions that allegedly undermined the value of certain Facebook pages Plaintiff created. Plaintiff sold these

pages for about $1 million, but believes that they were worth "billions" of dollars absent Facebook's conduct.

Plaintiff's claims should be dismissed for two reasons. First, each claim is barred by Section 230(c)(1) of the Communications Decency Act. That statute immunizes internet platforms like Facebook for claims that seek to target them for moderation of third-party content on the platform such as "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). Second, Plaintiff fails to state a cause of action for each of the claims he asserts. Accordingly, as explained below, this case should be dismissed with prejudice.

I. Introduction

Plaintiff Jason Fyk used Facebook's free platform to create a series of Facebook pages such as one dedicated to photos and videos of people urinating. *See* Complaint ("Compl."), ¶ 22 (describing Fyk's page www.facebook.com/takeapissfunny). Foregoing "food and other household necessities for him and his family," Plaintiff alleges that he "dedicated all the money he had" to creating a collection of such "funny" pages. Plaintiff alleges that Facebook took action that hindered the success of such pages. This alleged "unlawful interference," consisted of, among other things, blocking content posted by Plaintiff found to violate Facebook's community standards, failing to block similar content on his competitors' Facebook pages, and "muscling out" some of Plaintiff's content to make room for sponsored ads. Because of these

alleged improprieties, Plaintiff allegedly was forced to "fire sell" his pages for one million dollars.

Notwithstanding Plaintiff's inflated claim that this is a "true case of David versus Goliath," Compl., ¶ 9, his Complaint is a pedestrian business tort case that should end before it gets started. The Complaint must be dismissed with prejudice for two reasons. *First*, Facebook enjoys immunity under Section 230 (c)(1) of the Communications Decency Act, which protects internet platforms from claims targeting the exercise of their traditional editorial functions.

Second, the Complaint fails to state any plausible claim for relief: (1) Plaintiff's claim for civil extortion fails because the Complaint does not allege any actionable threat of unlawful injury; (ii) Plaintiff's claim for violation of the Unfair Competition Law is facially deficient because the Complaint does not plausibly allege that the purported "unfair" conduct violates antitrust principles or significantly harms competition; (iii) Plaintiff's claim for fraud and misrepresentation fails because Plaintiff does not plausibly allege any actionable misrepresentation; and (iv) Plaintiff's claim for intentional interference with prospective economic relations fails because it is entirely derivative of Plaintiff's other deficient claims.

II. Background

Facebook operates the world's leading social media service. Over two billion people worldwide use Facebook to create personal profiles, build community, and share content.

Plaintiff was "facing bankruptcy and eviction" when he started using Facebook's free platform "in

the hopes of experiencing the American Dream." Compl., ¶ 32. Plaintiff created various "humorous" Facebook pages-such as www.facebook.com/takeapiss funny.com—"designed to get a laugh out of Fyk's viewers/followers." *Id.*, ¶¶ 15, 22. Initially, those pages attracted a wide following, allegedly generating hundreds of thousands of dollars per month in advertising and net traffic revenue. *Id.*, ¶ 22. According to Plaintiff, however, Facebook severely devalued those pages over time through various forms of alleged unlawful interference such that he was eventually forced to sell them for the "relatively nominal approximate" sum of $1,000,000. *Id.*, ¶ 42. Those pages were "realistically valuated by some in the nine figure range," according to Plaintiff. *Id.*, ¶¶ 42, 43. Thus, Plaintiff estimates that Facebook "has deprived" him of hundreds of millions ("if not billions") of dollars. *Id.*, ¶ 55.

Plaintiff alleges that Facebook's "meddling" took myriad forms. Most notably, Facebook allegedly blocked or deleted content found to violate Facebook's community standards. *E.g.,* Compl., ¶ 20. Plaintiff contends that these actions were "incorrect" and that Facebook was "unresponsive to [his] subsequent pleas for appeal and/or customer service." *Id.*, ¶ 21. He also contends that Facebook had no valid basis to block his content because Facebook did not block other similar content on other users' Facebook pages. *Id.*, ¶ 23. Instead, Plaintiff insists that Facebook's alleged selective enforcement of its standards was calculated only to strong-arm him into participating in Facebook's optional paid reach program, which Facebook purportedly implemented "overnight and pursuant to corporate greed," *Id.*, ¶¶ 14, 18-19, 68. Fyk did ulti-

mately invest $43,000 in Facebook's paid reach program "out of fear of losing his business/pages." *Id.*, ¶ 19. But then Facebook allegedly "deactivated [his] ads account," leaving him "no reasonable alternative other than to return to an organic reach model." *Id.*

Facebook's alleged interference also took the form of "muscling out" some of the content on Plaintiff's Facebook pages to make room for sponsored ads from Facebook's own advertisers. In particular, Plaintiff alleges that "in order for users to see random Facebook-sponsored posts that they did not care to see, Facebook had to eliminate (or heavily curtail) the posts that people liked seeing on their news feeds (*e.g.*, Fyk's posts) and force Facebook-sponsored posts onto user feeds whether the user wanted that or not." *Id.*, ¶ 37. "By way of this misconduct, Facebook [allegedly] was/is making money from . . . random Facebook sponsored posts" while "strong-arming out user-friendly news feed posts like Fyk's." *Id.*, ¶ 39.

Finally, Plaintiff alleges that Facebook engaged in unlawful interference during the alleged "fire sale" of his Facebook pages to a competitor. Specifically, Plaintiff alleges that Facebook "offer[ed] [his] competitor customer service before, during, and after the fire sale" in order to "redistribute Fyk's economic advantage" to the competitor. *Id.*, ¶ 43. Plaintiff complains that the "customer service offered to the competitor . . . rose to the level of Facebook flying representation down to Los Angeles to meet with the competitor to make sure the Facebook-induced redistribution of Fyk's economic advantage . . . went through." *Id.*

Based on these allegations, Fyk asserts four claims: (1) intentional interference with prospective business advantage/relations; (2) unfair competition under California Business & Professions Code § 17200; (3) civil extortion; and (4) fraud/misrepresentation. Compl., ¶¶ 49-78.

III. Argument

A. Plaintiff's Claims Are Barred by Section 230(c)(1) of the CDA

Plaintiff's claims fail at the outset, and should be dismissed with prejudice, because they are barred by Section 230(c)(1) of the CDA. 47 U.S.C. § 230(c)(1). The Complaint seeks to hold Facebook liable for moderating what content it permits on its platform—something that Section 230(c)(1) directly prohibits.

CDA Section 230(c)(1) immunity, "like other forms of immunity, is generally accorded effect at the first logical point in the litigation process," because "immunity is an immunity from suit rather than a mere defense to liability." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) *(quoting Brown v. Gilmore*, 278 F.3d 362, 366 n.2 (4th Cir. 2002)) (internal quotation marks omitted) (emphasis in original); *accord Levitt v. Yelp! Inc. ("Levitt I)*, 2011 WL 5079526, at *8-9 (N.D. Cal. Oct. 26, 2011). Accordingly, courts routinely dismiss at the pleading stage claims like those asserted here under Section 230(c)(1). *See, e.g., Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1121 (9th Cir. 2007) (affirming dismissal of § 17200 unfair competition claim); *Levitt I*, 2011 WL 5079526, at *8-9 (dismissing claims for civil extortion and § 17200 unfair com-

petition); *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1122-23 (E.D. Cal. 2010) (dismissing intentional interference and fraud claims).

Section 230(c)(1) provides 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).[1] Section 230(c)(1) "establish[es] broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751, 767 (9th Cir. 2007) (internal quotations and citations omitted), opinion amended and superseded on denial of reh'g, 488 F.3d 1102 (9th Cir. 2007). Immunity extends to activities of a service provider that involve its moderation of third-party content, such as "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102. "So long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the editing or selection process." *Carafano v. Metro splash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).

Facebook is entitled to immunity under Section 230(c)(1) if (1) it is a "provider . . . of an interactive computer service," (2) the allegedly offending content was "provided by another information content provider,"

---

[1] The CDA provides a second form of immunity under Section 230(c)(2). While Facebook reserves the right to assert Section 230(c)(2) immunity at a later stage, if necessary, it relies solely on Section 230(c)(1) for purposes of this motion, in the interest of judicial economy.

and (3) Plaintiffs' claim treats Facebook as the "publisher" of that content. 47 U.S.C. § 230(c)(1); *accord Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016). The Complaint reveals that all three requirements for Section 230(c)(1) immunity are met.

1. Facebook Is an Interactive Computer Service Provider

Facebook undoubtedly qualifies as a "provider" of an "interactive computer service." The CDA defines "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(c)(2). Not surprisingly, every court to consider whether Facebook meets this definition has rightly concluded that it does. *See e.g., Sikhs for Justice, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1093 (N.D. Cal. 2015); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1065 (N.D. Cal. 2016); *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 206 (2017).

Here, the Complaint itself alleges that Facebook provides an internet-based platform where millions of individual users can access third party content, including content uploaded by Plaintiff. *See, e.g.*, Compl. ¶ 2. The first requirement for Section 230(c)(1) immunity is thus met.

2. The Content at Issue Was Provided by Someone Other than Facebook

For the second requirement, the content at issue must come from an "information content provider" other than Facebook. "Information content provider" is broadly defined as "any person or entity that is

responsible, in whole or in part, for the creation or development" of the content at issue. 47 U.S.C. § 230(c)(3); *see also Jefferson v. Zukerberg*, 2018 WL 3241343, at *5 (D. Md. July 3, 2018) (requirement met where "nothing in the Complaint suggests that Facebook was itself 'responsible' for the 'creation' or 'development' of any content"). Facebook's users, including Fyk, fit this definition, as numerous courts have held. *See, e.g., Klayman v. Zuckerberg*, 753 F.3d 1354, 1358-59 (D.C. Cir. 2014); *Sikhs for Justice*, 144 F. Supp. 3d at 1093-94.

Here, Fyk's claims arise almost entirely out of content created by Fyk or other Facebook users. Fyk's claims are based primarily on allegations that Facebook wrongfully removed content from various pages that Fyk created on Facebook. *E.g.*, Compl., ¶¶ 20-22, 42, 47, 52, 64, 66, 69. That content indisputably meets the second requirement for application of Section 230(c)(1) immunity. *See, e.g., Sikhs for Justice*, 144 F. Supp. 3d at 1093-94. *Klayman*, 753 F.3d at 1358-59; *Jefferson*, 2018 WL 3241343, at *5.

The Complaint also alleges that Facebook has treated Plaintiff unfairly by failing to block similar content on his competitors' Facebook pages. Compl., ¶¶ 23-24, 42, 45. Such third-party content also satisfies the second requirement for Section 230(c)(1) immunity. *Klayman*, 753 F.3d at 1358-59; *Jefferson*, 2018 WL 3241343, at *5.

Finally, Plaintiff's claims are based on allegations that Facebook improperly "muscled out" some of his content to make room for sponsored posts from certain unidentified advertisers. *E.g.*, Compel., ¶¶ 37-40, 51, 65, 66. The content from those advertisers likewise satisfies the second requirement for Section

230(c)(1) immunity. *See, e.g., Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 890 (N.D. Cal. 2017) (rejecting argument that defendants, including Facebook, were liable as creators of content because they allegedly "select advertisements to pair with content on their services"); *see also Kimzey*, 836 F.3d at 1270-71 (user content republished by Yelp! as advertisements meets second requirement); *Jurin*, 695 F. Supp. 2d at 1123 (Google's "Sponsored Link" advertisements program meets second requirement because Google does not "provide the content" of the advertisements).

Because the Complaint does not allege that Facebook created any content, but rather concedes that the relevant content was created by Facebook users (including Fyk) and advertisers, the second requirement for Section 230(c)(2) immunity is met.

3. Plaintiff's Claims Seek to Hold Facebook Liable for "Exercise of a Publisher's Traditional Editorial Functions"

The third requirement for Section 230(c)(1) immunity is met if a plaintiff "seek[s] 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." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). In determining whether the third requirement is met, "what matters is not the name of the cause of action" but rather "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1101-02. If "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or

conduct as a 'publisher or speaker,'" then "[S]ection 230(c)(1) precludes liability." *Id.* at 1102.

Here, each of Plaintiff's claims seeks to hold Facebook liable for, and is derived from, Facebook's "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Zeran*, 129 F.3d at 330. The civil extortion and § 17200 unfair competition claims are based on allegations that Facebook threatened to and/or did manipulate third-party content—deleting content from Plaintiff's pages, refusing to delete content from competitors, or promoting paid ads from others—to force Plaintiff to pay for advertising or benefit others who did. Compl. ¶¶ 63-65, 68-70. The intentional interference claim is derived from the same alleged conduct: Plaintiff alleges that Facebook interfered with his ability to get advertisers on his Facebook page by threatening to delete and/or actually deleting content from his page while promoting content from its own advertisers. Compl. ¶¶ 50-56. The fraud claim is no different. Plaintiff asserts that Facebook fraudulently claimed that it could properly take down content from his pages, when actually it did so to try to gain advertising revenue. Compl., ¶¶ 73-75. In other words, the fraud claim simply repackages his allegations that Facebook wrongfully threatened to and/or did take down content from his page.

Levitt I offers a useful analog for why Plaintiff's claims fall squarely within the scope of Section 230(c)(1)'s protections. In *Levitt I*, certain business owners alleged that Yelp pressured them into paying for its advertising program by threatening to manipulate, and actually manipulating, third-party content on

the site to hurt them and/or help their competitors. 2011 WL 5079526, at *1-2,[2] The plaintiffs asserted claims of civil extortion and § 17200 unfair competition based on these allegations. *Id.* The Court dismissed both claims at the pleading stage under Section 230(c)(1), finding that they derived from the exercise of traditional editorial functions. *Id.* at *6 ("Plaintiffs' allegations of extortion based on Yelp's alleged manipulation of their review pages—by removing certain reviews and publishing others or changing their order of appearance—falls within the conduct immunized by § 230(c)(1)."); *id.* at *9 (same for § 17200 claim). Plaintiffs' allegations that Yelp acted out of improper financial motives made no difference, because "traditional editorial functions often include subjective judgments informed by . . . financial considerations," and "[d]etermining what motives are permissible and what are not could prove problematic" and undermine the purpose of Section 230(c)(1). *Id.* at *7-8. The Ninth Circuit affirmed the dismissal on other grounds, without reaching Section 230(c)(1), as discussed further below. *See Levitt v. Yelp! Inc.* (*"Levitt II"*), 765 F.3d 1123, 1129 (9th Cir. 2014).

Here, just as in *Levitt I*, Plaintiff alleges that Facebook has improperly exercised traditional editorial functions to advance its own financial interests. Just as in *Levitt I*, Plaintiff's claims based on those allegations are barred by Section 230(c)(1).

---

[2] The plaintiffs in *Levitt I* also made claims based on allegations that Yelp itself created certain content, and the court rejected those claims as insufficiently pled. 2011 WL 5079526, at *5, 9.

B. Plaintiff Fails to Adequately Allege any Claim

Even if Fyk's claims were not barred entirely by Section 230(c)(1) of the CDA, they would have to be dismissed because they fail to state any plausible claim for relief.

1. The Complaint Fails to State a Claim for Civil Extortion

Plaintiff fails to state a claim for civil extortion because he does not and cannot allege that Facebook wrongfully threatened to withhold from him anything that he had a right to possess.

To the extent courts have recognized an independent cause of action for civil extortion, "it is based on the same elements as criminal extortion." *Levitt I*, 2011 WL 5079526, at *9 n.5 (noting that some courts have refused even to recognize such a cause of action). Under California law, "[e]xtortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear." Cal. Penal Code § 518 (emphasis added). "California law also provides that '[f]ear, such as will constitute extortion, may be induced by a threat . . . [t]o do an unlawful injury to the person or property of the individual threatened,' thus excluding fear induced by threat to do a lawful injury.'" *Levitt II*, 765 F.3d at 1132-33 (quoting Cal. Penal Code § 519(1) and *People v. Beggs*, 178 Cal. 79, 83 (1918)) (emphasis, omission, and alterations in original). Accordingly, "to state a claim of economic extortion under both federal and California law, a litigant must demonstrate either that he had a pre-existing right to be free from the threatened harm, or that the defendant had no right to seek payment for the service offered." *Id.* at 1133. "[A]ny less stringent

standard would transform a wide variety of legally acceptable business dealings into extortion." *Id.*

Plaintiff's claim is premised on his "fear" that Facebook would remove his content or promote content of others if he declined to enroll in Facebook's paid reach program. Compl., ¶¶ 18, 68-70. But the Complaint does not identify any contractual provision or any law giving him the right to maintain content on Facebook or to prevent Facebook from promoting the content of other Facebook users or advertisers. Furthermore, the only purported "threat" identified in the Complaint at all is an alleged remark by an unnamed "high ranking Facebook executive" purportedly advising him that "one has to pay Facebook in order to play with Facebook." Compl., ¶ 68; *see also id.*, ¶ 18. This vague allegation is insufficient to state a plausible claim for relief.[3]

Once again, the Ninth Circuit's decision in *Levitt II* is on point. There, the plaintiffs alleged that Yelp tried to force them to pay for its advertising program by threatening to manipulate content on its site to hurt their business and/or promote their competitors. The Ninth Circuit held that "any implicit threat by Yelp to remove positive reviews absent payment for advertising was not wrongful within the meaning of the extortion statutes," because the plaintiffs had no

---

[3] Plaintiff also alleges that alter enrolling in the optional paid reach program he "noticed no appreciable increase in his already sizeable viewership," Compl., ¶ 70. But Plaintiff does not contend that the optional program in which he voluntarily enrolled was "a valueless sham," nor does he assert that he "was already entitled to the . . . privileges [Facebook] induced h[im] to buy." *Levitt II*, 765 F.3d at 1134. This allegation is therefore also insufficient. *See id.*

preexisting right to have positive reviews appear on Yelp's website. *Id.* at 1134. Plaintiffs there "allege[d] no contractual right pursuant to which Yelp must publish positive reviews, nor does any law require Yelp to publish them." *Id.* at 1133. As the court explained, "[b]y withholding the benefit of these positive reviews, Yelp is withholding a benefit that Yelp makes possible and maintains," but "[i]t has no obligation to do so." *Id.* The Court also rejected vague allegations that Yelp itself created negative reviews as insufficient to plausibly state a claim for relief. *Id.* at 1135.

The Court should reach the same conclusion here. Just as in *Levitt II*, what Fyk alleges Facebook withheld from him is "a benefit that [Facebook] makes possible and maintains," and, like the claim in *Levitt II*, Fyk's claim fails because it does not demonstrate any "pre-existing right to be free from the threatened harm." *Levitt II*, 765 F.3d at 1132-33. Accordingly, Plaintiff's claim fails to satisfy the "stringent standard" for stating a claim of civil extortion.

2. The Complaint Fails to State a Claim for Violation of California Business and Professions Code Sections 17200-17210 (Unfair Competition)

Plaintiff's unfair competition claim is predicated on the UCL's "unfair" prong. *See* Compl., ¶ 62 ("California's unfair competition law affords a private right of action where (as here) the conduct is predicated on 'unfair' conduct."). But Plaintiff fails to plead allegations that would support the assertion of an "unfair" conduct claim under the applicable test.

The Ninth Circuit set forth the requirements for pleading an "unfair" prong UCL claim in *Levitt II*.

"At least with respect to business-competitor cases, to state a claim under the UCL's 'unfair' prong the alleged unfairness must 'be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.'" *Levitt II*, 765 F.3d at 1136 (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 186-187 (1999)). That standard, known as the *Cel-Tech* standard, applies where "the crux of [the] complaint is that [defendant's] conduct unfairly injures [the plaintiff's] economic interests to the benefit of other businesses." *Id.*; *see also, e.g.*, Compl., ¶¶ 63-65. Accordingly, to state a claim under the "unfair" prong, a plaintiff must sufficiently allege "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, 'or otherwise significantly threatens or harms competition.'" *Levitt II*, 765 F.3d at 1136. In *Levitt II*, the Ninth Circuit affirmed the dismissal of a UCL claim predicated on "unfair" conduct where the plaintiffs had alleged that Yelp "harms competition by favoring businesses that submit to Yelp's manipulative conduct and purchase advertising to the detriment of competing businesses that decline to purchase advertising." *Id.*

Plaintiff's claim here likewise fails to meet the standard for pleading an unfair competition claim. First, he does not allege that Facebook violated any "legislatively declared policy" other than the prohibitions on extortion discussed above. As discussed above, the facts pled do not sufficiently allege a direct extortionate threat, nor do they support an inference of extortion.

Moreover, Plaintiff does not allege conduct rising to the level of an antitrust violation. Plaintiff asserts that Facebook's conduct is "conducive of economic instability and [is] antithetical to the American Dream." Compl., ¶ 63. But this general allegation "does not satisfy *Cel-Tech*'s requirement that the effect of [Facebook's] conduct amounts to a violation of antitrust laws 'or otherwise significantly threatens or harms competition.'" *Levitt II*, 765 F.3d at 1136-37.

None of the other alleged "unfair" conduct satisfies, or is even relevant to, the *Cel-Tech* inquiry. Plaintiff alleges, for instance, that Facebook unfairly "rein-stat[ed] the supposedly CDA violative pages for [Plaintiff's] competitor" (Compl., ¶ 64) and "muscl[ed] out the Fyk-related posts from user news feeds that users actually wanted" (Compl., ¶ 65). Those allegations do not plausibly suggest that Facebook has violated antitrust laws. *See Levitt II*, 765 F.3d at 1136-37.

Plaintiff also generally asserts that Facebook "steer[ed] Fyk's business/pages to the competitor to whom Fyk had to fire sell eight businesses/pages due to Facebook's leaving Fyk with no reasonable alternative." Compl., ¶ 63. This vague allegation also does not state a claim for unfair competition under *Cel-Tech*, or any other standard, particularly given Fyk's own averment that he voluntarily sold his pages for approximately one million dollars. Compl., ¶ 55. Fyk asserts, without support, that this sum is "relatively nominal" (*id.*), but he provides no factual basis for the bald assertion that Facebook's alleged unfair competition left him "with no reasonable alternative" but to make the million-dollar sale. *Id.*, ¶ 63. Fyk also alleges that Facebook "fl[ew] representation down to Los Angeles" to "effectuate" the "fire sale" by "offer-

[ing] the competitor customer service" and that Facebook purportedly advised the competitor that it would "breath life back into the subject eight pages only if such were purchased by the competitor." *Id.*, ¶¶ 42,43. But such vague allegations do not demonstrate an entitlement to relief under the "unfair" prong, Fyk was a voluntary participant in the purported seven-figure "fire sale," and there is nothing unfair or unlawful about providing customer service to a competitor. In any event, that allegation does not plausibly suggest that Facebook has engaged in conduct that violates antitrust laws or principles. *Levitt II*, 765 F.3d at 1136-37.

Accordingly, Plaintiff has failed to state a claim under the UCL's "unfair" prong.[4]

3. The Complaint Fails to State a Claim for Fraud/Intentional Misrepresentation

Plaintiff's fraud claim fails because he does not plead any actionable misrepresentation, and certainly not with the level of specificity required under Rule 9(b).[5] "Rule 9(b) demands that the circumstances

---

[4] To the extent Plaintiff contends that Facebook has engaged in deceptive advertising (*see* Compl., ¶ 66), the Complaint fails both to satisfy Rule 9(b) and to satisfy statutory standing requirements. *In re Arris Cable Modem Consumer Litig.*, 2018 WL 288085, at *6 (N.D. Cal. Jan. 4, 2018) (plaintiff must have actually relied on the misrepresentation, and suffered economic injury as a result of that reliance, in order to have standing to sue); *id.* (UCL claims premised on misleading advertising must comply with Rule 9(b)).

[5] To state a claim for fraud, a plaintiff must plead: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting

constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge." *Id.* (quotations and citations omitted). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id.* Plaintiff does not and cannot satisfy this standard.

First, Plaintiff alleges that "Facebook represented to Fyk that businesses/pages Facebook crippled in or around October 2016 were violative of the CDA when, in reality, there was nothing CDA violative about such businesses/pages." Compl., ¶ 73. This allegation is incomprehensible because there is no such thing as speech that "violates" the CDA; rather, as detailed above, the CDA provides immunity to Facebook when the claims seek to treat Facebook as "the publisher . . . of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Regardless, alleged "misrepresentations of law are not actionable as fraud." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 940 (9th Cir. 2006).

Second, Plaintiff alleges that "Facebook represented to Fyk that the 'free' organic reach program was perfectly acceptable when, in reality, only the 'optional' paid for reach program is acceptable." Compl., ¶ 71 But he admits elsewhere in his Complaint that, in fact, "there is nothing explicitly making the 'optional' paid for reach program 'mandatory' that we are presently aware of sans the benefit of discovery," and that his allegation is based merely on what he has seen in "some news outlets report." Compl. ¶ 18 n.3.

---

damage." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009).

This allegation is also directly contradicted by his allegations that Facebook caused him to believe that he had no choice but to participate in the "optional" program. *E.g.*, Compl. ¶¶ 18-19, 68. This speculative and contradictory allegation is thus insufficient to plausibly state a claim for relief. *Levitt II*, 765 F.3d at 1135.

Third, Plaintiff alleges that Facebook falsely told him "he was welcomed to participate in the 'optional' paid for reach program" and "wished to bait [him] into" that program. Compl., ¶¶ 73, 75. But, again, he admits elsewhere that he in fact was able to participate in that program, at least for some time. *E.g.*, Compl. ¶¶ 19. Plaintiff does not allege that Facebook represented that he could participate in the program in perpetuity, regardless of anything else.

Finally, Plaintiff fails to allege with specificity the "who, what, when, where, and how" for any of the three theories outlined above thereby falling short of Rule 9(b)'s heightened pleading standard. For all of these reasons, Plaintiff's claim for fraud must be dismissed.

4. The Complaint Fails to State a Claim for Intentional Interference with Prospective Economic Relations

Plaintiffs claim for intentional interference rises or falls with all of the other claims he pleads. Because those other claims fail, as explained above, so too must the interference claim.

To state a claim for intentional interference with prospective economic relations under California law, a plaintiff must plead, among other things, "that the

defendant engaged in an independently wrongful act in disrupting the relationship." *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1152 (2004). "An act is not independently wrongful merely because defendant acted with an improper motive." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158 (2003). Rather, the defendant's conduct must be "unlawful"—*i.e.*, "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id.*

Here, Plaintiff alleges that Facebook's conduct was independently wrongful because it constituted civil extortion and/or unfair competition. Compl., ¶ 52. But, as discussed above, his Complaint fails to state a plausible claim for relief for extortion, unfair competition, or fraud. Accordingly, his derivative claim for intentional interference must likewise be dismissed. *Name, Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1134 (9th Cir. 2015) (affirming dismissal of intentional interference claim where plaintiff failed to sufficiently allege predicate antitrust and trademark claims).

IV. Conclusion

For the foregoing reasons, Facebook respectfully requests that the Court dismiss Plaintiff's claims.

KEKER, VAN NEST & PETERS LLP

By: /s/ William Hicks
Paven Malhotra
Matan Shacham
William S. Hicks

Attorneys for Defendant
Facebook, Inc.

Dated: November 1, 2018

ORDER GRANTING DEFENDANT FACEBOOK'S MOTION TO DISMISS (PROPOSED, UNSIGNED)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:18-CV-05159-JSW

Before: Hon. Jeffrey S. WHITE,
United States District Judge.

The above matter having come before the Court on Defendant Facebook, Inc.'s Motion to Dismiss, and the Court having considered the motions and the arguments in support thereof and any opposition thereto, hereby GRANTS the Motion.

It is ORDERED that Plaintiff's Complaint is dismissed with prejudice.

By: _____
Honorable Jeffrey S. White
United States District Judge

REPLY IN SUPPORT OF FACEBOOK'S MOTION TO DISMISS (DECEMBER 28, 2018)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:18-CV-05159-JSW

Reply in Support of
Facebook's Motion to Dismiss

Date: April 5, 2018
Time: 9:00 a .m.

Judge: Hon. Jeffrey S. White

Dept.: Courtroom 5

Date Filed: August 22, 2018

Trial Date: Not set

KEKER, VAN NEST & PETERS LLP
MATAN SHACHAM - # 262348
mshacham@keker.com
WILLJAM S. HICKS -#256095
whicks@keker.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188Wi

Attorneys for Defendant
FACEBOOK, INC.

[Table of Contents and
Table of Authorities Omitted]

I. Introduction and Summary of Argument

Plaintiff's "conformed" opposition brief is an exercise in misdirection. It fails to effectively rebut the two principal reasons why this lawsuit should be dismissed.

First, the claims are barred by CDA Section 230(c)(1) immunity. Plaintiff's principal argument is that Section 230(c)(1) immunity does not apply when a plaintiff asserts claims that his own content was removed from a platform. No so. Plaintiff fails to cite a single case that actually holds as much because that is not the law. Courts, including those in this District, repeatedly dismiss claims against interactive computer service providers like Facebook when they are sued by users who complain about their own content being taken down. *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088 (N.D. Cal. 2015); *Lancaster v. Alphabet, Inc.*, 2016 WL 3648608, at *3 (N.D. Cal. July 8, 2016).

Second, putting aside the immunity afforded under the CDA, Plaintiff's individual causes of action suffer from their own defects, all of which require dismissal. Plaintiff has failed to address Facebook's arguments (or the relevant case law), but instead urges the Court to accept his bald assurances, supported by unexplained string citations, that the Complaint is "replete with detailed allegations." *See, e.g.*, Opp. at 13, 14. Plaintiff's inability to explain in any coherent way how his "detailed allegations" state any valid claim for relief simply confirms that his claims are legally baseless.

For the reasons set forth below and in Facebook's opening brief, the Court should dismiss the Complaint in its entirety without leave to amend.

II. Argument

A. Section 230(c)(1) Bars Plaintiff's Complaint in Its Entirety

1. Facebook's Communications Decency Act Defense Is Properly Considered on a Motion to Dismiss

As a preliminary matter, Plaintiff improperly suggests that Facebook's CDA Section 230 defense requires discovery and is properly considered only on a motion for summary judgment. Opp. at 2-3. But courts routinely hold that if the elements of a defense are apparent from the face of a complaint, then resolution of the defense on a motion to dismiss is proper.[1]

---

[1] *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1103-04 (N.D. Cal. 2011) ("[t]he assertion of an affirmative defense properly may be considered on a Rule 12(b)(6) motion where the

And as explained in Facebook's opening papers and further below, each of the requirements needed to trigger the protections under the CDA is apparent on the face of Plaintiff's Complaint, namely that (i) Facebook is an interactive computer service provider; (ii) the content at issue came from a third party; and (iii) Plaintiff's claims all seek to treat Facebook as the publisher of various content. Courts in the Ninth Circuit and this District routinely dismiss lawsuits against interactive computer service providers given the protections afforded under the CDA.[2] This is especially so given that Congress enacted the CDA not just to afford protections to service providers but to ensure that those protections guard against protracted litigation.[3] In short, resolution of the CDA

---

defense is apparent from the face of the [c]omplaint") (citing *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1200 n. 5 (N.D. Cal. 2009) (internal citation omitted); *Jones v. Bock*, 549 U.S. 199, 215 (2007) (finding "[w]hether a particular ground for opposing a claim may be the basis for dismissal for [a 12(b)(6) motion] depends on whether the allegations in the complaint suffice to establish that ground. . . . ").

2 *See Mot.* at 4; *Igbonwa v. Facebook Inc.*, 2018 WL 4907632 (N.D. Cal. Oct. 9, 2018) (granting motion to dismiss under Section 230(c)(1)); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888 (N.D. Cal. 2017) (same); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016) (same) *Sikhs for Justice, Inc.*, 144 F. Supp. at 1094-96 (same); *Levitt v. Yelp! Inc. ("Levitt I")*, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011) (same); *kimzey v, Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016) (affirming grant of motion to dismiss based on CDA Section 230(c)(1)); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009) (same).

3 "Section 230(c)(1) immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process" because "immunity is an immunity from suit rather than a mere defense to liability." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009)

Section 230 defense is appropriate at the pleading stage and, given what Plaintiff has pled, requires dismissal of Plaintiff's Complaint now.

2. Each Element of the Section 230(c)(1) Defense Is Satisfied

a. Plaintiff Concedes That Facebook Is an Interactive Service Provider

Plaintiff does not dispute that Facebook is an interactive computer service provider. *See* Opp. at 1, 4. Accordingly, the first requirement for Section 230(c)(1) immunity is satisfied.

b. Plaintiff Concedes That the Content at Issue Was Provided by Someone Other than Facebook

The second requirement for Section 230(c)(1) immunity is that the content at issue must come from someone other than Facebook. *See, e.g.*, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (Section 230(c)(1) "precludes treatment as a publisher or speaker for 'any information provided by another information content provider.'" (emphasis in original) (quoting 47 U.S.C. § 230(c)(1)). Plaintiff repeatedly concedes that he (not Facebook) is the provider of the content at issue. He asserts that "this lawsuit is about the 'content provider' (Fyk) pursuing

---

(emphasis in original) (internal quotes and citations omitted). Courts "aim to resolve the question or § 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.* (internal quotations and citations omitted).

an 'interactive computer service' (Facebook)." Opp. at 1; *see also id.* at 4 ("This case is about the content of a first-party (Fyk) being wrongfully destroyed by an 'interactive computer service' (Facebook)."); Summary of Argument (Facebook is not immunized from "liability concerning content published or spoken by the 'content provider' (Fyk)") (emphasis in original). Accordingly, the second requirement is satisfied as a matter of law.

Plaintiff advances two arguments in response. First, he contends that Section 230(c)(1) applies only when the content at issue was provided by someone other than the plaintiff. Opp. at 3-6. Second, he urges the Court to deny Facebook's motion on the basis that Facebook is itself an "information content provider." *Id.* at 6-7. Each of these arguments fails as a matter of law and should be rejected.

(i) Section 230(c)(1) Immunity Applies to Content Provided By Plaintiff

Nothing in the statute or the caselaw supports Plaintiff's flawed argument that Section 230(c)(1) applies only when the content at issue was provided by someone other than the plaintiff. Indeed, this Court has held otherwise. In *Sikhs for Justice, Inc.*, for example, the court held that Section 230(c)(1) barred the plaintiff's Title II claim alleging that Facebook had engaged in "blatant discriminatory conduct by blocking Plaintiff's content in the entire India." 144 F. Supp. at 1094-96 (emphasis added). In affirming that ruling, the Ninth Circuit explained that because [the plaintiff], not Facebook, is the party solely responsible for creating and developing the content on [its] webpage, "Facebook cannot be deemed

an 'information content provider,' and it is therefore entitled to the immunity conferred under § 230." *See Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (noting also that the plaintiff sought "to hold Facebook liable as a publisher for hosting, and later blocking, [the plaintiff's] online content)"). Likewise, in *Lancaster v. Alphabet Inc.*, this Court held that "§ 230(c)(1) of the CDA precludes as a matter of law any claims arising from Defendants' removal of Plaintiff's [YouTube] videos." 2016 WL 3648608, at *3 (emphasis added).[4]

And none of Plaintiff's cases supports his novel proposition that Section 230(c)(1) immunity cannot apply when the content at issue was provided by the plaintiff.

- *Song Fi, Inc. v. Google, Inc.*, 108 F. Supp. 3d 876 (N.D. Cal. 2015): The court did not even mention Section 230(c)(1). Rather, it based its decision entirely on Section 230(c)(2). *Id.* at 882-84.
- *Atlantic Recording Corporation v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009): The court declined to dismiss the complaint under Section 230(c)(1) only because the claims at issue fell within the carveout for claims based on intellectual property. *Id.* at 702-03

[4] *See also, e.g.*, *Riggs v. MySpace, Inc.*, 444 Fed. Appx. 986, 987 (9th Cir. 2011) (Section 230(c)(1) immunizes "decisions to delete [plaintiff's] user profiles"); *Mezey v. Twitter, Inc.*, 2018 WL 5306769, at *1 (S.D. Fla. July 19, 2018) (holding that Section 230(c)(1) immunized Twitter from liability for blocking the plaintiff's content; noting that "Plaintiff is the information content provider" of the content at issue "as he created the relevant content associated with his Twitter account").

(citing Section 230(e)(2)). There was no suggestion that Section 230(c)(1) immunity is unavailable when plaintiff's own content has been removed.

- *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) There, the Ninth Circuit held that Section 230(c)(1) did not apply because the defendant was an "information content provider" for the content at issue. 521 F.3d at 1166.[5] Contrary to Plaintiff's contention, the court did not hold that Section 230(c)(1) immunity cannot apply when claims are predicated on content provided by the plaintiff.[6]

---

[5] In particular, the court explained that "[b]y requiring subscribers to provide the [discriminatory] information as a condition of accessing its service, and by providing a limited set of pre-populated answers, [the defendant] becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information." *Fair Housing Council*, 521 F.3d at 1166; *see also id.* at 1167.

[6] In *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017), the court specifically noted that courts in the Ninth Circuit "have found that CDA immunity [can] attach[ ] when the content involved was created by the plaintiff." *Id.* at *3 (citing *Sikhs for Justice*, 144 F. Supp. 3d at 1093). To the extent the *e-ventures Worldwide* court applied a different understanding, its decision is contrary to the plain language of the statute and inconsistent with reasoned decisions by courts in this District and elsewhere.

(ii) Facebook Is Not an "Information Content Provider" for the Content at Issue

The Court should likewise reject Plaintiff's argument that Section 230(c)(1) does not apply because Facebook purportedly is an "information content provider." *See* Opp. at 6-7. First, as noted above, it is undisputed that Plaintiff (not Facebook) created the content at issue in this case.

Notwithstanding that concession, Plaintiff contends that Facebook somehow became the "information content provider" because, after Plaintiff sold his Facebook pages to a competitor, Facebook purportedly "published" the same content. Opp. at 7. Not so. An interactive service provider does not become an "information content provider," for purposes of the CDA, when it publishes content created by third parties—indeed, Section 230(c)(1) was intended to provided immunity in this precise scenario. *See, e.g., Jurin v. Google Inc.*, 481 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010) ("The CDA provides complete immunity to any 'provider or user of an interactive computer service' from liability premised on 'information provided by another `information content provider.'").

Not surprisingly, Plaintiff's cases all involve the fundamentally different situation in which the defendant allegedly had created and/or developed the content at issue. In *Fraley v. Facebook, Inc.*, for instance, the plaintiffs accused Facebook of "creating and developing commercial content that violates their statutory right of publicity" through its "Sponsored Story" feature. 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011) (emphasis added). Specifically, the plaintiffs alleged that Facebook "creates content" by translating

"members' actions, such as clicking on the 'Like' button on a company's page, into the words 'Plaintiff likes [Brand],'" and further combining that text with Plaintiff's photograph, the company's logo, and the label "Sponsored Story." *Id.* at 802. The court held that Facebook could be considered an "information content provider" under those particular circumstances because it allegedly had taken users' names, photographs and likenesses "to create new content that it publishes as endorsements of third-party products or services." *Id.* at 801 (emphasis added); *see also id.* at 802. Here, in contrast, the Complaint does not allege any injury based on the Sponsored Story feature, nor does Plaintiff allege that Facebook created any content whatsoever.

In *Perkins v. LinkedIn Corporation*, on which Plaintiff also relies, the court held that LinkedIn was not immune from suit under Section 230(c)(1) because it allegedly was "solely responsible for the creation and development" of the content at issue. 53 F. Supp. 3d 1222, 1247 (N.D. Cal. 2014) (emphasis added) (noting also that each reminder email at issue allegedly "was new, original, and unique content created and developed in whole or in part by LinkedIn").

In *Fair Housing Council*, as noted above, the court held that Section 230(c)(1) immunity did not apply because the defendant had developed the content at issue. Here, in contrast to *Fair Housing Council, Fraley*, and *Perkins*, there is no comparable allegation that Facebook created or developed any of the content at issue. To the contrary, Plaintiff has repeatedly confirmed that "[t]his case is about the content of a first party (Fyk)." Opp. at 4.

Moreover, to the extent Plaintiff contends that Facebook's alleged placement of sponsored advertisements in News Feed makes Facebook an "information content provider" (*see* Opp. at 7-8), that contention has no basis in law or fact. Plaintiff does not allege that Facebook created or developed any content for those advertisements. Moreover, courts have consistently held that interactive service providers, like Facebook, do not become "information content providers" simply by placing advertisements, or rearranging content, created by others. *See Pennie*, 281 F. Supp. 3d at 890-91 (rejecting Plaintiff's contention that the defendants (including Facebook) "c[ould] be held liable as creators of content, rather than merely interactive service providers, because [they] select advertisements to pair with content on their services . . . based on what is known about the viewer and what the viewer is looking at"); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1167-68 (N.D. Cal. 2017) (holding that Google could not be held liable as an "information content provider" by allegedly selecting advertisements "to be displayed alongside user content based on information it gathers about the viewer and the posting"; noting that plaintiff's "theory finds no support in the case law"); *see also, e.g., Levitt I*, 2011 WL 5079526, at *6; *Jurin*, 695 F. Supp. 2d at 1122-23.

c. Plaintiff Concedes That the Complaint Seeks to Hold Facebook Liable for Exercising Traditional Editorial Functions

The final requirement for Section 230(c)(1) immunity—that the Complaint seeks to hold Facebook liable for exercising traditional editorial functions—is also satisfied. Plaintiff does not dispute, and therefore

concedes, that all of his claims seek to hold Facebook liable for its decisions regarding whether or not to publish third-party content—including, in particular, content provided by Plaintiff. Mot. at 6-8. Nor does he dispute that these sorts of decisions fall squarely within the traditional editorial function. *Id.*; *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

To the extent Plaintiff contends that Section 230 (c)(1) does not apply here because Facebook is an alleged competitor whose decisions purportedly were financially motivated (*see* Opp. at 7), Plaintiff is wrong. As explained in Facebook's opening brief, courts in the Ninth Circuit have repeatedly confirmed that there is no intent-based exception to Section 230(c)(1) immunity and have applied the immunity in cases where the defendant was alleged to have acted for competitive or even discriminatory reasons. *See*, *e.g.*, *Levitt I*, 2011 WL 5079526, at *7 (decision allegedly motived by improper business reasons); *Sikhs for Justice*, 144 F. Supp. 3d at 1095 (decision allegedly motivated by discrimination).

For instance, in *Levitt I*, which Plaintiff studiously ignores, the court held that Yelp was entitled to Section 230(c)(1) immunity despite allegations that it had pressured the plaintiff's into paying for advertising by threatening to manipulate, and actually manipulating, third-party content on the site to hurt the plaintiffs and/or help their competitors who agreed to pay for advertising. Mot. at 7; *Levitt I*, 2011 WL 5079526, at *7. The court specifically rejected the plaintiffs' argument that Section 230(c)(1) includes an intent requirement, explaining that "traditional editorial functions often include subjective judgments

informed by . . . financial considerations," and "[d]etermining what motives are permissible and what are not could prove problematic" and undermine the purpose of Section 230(c)(1). *Levitt I*, 2011 WL 5079526, at *7-8. The court also noted that "the text of the two subsections of § 230(c) indicates that (c)(1)'s immunity applies regardless of whether the publisher acts in good faith." *Id.* at *7.

Here, just as in *Levitt I*, Plaintiff's claims are predicated on allegations that Facebook improperly exercised its editorial function to advance its own financial interests. And just as in *Levitt I*, those claims are barred by Section 230(c)(1).

In sum, all three requirements for Section 230(c)(1) immunity are satisfied. Accordingly, each of Plaintiffs claims fails as a matter of law and must be dismissed.

B. Plaintiff's Argument That Facebook Should Be Estopped from Asserting Section 230(c)(1) Immunity Is Baseless

Plaintiff identifies no authority for the unprecedented proposition that a party is estopped from asserting arguments in litigation that it did not specifically identify in pre-filing communications with the plaintiff. Once again, Plaintiff is simply asking the Court to make radical new law without any legal or logical basis.

The so-called "mend and hold" doctrine, upon which Plaintiff relies, "provides that a contract party is not permitted to change is position on the meaning of a contract in the middle of litigation over it." *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 864 F. Supp. 2d 1157, 1170 n. 9 (D.N.M. 2012) (citing *First*

Bank & Trust Co. of Illinois v. Cimerring, 365 Fed. Appx. 5, 8 (7th Cir. 2010)). That doctrine has no application here, among other reasons, because this case does not involve the meaning of a contract. In any event, Facebook has not changed its position in this litigation; it asserted Section 230(c)(1) immunity in its first response to Plaintiff's Complaint, while "reserve[ing] the right to assert Section 230(c)(2) immunity at a later stage." Mot. at 4, n. 1.

Accordingly, the Court can and should apply Section 230(c)(1) to dismiss this case, even though, for the sake of judicial economy, Facebook chose not to assert Section 230(c)(2) immunity at this time.

C. Plaintiff Has Failed to Sufficiently Allege Any Claim for Relief

1. The Complaint Fails to State a Claim for Civil Extortion

Plaintiff concedes that, to state a valid claim for civil extortion against Facebook, he is required to allege (among other things) that Facebook wrongfully threatened to withhold from him something that he has a right to possess. *See* Mot. at 8; *Levitt v. Yelp! Inc.* (*Levitt II*), 765 F.3d 1123, 1135 (9th Cir. 2014).

Nevertheless, Plaintiff asserts that Congressional testimony by Facebook's CEO, Mark Zuckerberg, somehow creates a legally enforceable obligation supporting his civil extortion claim. Opp. at 13. Plaintiff is wrong. Not only does the Complaint fail even to mention this supposed testimony, Plaintiff fails to explain how the testimony confers a legally cognizable right, nor does he identify the nature of

that right, or otherwise explain how it purportedly relates to his civil conspiracy claim.

Plaintiff also cites Facebook's terms of service to support the notion that he purportedly "owns" the content on his Facebook page. Opp. at 13 (citing n. 6). Putting aside the issue that Plaintiff's Complaint never once mentions the terms of service as the source of any legal obligation on the part of Facebook, the provision to which Plaintiff refers simply provides permission to share content posted on Facebook with others. Nothing in Facebook's terms of service gives Plaintiff the unfettered right to maintain content on Facebook or to prevent Facebook from featuring advertising on its platform—and Plaintiff does not contend otherwise. Rather, consistent with the Ninth Circuit's opinion in *Levitt II* (which Plaintiff disregards entirely), the benefit that Facebook allegedly withheld from Plaintiff is "a benefit that [Facebook] makes possible and maintains." 765 F.3d at 1132-33; Mot. at 9-10. Because Plaintiff has no "preexisting right to be free from the threatened harm," his claim for civil extortion fails as a matter of law. *Levitt II*, 765 F.3d at 1132-33.[7]

---

[7] Moreover, as noted in Facebook's opening brief, the only purported "threat" identified in the Complaint at all is an alleged remark by an unnamed executive allegedly advising Plaintiff that "one has to pay Facebook in order to play with Facebook." Mot. at 9. This vague, barebones allegation is insufficient to state a claim for civil extortion under the "stringent standard" announced by the Ninth Circuit in *Levitt II*. *See* 765 F.3d at 1133.

2. The Complaint Fails to State a Claim for Unfair Competition

Plaintiff does not dispute that, to state a valid claim for unfair competition under the "unfair" prong, he must sufficiently allege "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Levitt II*, 765 F.3d at 1136; Mot. at 10.[8] But in his opposition brief, Plaintiff fails to identify any factual allegations in the Complaint that could plausibly satisfy this standard.

Plaintiff asserts, for instance, that Facebook has given preferential treatment to a competitor of Plaintiff who paid Facebook more money, thereby injuring Plaintiff. Opp. at 13. But that allegation is virtually identical to the business owners' allegation in *Levitt* that "Yelp's conduct 'harms competition by favoring businesses that submit to Yelp's manipulative conduct and purchase advertising to the detriment of competing businesses that decline to purchase advertising." *Levitt II*, 765 F.3d at 1137. As the Ninth Circuit has already held, that sort of "very general allegation does not satisfy *Cel-Tech*'s requirement that the effect of [Facebook's] conduct amounts to a violation of antitrust laws 'or otherwise significantly threatens or harms competition.'" *Id.*

---

[8] Nor can he. The Ninth Circuit held in *Levitt II* that this standard applies in business-competitor cases, 765 F.3d at 1136, and Plaintiff has argued that "Facebook is a direct competitor." Opp. at 7.

Plaintiff's argument also assumes erroneously that an alleged competitive impact on him personally is sufficient to state a claim under the "unfair" prong. Not so. Courts have consistently held that "the harms alleged must be 'significant' and have impacts on 'competition,' not merely on a competitor." *DirecTV, LLC v. E&E Enters. Glob., Inc.*, 2018 WL 707964, at *5 (C.D. Cal. Feb. 5, 2018) (emphasis added). In *DirectTV*, for instance, the court dismissed a UCL claim because the "specific harms alleged in the [Complaint] chiefly impact [Plaintiff] as DirecTV's competitor rather than 'significantly threaten[ing] or harm[ing] competition.'" *Id.*; *see also, e.g., Glob. Plastic Sheeting v. Raven Indus.*, 2018 WL 3078724, at *6 (S.D. Cal. Mar. 14, 2018) (granting motion to dismiss UCL claim under the "unfair" prong where Plaintiff's allegations "merely indicate Defendant's conduct resulted in harm to its commercial interests rather than harm to competition").

So too here. Because Plaintiff alleges that Facebook's alleged conduct has injured him personally, not that Facebook's conduct has threatened or harmed competition generally, the Complaint fails as a matter of law to state a plausible claim for relief under the UCL's "unfair" prong.

Plaintiff relies heavily on *Fraley* (*see* Opp. at 13-14), but that case is readily distinguishable. There, the court found that the plaintiffs had sufficiently pled a claim for misappropriation under California Civil Code § 3344 based on alleged nonconsensual use of their names, photographs, and likenesses. 830 F. Supp. 2d at 803. Based on that predicate cause of action, the court went on to find that the plaintiffs also had alleged an unlawful commercial practice

under the UCL's "unlawful" prong, and a violation of a "statutorily declared public policy" under the "unfair" prong. *Id.* at 812, 813. Here, in contrast, Plaintiff has not sufficiently alleged any predicate UCL violation, nor has Plaintiff alleged that Facebook has violated any "statutorily declared public policy" other than the prohibitions on extortion, discussed above.

Moreover, to the extent Plaintiff contends that the Complaint sufficiently pleads a UCL violation under the "fraudulent" prong, he is wrong. A claim under the fraudulent prong of the UCL is governed by the "reasonable consumer" standard, which requires the plaintiff to "show that members of the public are likely to be deceived." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citation and internal quotation marks omitted). In addition, the plaintiff must "allege actual reliance, that the defendant's misrepresentation or nondisclosure was an immediate cause of the plaintiff's injury-producing conduct . . . [such that] in its absence the plaintiff in all reasonable probability would not have engaged in the injury-producing conduct[.]" *Block v. eBay, Inc.*, 747 F.3d 1135, 1140 (9th Cir. 2014) (internal quotation marks and citations omitted). Here, Plaintiff has failed to allege any of the required elements, much less with the specificity required by Rule 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (when a UCL claim rests on allegations of fraud, it must satisfy Rule 9(b)).

Accordingly, Plaintiff's unfair competition claim must be dismissed.

3. The Complaint Fails to State a Claim for Fraud/Misrepresentation

As explained in Facebook's opening brief, the Complaint fails to allege any actionable misrepresentation, nor does the Complaint plead any of the other essential elements of a fraud claim under Rule 9's heightened pleading standard. Mot. 12-13. Plaintiff's response fails to address any of Facebook's arguments, but instead posits that "just about everything said about Facebook and what it has done to Fyk has a fraud/intentional misrepresentation undercurrent." Opp. at 14.

It is undisputed that the Complaint fails to provide "the who, what, when, where, and how" needed to plead a fraud claim under Rule 9(b). *See Kearns*, 567 F.3d at 1126. Thus, this claim must be dismissed.

4. The Complaint Fails to State a Claim for Intentional Interference with Prospective Economic Relations

Plaintiff does not dispute that his claim for intellectual interference with prospective economic relations rises and falls with his other three claims. Opp. at 15. Because Plaintiff has failed to sufficiently plead any of those three claims, as explained above, Plaintiff's derivative claim for intentional interference must be dismissed as well. Mot. at 13; *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1134 (9th Cir. 2015).

D. Leave to Amend Should Be Denied

Given the robust immunities afforded under the CDA, courts in this district have previously denied leave to amend complaints asserting claims against internet service providers like Facebook that are predicated on content provided by third parties. *See, e.g., Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1067 (N.D. Cal. 2016) ("Because Plaintiff's claims against Facebook are barred as a matter of law by § 230(c), the court finds that allowing for their amendment would be futile."); *Sikhs for Justice*, 144 F. Supp. 3d. at 1095-96 (same). Moreover, Plaintiff has not explained how he could possibly cure by amendment the other deficiencies identified in Facebook's motion to dismiss. Because amendment would be futile, Plaintiff's Complaint should be dismissed with prejudice.

III. Conclusion

For the foregoing reasons, as well as those set forth in Facebook's opening brief, the Court should grant Facebook's motion to dismiss without leave to amend.

Respectfully submitted,

KEKER, VAN NEST & PETERS LLP

By: /s/ William S. Hicks
Matan Shacham
William S. Hicks

Attorneys for Defendant
Facebook, Inc.

Dated: December 28, 2018

U.S. DISTRICT COURT DOCKET DETAILS

U.S. District Court
California Northern District (Oakland)
CIVIL DOCKET FOR CASE #: 4:18-cv-05159-JSW

Fyk v. Facebook, Inc.
Assigned to: Hon. Jeffrey S. White
Case in other court:
Ninth Circuit Court of Appeals, 19-16232
Cause: 28:1332 Diversity-(Citizenship)

Date Filed: 08/22/2018
Date Terminated: 06/18/2019
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff
Jason Fyk

represented by

Jeffrey Lewis Greyber
Callagy Law, P.C.
1900 NW Corporate Boulevard
Suite 310W
Boca Raton, FL 33431
(561) 405-7966
Email: jgreyber@callagylaw.com

Michael Smikun
650 From Rd.
Paramus, NJ 07652
(201) 261-1700
Email: msmikun@callagylaw.com

Sean R Callagy
650 From Rd.
Paramus, NJ 07652
(201) 261-1700
Email: scallagy@callagylaw.com

Constance Jiun-Yee Yu
Futterman Landry Yu LLP
345 California Street
Suite 1160
San Francisco, CA 94104
(415) 685-0729
Fax: (415) 737-1363
Email: cyu@plylaw.com

V.

Defendant
Facebook Inc.

represented by

Matan Shacham
Keker & Van Nest LLP
633 Battery Street
San Francisco, CA 94111-1804
415-391-5400
Fax: 415-397-7188
Email: mshacham@keker.com

William Sellers Hicks
Keker & Van Nest LLP
633 Battery Street
San Francisco, CA 94111-1809
415-391-5400
Fax: 415-397-7188
Email: whicks@kvn.com

08/22/2018

1) COMPLAINT *VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL* against Facebook, Inc. (Filing fee $400, receipt number 0971-12618798.). Filed by Jason Fyk. (Attachments: # 1 Summons, # 2 Civil Cover Sheet) (Yu, Constance) (Filed on 8/22/2018) (Entered: 08/22/2018)

08/22/2018

2) MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice* (Filing fee $310, receipt number 0971-12618807.) filed by Jason Fyk. (Yu, Constance) (Filed on 8/22/2018) (Entered: 08/22/2018)

08/22/2018

3) MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice* (Michael Smikun) (Filing fee $310, receipt number 0971-12618812.) filed by Jason Fyk. (Yu, Constance) (Filed on 8/22/2018) (Entered: 08/22/2018)

08/22/2018

4) MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice* (Jeffrey Greyber) (Filing fee $310, receipt number 0971-12618814.) filed by Jason Fyk. (Yu, Constance) (Filed on 8/22/2018) (Entered: 08/22/2018)

08/23/2018

5) Case assigned to Magistrate Judge Kandis A. Westmore.

Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit *E-Filing A New Civil Case* at http://cand.uscourts.gov/ecf/case opening.

Standing orders can be downloaded from the court's web page at www.cand.uscourts. gov/judges. Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 9/6/2018. (as, COURT STAFF) (Filed on 8/23/2018) (Entered: 08/23/2018)

08/23/2018

6) Proposed Summons. (Yu, Constance) (Filed on 8/23/2018) (Entered: 08/23/2018)

08/24/2018

7) Summons Issued as to Facebook, Inc. (jmlS, COURT STAFF) (Filed on 8/24/2018) (Entered: 08/24/2018)

08/24/2018

8) **Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 11/13/2018. Initial Case Management Conference set for 11/20/2018 01:30 PM. (jmlS, COURT STAFF) (Filed on 8/24/2018) (Entered: 08/24/2018)**

08/28/2018

9) CERTIFICATE OF SERVICE by Jason Fyk re 2 MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice* (Filing fee $310, receipt number 0971-12618807.), 3 MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice* (Michael Smikun) (Filing fee $310, receipt number 0971-12618812.), 7 Summons Issued, 1 Complaint, 4 MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice* (Jeffrey Greyber) (Filing fee $310, receipt number 0971-1261 8814.), 8 Initial Case Management Scheduling Order with ADR Deadlines *Proof of Service on Facebook, Inc.* (Yu, Constance) (Filed on 8/28/2018) (Entered: 08/28/2018)

09/04/2018

10) Amended MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice previously filed Docket* #2 (Filing fee $310, receipt number 0971-12618807.) Filing fee previously paid on 08/22/18 filed by Jason Fyk. (Yu, Constance) (Filed on 9/4/2018) (Entered: 09/04/2018)

09/04/2018

11) **ORDER by Magistrate Judge Kandis A. Westmore granting 3 Motion for Pro Hac Vice for Michael Smikun. (sisS, COURT STAFF) (Filed on 9/4/2018) (Entered: 09/04/2018)**

09/04/2018

12) **ORDER by Magistrate Judge Kandis A. Westmore granting 4 Motion for Pro Hac Vice for Jeffrey Greyber. (sisS, COURT STAFF) (Filed on 9/4/2018) (Entered: 09/04/2018)**

09/04/2018

13) **ORDER by Magistrate Judge Kandis A. Westmore granting 10 Motion for Pro Hac Vice for Sean Callagy. (sisS, COURT STAFF) (Filed on 9/4/2018) (Entered: 09/04/2018)**

09/11/2018

14) STIPULATION (*Joint*) *to Extend Facebook, Inc.'s Time to Respond to Complaint* filed by Facebook, Inc. and Jason Fyk. (Shacham, Matan) (Filed on 9/11/2018) Modified on 9/12/2018 (jmlS, COURT STAFF). (Entered: 09/11/2018)

09/25/2018

15) DECLINATION to Proceed Before a US Magistrate Judge by Facebook, Inc. (Shacham, Matan) (Filed on 9/25/2018) Modified on 9/26/2018 (jmlS, COURT STAFF). (Entered: 09/25/2018)

09/26/2018

16) CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE; The Clerk of this Court will now randomly reassign this case to a District Judge because either (1) a party has not consented to the jurisdiction of a Magistrate Judge, or (2) time is of the essence in deciding a pending judicial action for which the necessary consents to Magistrate Judge jurisdiction have not been secured. You will be informed by separate notice of the district judge to whom this case is reassigned.

ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED.

This is a text only docket entry; there is no document associated with this notice. (sisS, COURT STAFF) (Filed on 9/26/2018) (Entered: 09/26/2018)

09/26/2018

17) **ORDER REASSIGNING CASE. Case reassigned to Judge Jeffrey S. White for all further proceedings. Magistrate Judge Kandis A. Westmore no longer assigned to the case. This case is assigned to a judge who participates in the Cameras in the Courtroom Pilot Project. *See* General Order 65 and http://cand.uscourts.gov/cameras. Signed by Executive Committee on 9/26/2018. (Attach-**

ments: # 1 Notice of Eligibility for Video Recording) (jmlS, COURT STAFF) (Filed on 9/26/2018) (Entered: 09/26/2018)

10/29/2018

18) NOTICE of Appearance by William Sellers Hicks (Hicks, William) (Filed on 10/29/2018) (Entered: 10/29/2018)

10/29/2018

19) NOTICE of Appearance by Matan Shacham (Shacham, Matan) (Filed on 10/29/2018) (Entered: 10/29/2018)

11/01/2018

20) MOTION to Dismiss filed by Facebook, Inc., Motion Hearing set for 12/14/2018 09:00 AM in Oakland, Courtroom 5, 2nd Floor before Judge Jeffrey S. White. Responses due by 11/15/2018. Replies due by 11/23/2018. (Attachments: # 1 Proposed Order) (Hicks, William) (Filed on 11/1/2018) (Entered: 11/01/2018)

11/12/2018

21) STIPULATION REGARDING ENLARGEMENT OF THE NOVEMBER 15, 2018, DEADLINE FOR PLAINTIFF TO RESPOND TO DEFENDANTS NOVEMBER 1, 2018, MOTION TO DISMISS AND RELATED DEADLINES filed by Jason Fyk, Facebook, Inc. (Attachments: # 1 Proposed Order) (Yu, Constance) (Filed on 11/12/2018) Modified on 11/13/2018 (cjlS, COURT STAFF). (Entered: 11/12/2018)

11/13/2018

22) ORDER GRANTING AS MODIFIED 21 STIPULATION REGARDING ENLARGEMENT OF THE NOVEMBER 15, 2018, DEADLINE FOR PLAINTIFF TO RESPOND TO DEFENDANTS NOVEMBER 1, 2018, MOTION TO DISMISS AND RELATED DEADLINES. Signed by Judge Jeffrey S. White on 11/13/18. Responses due by 11/30/2018. Replies due by 12/14/2018. Motion Hearing set for 1/25/2019 09:00 AM in Oakland, Courtroom 5, 2nd Floor before Judge Jeffrey S. White. (jjoS, COURT STAFF) (Filed on 11/13/2018) (Entered: 11/13/2018)

11/28/2018

23) MOTION for Extension of Time to File Response/Reply as to 20 MOTION to Dismiss filed by Jason Fyk, Facebook, Inc. (Attachments: # 1 Proposed Order) (Greyber, Jeffrey) (Filed on 11/28/2018) Modified on 11/28/2018 (cjlS, COURT STAFF). (Entered: 11/28/2018)

11/30/2018

24) **ORDER GRANTING AS MODIFIED 23 MOTION for Extension of Time to File Response/Reply as to 20 MOTION to Dismiss. Signed by Judge Jeffrey S. White on 11/30/18. Responses due by 12/7/2018. Replies due by 12/21/2018. Motion Hearing set for 2/1/2019 09:00 AM in Oakland, Courtroom 5, 2nd Floor before Judge Jeffrey S. White. (jjoS, COURT STAFF) (Filed on 11/30/2018) (Entered: 11/30/2018)**

12/07/2018

25) RESPONSE IN OPPOSITION TO 20 DEFENDANT'S NOVEMBER 1, 2018, MOTION TO DISMISS filed by Jason Fyk. (Yu, Constance) (Filed on 12/7/2018) Modified on 12/7/2018 (cjlS, COURT STAFF). (Entered: 12/07/2018)

12/07/2018

26) PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF 25 HIS RESPONSE IN OPPOSITION TO 20 DEFENDANT'S MOTION TO DISMISS filed by Jason Fyk. (Yu, Constance) (Filed on 12/7/2018) Modified on 12/7/2018 (cjlS, COURT STAFF). (Entered: 12/07/2018)

12/14/2018

27) REPLY (re 20 MOTION to Dismiss) filed by Jason Fyk. (Attachments: # 1 Proposed Order) (Greyber, Jeffrey) (Filed on 12/14/2018) (Entered: 12/14/2018)

12/14/2018

28) Request for Judicial Notice re 27 Reply to Motion to Dismiss filed by Jason Fyk. (Related document(s) 27 (Greyber, Jeffrey) (Filed on 12/14/2018) Modified on 12/14/2018 (cjlS, COURT STAFF). (Entered: 12/14/2018)

12/14/2018

29) STIPULATION WITH [PROPOSED] ORDER Regarding One Week Enlargement of Time for Plaintiff to File a Brief in Response to Facebooks Motion to Dismiss that Complies with Applicable Page Limits, and Enlargement of Related Deadlines filed by Facebook, Inc., Jason Fyk. (Hicks, William) (Filed on 12/14/2018) Modified on 12/14/2018 (cjlS, COURT STAFF). (Entered: 12/14/2018)

12/17/2018

30) **ORDER by Judge Jeffrey S. White granting AS MODIFIED 29 Stipulation Regarding One Week Enlargement of Time for Plaintiff to File a Brief in Response to Facebooks Motion to Dismiss that Complies with Applicable Page Limits, and Enlargement of Related Deadlines. (jjoS, COURT STAFF) (Filed on 12/17/2018) (Entered: 12/17/2018)**

12/17/2018

Set/Reset Deadlines as to 20 MOTION to Dismiss. Responses due by 12/14/2018. Replies due by 12/28/2018. Motion Hearing set for 4/5/2019 09:00 AM in Oakland, Courtroom 5, 2nd Floor before Judge Jeffrey S. White. (jjoS, COURT STAFF) (Filed on 12/17/2018) (Entered: 12/17/2018)

12/28/2018

31) REPLY (re 20 MOTION to Dismiss) filed by Facebook, Inc., (Hicks, William) (Filed on 12/28/2018) (Entered: 12/28/2018)

12/28/2018

32) Opposition to 28 Plaintiff's Request for Judicial Notice filed by Facebook, Inc. (Hicks, William) (Filed on 12/28/2018) Modified on 12/28/2018 (cjlS, COURT STAFF). (Entered: 12/28/2018)

03/19/2019

33) Clerk's Notice of Video Recording Request. Video Camera hearing set for 4/5/2019 09:00 AM. Objections to Video Recording due 3/26 /2019. (jjoS, COURT STAFF) (Filed on 3/19/2019) (Entered: 03/19/2019)

03/25/2019

34) CLERK'S NOTICE CONTINUING HEARING ON 20 MOTION TO DISMISS: Motion Hearing set for 6/21/2019 09:00 AM in Oakland, Courtroom 5, 2nd Floor before Judge Jeffrey S. White. (jjoS, COURT STAFF) (Filed on 3/25/2019) (Entered: 03/25/2019)

04/15/2019

35) Clerk's Notice of Video Recording Request. Video Camera hearing set for 6/21/2019 09:00 AM. Objections to Video Recording due 4/22/2019. (jjoS, COURT STAFF) (Filed on 4/15/2019) (Entered: 04/15/2019)

04/29/2019

36) **Clerks Notice of Video Recording Decision** (Related documents(s) 35) (jjoS, COURT STAFF) (Filed on 4/29/2019) (Entered: 04/ 29/2019)

06/17/2019

37) **CLERK'S NOTICE VACATING HEARING ON 20 MOTION TO DISMISS (jjoS, COURT STAFF) (Filed on 6/17/2019) (Entered: 06/17/2019)**

06/18/2019

38) **ORDER by Judge Jeffrey S. White granting 20 Motion to Dismiss. (jjoS, COURT STAFF) (Filed on 6/18/2019) (Entered: 06/18/2019)**

06/18/2019

39) **JUDGMENT. Signed by Judge Jeffrey S. White on 6/18/19. * * * Civil Case Terminated. (jjoS, COURT STAFF) (Filed on 6/18/2019) (Entered: 06/18/2019)**

06/19/2019

40) NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Jason Fyk. Appeal of Order on Motion to Dismiss 38, Judgment, Terminated Case, Terminate Deadlines and Hearings 39 (Appeal fee of $505 receipt number 0971-13450908 paid.) (Greyber, Jeffrey) (Filed on 6/19/2019) (Entered: 06/19/2019)

06/20/2019

41) USCA Case Number 19-16232 Ninth Circuit Court of Appeals for 40 Notice of Appeal, filed by Jason Fyk. (cjlS, COURT STAFF) (Filed on 6/20/2019) (Entered: 06/20/2019)

NOTICE OF APPEAL FROM A JUDGMENT OR ORDER OF A UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 1. Notice of Appeal from a Judgment or Order of a United States District Court

Name of U.S. District Court:
Northern District of California

U.S. District Court case number:
C-18-05159 JSW

Date case was first filed in U.S. District Court:
08/22/2018

Date of the judgment or order you are appealing:
06/18/2019

Fee paid for appeal? Yes

List all Appellants

Jason Fyk

Is this a cross-appeal? No

Was there a previous appeal in this case? No

Your mailing address:

50 Gibble Road
Cochranville, PA 19330

Signature: Jason Fyk

Date: Jun 19, 2019

Form 6. Representation Statement

Instruction for this form: http://www.ca9.uscourts.gov/forms/form06instructions.pdf

Appellant(s)

(List each party filing the appeal, do not use "et al." or other abbreviations.)

Name(s) of party/parties: Jason Fyk

Name(s) of counsel (if any):

Callagy Law, P.C. – Sean Callagy, Esq.;
Michael J. Smikun, Esq.;
Jeffrey Greyber, Esq.

Address:

650 From Road, Suite 565,
Paramus, NJ 07652

Telephone number(s): 201-261-1700

Email(s): scallagy@callagylaw.com

Is counsel registered for Electronic Filing in the 9th Circuit? Yes

Appellee(s)

(List only the names of parties and counsel who will oppose you on appeal. List separately represented parties separately.)

Name(s) of party/parties: Facebook, Inc.

Name(s) of counsel (if any):

Keker, Van nest & Peters, LLP
William Hicks, Esq.;
Paven Malhotra, Esq.;
Matan Shacham, Esq.

Address:

633 Battery Street,
San Francisco, CA 94111

Telephone number(s): 415-391-5400

Email(s): whicks@keker.com

Appellants

Name(s) of party/parties: Jason Fyk

Name(s) of counsel (if any):

Putterman, Yu LLP – Constance Yu, Esq.

Address:

345 California Street,
Suite 1160, San Francisco, CA 94104

Telephone number(s): 415-839-8779

Email(s): cyu@plylaw.com

Is counsel registered for Electronic Filing in the 9th Circuit? Yes

Appellees

Name(s) of party/parties: N/A

Name(s) of counsel (if any): N/A

Name(s) of party/parties: N/A

Name(s) of counsel (if any): N/A

JUSTICE THOMAS' STATEMENT IN *MALWAREBYTES, INC. v. ENIGMA SOFTWARE GROUP USA, LLC* (OCTOBER 13, 2020)

SUPREME COURT OF THE UNITED STATES

Cite as: 592 U. S. ____ (2020)

MALWAREBYTES, INC.

v.

ENIGMA SOFTWARE GROUP USA, LLC,

No. 19–1284.
Decided October 13, 2020

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The petition for a writ of certiorari is denied.

Statement of JUSTICE THOMAS respecting the denial of certiorari.

This petition asks us to interpret a provision commonly called § 230, a federal law enacted in 1996 that gives Internet platforms immunity from some civil and criminal claims. 47 U.S.C. § 230. When Congress enacted the statute, most of today's major Internet platforms did not exist. And in the 24 years since, we have never interpreted this provision. But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world.

This case involves Enigma Software Group USA and Malwarebytes, two competitors that provide software to enable individuals to filter unwanted content, such as content posing security risks. Enigma sued Malwarebytes, alleging that Malwarebytes engaged in anticompetitive conduct by reconfiguring its products to make it difficult for consumers to download and use Enigma products. In its defense, Malwarebytes invoked a provision of § 230 that states that a computer service provider cannot be held liable for providing tools "to restrict access to material" that it "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." § 230(c)(2). The Ninth Circuit relied heavily on the "policy" and "purpose" of § 230 to conclude that immunity is unavailable when a plaintiff alleges anticompetitive conduct.

The decision is one of the few where courts have relied on purpose and policy to *deny* immunity under § 230. But the court's decision to stress purpose and policy is familiar. Courts have long emphasized nontextual arguments when interpreting § 230, leaving questionable precedent in their wake.

I agree with the Court's decision not to take up this case. I write to explain why, in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms.

I

Enacted at the dawn of the dot-com era, § 230 contains two subsections that protect computer service providers from some civil and criminal claims. The first is definitional. It 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." § 230(c)(1). This provision ensures that a company (like an e-mail provider) can host and transmit third-party content without subjecting itself to the liability that sometimes attaches to the publisher or speaker of unlawful content. The second subsection provides direct immunity from some civil liability. It states that no computer service provider "shall be held liable" for (A) good-faith acts to restrict access to, or remove, certain types of objectionable content; or (B) giving consumers tools to filter the same types of content. § 230(c)(2). This limited protection enables companies to create community guidelines and remove harmful content without worrying about legal reprisal.

Congress enacted this statute against specific background legal principles. *See Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005) (interpreting a law by looking to the "backdrop against which Congress" acted). Traditionally, laws governing illegal content distinguished between publishers or speakers (like newspapers) and distributors (like newsstands and libraries). Publishers or speakers were subjected to a higher standard because they exercised editorial control. They could be strictly liable for transmitting illegal content. But distributors were different. They acted as a mere conduit without exercising editorial control, and they often transmitted far more content than they could be expected to review. Distributors were thus liable only when they knew (or constructively knew) that content was illegal. *See*, *e.g., Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, *3 (Sup. Ct. NY, May 24, 1995); Restatement

(Second) of Torts § 581 (1976); *cf. Smith v. California*, 361 U.S. 147, 153 (1959) (applying a similar principle outside the defamation context).

The year before Congress enacted § 230, one court blurred this distinction. An early Internet company was sued for failing to take down defamatory content posted by an unidentified commenter on a message board. The company contended that it merely distributed the defamatory statement. But the company had also held itself out as a family-friendly service provider that moderated and took down offensive content. The court determined that the company's decision to exercise editorial control over some content "render[ed] it a publisher" even for content it merely distributed. *Stratton Oakmont*, 1995 WL 323710, *3–*4.

Taken at face value, § 230(c) alters the *Stratton Oakmont* rule in two respects. First, § 230(c)(1) indicates that an Internet provider does not become the publisher of a piece of third-party content—and thus subjected to strict liability—simply by hosting or distributing that content. Second, § 230(c)(2)(A) provides an additional degree of immunity when companies take down or restrict access to objectionable content, so long as the company acts in good faith. In short, the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A).

This modest understanding is a far cry from what has prevailed in court. Adopting the too-common practice of reading extra immunity into statutes where it does not belong, *see Baxter v. Bracey*, 590 U.S. ___

(2020) (THOMAS, J., dissenting from denial of certiorari), courts have relied on policy and purpose arguments to grant sweeping protection to Internet platforms. *E.g.*, 1 R. Smolla, Law of Defamation § 4:86, p. 4–380 (2d ed. 2019) ("[C]ourts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress); accord, Rustad & Koenig, Rebooting Cybertort Law, 80 Wash. L. Rev. 335, 342–343 (2005) (similar). I address several areas of concern.

A

Courts have discarded the longstanding distinction between "publisher" liability and "distributor" liability. Although the text of § 230(c)(1) grants immunity only from "publisher" or "speaker" liability, the first appellate court to consider the statute held that it eliminates distributor liability too—that is, § 230 confers immunity even when a company distributes content that it *knows* is illegal. *Zeran v. America Online, Inc.,* 129 F.3d 327, 331–334 (CA4 1997). In reaching this conclusion, the court stressed that permitting distributor liability "would defeat the two primary purposes of the statute," namely, "immuniz-[ing] service providers" and encouraging "selfregulation." *Id.*, at 331, 334. And subsequent decisions, citing *Zeran*, have adopted this holding as a categorical rule across all contexts. *See*, *e.g.*, *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (CA1 2007); *Shiamili v. Real Estate Group of NY, Inc.*, 17 N. Y. 3d 281, 288–289, 952 N. E. 2d 1011, 1017 (2011); *Doe v. Bates*, 2006 WL 3813758, *18 (ED Tex., Dec. 27, 2006).

To be sure, recognizing some overlap between publishers and distributors is not unheard of Sources sometimes use language that arguably blurs the distinction between publishers and distributors. One source respectively refers to them as "primary publishers" and "secondary publishers or disseminators," explaining that distributors can be "charged with publication." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 799, 803 (5th ed. 1984).

Yet there are good reasons to question this interpretation.

First, Congress expressly imposed distributor liability in the very same Act that included § 230. Section 502 of the Communications Decency Act makes it a crime to "knowingly . . . display" obscene material to children, even if a third party created that content. 110 Stat. 133–134 (codified at 47 U.S.C. § 223(d)). This section is enforceable by civil remedy. 47 U.S.C. § 207. It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability in the very Act in which Congress explicitly imposed it.

Second, Congress enacted § 230 just one year after *Stratton Oakmont* used the terms "publisher" and "distributor," instead of "primary publisher" and "secondary publisher." If, as courts suggest, *Stratton Oakmont* was the legal backdrop on which Congress legislated, *e.g., FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (CA10 2009), one might expect Congress to use the same terms *Stratton Oakmont* used.

Third, had Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in § 230(c)(1):

No provider "shall be held liable" for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content. § 230(c)(2). Where Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful. *Russello v. United States*, 464 U.S. 16, 23 (1983); *cf. Doe v. America Online, Inc.*, 783 So.2d 1010, 1025 (Fla. 2001) (Lewis, J., dissenting) (relying on this rule to reject the interpretation that § 230 eliminated distributor liability).

B

Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content. Section 230(c)(1) protects a company from publisher liability only when content is "provided by *another* information content provider." (Emphasis added.) Nowhere does this provision protect a company that is itself the information content provider. *See Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1165 (CA9 2008). And an information content provider is not just the primary author or creator; it is anyone "responsible, *in whole or in part*, for the creation or development" of the content § 230(f)(3) (emphasis added).

But from the beginning, courts have held that § 230(c)(1) protects the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or *alter* content." *E.g., Zeran*, 129 F.3d, at 330 (emphasis added); *cf. id.*, at 332 (stating also that § 230(c)(1) protects the

decision to "edit"). Only later did courts wrestle with the language in § 230(f)(3) suggesting providers are liable for content they help develop "in part." To harmonize that text with the interpretation that § 230(c)(1) protects "traditional editorial functions," courts relied on policy arguments to narrowly construe § 230(f)(3) to cover only substantial or material edits and additions. *E.g., Batzel v. Smith*, 333 F.3d 1018, 1031, and n. 18 (CA9 2003) ("[A] central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted").

Under this interpretation, a company can solicit thousands of potentially defamatory statements, "selec[t] and edi[t] . . . for publication" several of those statements, add commentary, and then feature the final product prominently over other submissions—all while enjoying immunity. *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 403, 410, 416 (CA6 2014) (interpreting "development" narrowly to "preserv[e] the broad immunity th[at § 230] provides for website operators' exercise of traditional publisher functions"). To say that editing a statement and adding commentary in this context does not "creat[e] or develo[p]" the final product, even in part, is dubious.

C

The decisions that broadly interpret § 230(c)(1) to protect traditional publisher functions also eviscerated the narrower liability shield Congress included in the statute. Section 230(c)(2)(A) encourages companies to create content guidelines and protects those companies that "in good faith . . . restrict access to or

availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Taken together, both provisions in § 230(c) most naturally read to protect companies when they unknowingly *decline* to exercise editorial functions to edit or remove third-party content, § 230(c)(1), and when they *decide* to exercise those editorial functions in good faith, § 230(c)(2)(A).

But by construing § 230(c)(1) to protect *any* decision to edit or remove content, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (CA9 2009), courts have curtailed the limits Congress placed on decisions to remove content, *see e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, *3 (MD Fla., Feb. 8, 2017) (rejecting the interpretation that § 230(c)(1) protects removal decisions because it would "swallo[w] the more specific immunity in (c)(2)"). With no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (CA9 2017), *aff'g* 144 F.Supp.3d 1088, 1094 (ND Cal. 2015) (concluding that "'any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune'" under § 230(c)(1)).

D

Courts also have extended § 230 to protect companies from a broad array of traditional product-defect claims. In one case, for example, several victims of human trafficking alleged that an Internet company that allowed users to post classified ads for "Escorts" deliberately structured its web-site to facilitate illegal

human trafficking. Among other things, the company "tailored its posting requirements to make sex trafficking easier," accepted anonymous payments, failed to verify e-mails, and stripped metadata from photographs to make crimes harder to track. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 16–21 (CA1 2016). Bound by precedent creating a "capacious conception of what it means to treat a website operator as the publisher or speaker," the court held that § 230 protected these web-site design decisions and thus barred these claims. *Id.,* at 19; *see also M. A. v. Village Voice Media Holdings, LLC*, 809 F.Supp.2d 1041, 1048 (ED Mo. 2011).

Consider also a recent decision granting full immunity to a company for recommending content by terrorists. *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (CA2 2019), cert. denied, 590 U.S. ___ (2020). The court first pressed the policy argument that, to pursue "Congress's objectives, . . . the text of Section 230(c)(1) should be construed broadly in favor of immunity." 934 F.3d, at 64. It then granted immunity, reasoning that recommending content "is an essential result of publishing." *Id.*, at 66. Unconvinced, the dissent noted that, even if all publisher conduct is protected by § 230(c)(1), it "strains the English language to say that in targeting and recommending these writings to users . . . Facebook is acting as 'the *publisher* of . . . information provided by another information content provider.'" *Id.*, at 76–77 (Katzmann, C.J., concurring in part and dissenting in part) (quoting § 230(c)(1)).

Other examples abound. One court granted immunity on a design-defect claim concerning a dating application that allegedly lacked basic safety features

to prevent harassment and impersonation. *Herrick v. Grindr LLC*, 765 Fed. Appx. 586, 591 (CA2 2019), cert. denied, 589 U.S. ___ (2019). Another granted immunity on a claim that a social media company defectively designed its product by creating a feature that encouraged reckless driving. *Lemmon v. Snap, Inc.*, 440 F.Supp.3d 1103, 1107, 1113 (CD Cal. 2020).

A common thread through all these cases is that the plaintiffs were not necessarily trying to hold the defendants liable "as the publisher or speaker" of third-party content. § 230(c)(1). Nor did their claims seek to hold defendants liable for removing content in good faith. § 230(c)(2). Their claims rested instead on alleged product design flaws—that is, the defendant's own misconduct. *Cf. Accusearch*, 570 F.3d, at 1204 (Tymkovich, J., concurring) (stating that § 230 should not apply when the plaintiff sues over a defendant's "*conduct* rather than for the *content* of the information"). Yet courts, filtering their decisions through the policy argument that "Section 230(c)(1) should be construed broadly," *Force*, 934 F.3d, at 64, give defendants immunity.

II

Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail. Moreover, States and the Federal Government are free to update their liability laws to make them more appropriate for an Internet-driven society.

Extending § 230 immunity beyond the natural reading of the text can have serious consequences. Before giving companies immunity from civil claims for "knowingly host[ing] illegal child pornography," *Bates*, 2006 WL 3813758, *3, or for race discrimination, *Sikhs for Justice*, 697 Fed. Appx., at 526, we should be certain that is what the law demands.

Without the benefit of briefing on the merits, we need not decide today the correct interpretation of § 230. But in an appropriate case, it behooves us to do so.

MARK ZUCKERBERG, *UNDERSTANDING FACEBOOK'S BUSINESS MODEL* (JANUARY 24, 2019)

By Mark Zuckerberg, Founder, Chairman and Chief Executive Officer

Facebook turns 15 next month. When I started Facebook, I wasn't trying to build a global company. I realized you could find almost anything on the internet—music, books, information—except the thing that matters most: people. So I built a service people could use to connect and learn about each other. Over the years, billions have found this useful, and we've built more services that people around the world love and use every day.

Recently I've heard many questions about our business model, so I want to explain the principles of how we operate.

I believe everyone should have a voice and be able to connect. If we're committed to serving everyone, then we need a service that is affordable to everyone. The best way to do that is to offer services for free, which ads enable us to do.

People consistently tell us that if they're going to see ads, they want them to be relevant. That means we need to understand their interests. So based on what pages people like, what they click on, and other signals, we create categories—for example, people who like pages about gardening and live in Spain—and then charge advertisers to show ads to that category. Although advertising to specific groups existed well before the internet, online advertising allows

much more precise targeting and therefore more-relevant ads.

The internet also allows far greater transparency and control over what ads you see than TV, radio or print. On Facebook, you have control over what information we use to show you ads, and you can block any advertiser from reaching you. You can find out why you're seeing an ad and change your preferences to get ads you're interested in. And you can use our transparency tools to see every different ad an advertiser is showing to anyone else.

Still, some are concerned about the complexity of this model. In an ordinary transaction, you pay a company for a product or service they provide. Here you get our services for free—and we work separately with advertisers to show you relevant ads. This model can feel opaque, and we're all distrustful of systems we don't understand.

Sometimes this means people assume we do things that we don't do. For example, we don't sell people's data, even though it's often reported that we do. In fact, selling people's information to advertisers would be counter to our business interests, because it would reduce the unique value of our service to advertisers. We have a strong incentive to protect people's information from being accessed by anyone else.

Some worry that ads create a misalignment of interests between us and people who use our services. I'm often asked if we have an incentive to increase engagement on Facebook because that creates more advertising real estate, even if it's not in people's best interests.

We're very focused on helping people share and connect more, because the purpose of our service is to help people stay in touch with family, friends and communities. But from a business perspective, it's important that their time is well spent, or they won't use our services as much over the long term. Clickbait and other junk may drive engagement in the near term, but it would be foolish for us to show this intentionally, because it's not what people want.

Another question is whether we leave harmful or divisive content up because it drives engagement. We don't. People consistently tell us they don't want to see this content. Advertisers don't want their brands anywhere near it. The only reason bad content remains is because the people and artificial-intelligence systems we use to review it are not perfect—not because we have an incentive to ignore it. Our systems are still evolving and improving.

Finally, there's the important question of whether the advertising model encourages companies like ours to use and store more information than we otherwise would.

There's no question that we collect some information for ads—but that information is generally important for security and operating our services as well. For example, companies often put code in their apps and websites so when a person checks out an item, they later send a reminder to complete the purchase. But this type of signal can also be important for detecting fraud or fake accounts.

We give people complete control over whether we use this information for ads, but we don't let them control how we use it for security or operating

our services. And when we asked people for permission to use this information to improve their ads as part of our compliance with the European Union's General Data Protection Regulation, the vast majority agreed because they prefer more relevant ads.

Ultimately, I believe the most important principles around data are transparency, choice and control. We need to be clear about the ways we're using information, and people need to have clear choices about how their information is used. We believe regulation that codifies these principles across the internet would be good for everyone.

It's important to get this right, because there are clear benefits to this business model. Billions of people get a free service to stay connected to those they care about and to express themselves. And small businesses—which create most of the jobs and economic growth around the world—get access to tools that help them thrive. There are more than 90 million small businesses on Facebook, and they make up a large part of our business. Most couldn't afford to buy TV ads or billboards, but now they have access to tools that only big companies could use before. In a global survey, half the businesses on Facebook say they've hired more people since they joined. They're using our services to create millions of jobs.

For us, technology has always been about putting power in the hands of as many people as possible. If you believe in a world where everyone gets an opportunity to use their voice and an equal chance to be heard, where anyone can start a business from scratch, then it's important to build technology that

serves everyone. That's the world we're building for every day, and our business model makes it possible.

IS FACEBOOK A PUBLISHER IN PUBLIC IT SAYS NO, BUT IN COURT IT SAYS YES (OCTOBER 28, 2020)

Sam Levin
The Guardian
July 3, 2018

IN ITS DEFENSE AGAINST A FORMER APP STARTUP, FACEBOOK IS CONTRADICTING ITS LONG-HELD CLAIM TO BE SIMPLY A NEUTRAL PLATFORM

Facebook has long had the same public response when questioned about its disruption of the news industry: it is a tech platform, not a publisher or a media company.

But in a small courtroom in California's Redwood City on Monday, attorneys for the social media company presented a different message from the one executives have made to Congress, in interviews and in speeches: Facebook, they repeatedly argued, is a publisher, and a company that makes editorial decisions, which are protected by the first amendment.

The contradictory claim is Facebook's latest tactic against a high-profile lawsuit, exposing a growing tension for the Silicon Valley corporation, which has long presented itself as neutral platform that does not have traditional journalistic responsibilities.

The suit, filed by an app startup, alleges that Mark Zuckerberg developed a "malicious and fraudulent scheme" to exploit users' personal data and force rival companies out of business. Facebook, meanwhile, is arguing that its decisions about "what not to publish" should be protected because it is a "publisher".

In court, Sonal Mehta, a lawyer for Facebook, even drew comparison with traditional media: "The publisher discretion is a free speech right irrespective of what technological means is used. A newspaper has a publisher function whether they are doing it on their website, in a printed copy or through the news alerts."

The plaintiff, a former startup called Six4Three, first filed the suit in 2015 after Facebook removed app developers' access to friends' data. The company had built a controversial and ultimately failed app called Pikinis, which allowed people to filter photos to find ones with people in bikinis and other swimwear.

Six4Three attorneys have alleged that Facebook enticed developers to create apps for its platform by implying creators would have long-term access to the site's huge amounts of valuable personal data and then later cut off access, effectively defrauding them. The case delves into some of the privacy concerns sparked by the Cambridge Analytica scandal.

Facebook has rejected all claims. Mehta argued in court Monday that Facebook's decisions about data access were a "quintessential publisher function" and constituted "protected" activity, adding that this "includes both the decision of what to publish and the decision of what not to publish".

David Godkin, an attorney for Six4Three, later responded: "For years, Facebook has been saying publicly that it's not a media company. This is a complete 180."

Questions about Facebook's moral and legal responsibilities as a publisher have escalated surrounding its role in spreading false news and propaganda, along with questionable censorship decisions.

Eric Goldman, a Santa Clara University law professor, said it was frustrating to see Facebook publicly deny that it was a publisher in some contexts but then claim it as a defense in court.

"It's politically expedient to deflect responsibility for making editorial judgements by claiming to be a platform," he said, adding, "But it makes editorial decisions all the time, and it's making them more frequently."

Facebook may be resistant to embrace its role as a publisher due to stricter laws and regulations outside of the US that could cause the company trouble, Goldman said.

Still, he argued, Facebook should have the right to make these kinds of decisions about data access and predicted that the company would prevail in court: "Facebook should have the power to stop apps

like Pikinis . . . Facebook was far too loose with its data, and now it's having to clean it up."

In the Six4Three case, Facebook has also cited Section 230 of the Communications Decency Act, US legislation that paved the way for the modern internet by asserting that platforms cannot be liable for content users post on their sites. In court filings, Facebook quoted the law saying providers of a "computer service" should not be "treated as the publisher" of information from others.

"It just strikes me as fundamentally problematic," said Jane Kirtley, a professor of media ethics and law at the University of Minnesota. "On one hand, you're trying to argue you're this publisher making editorial judgments. But then they turn around and claim they are protected under [Section 230] because they are not publishers."

Natalie Naugle, Facebook's associate general counsel for litigation, defended the company's legal

strategy in a statement to the Guardian, saying: "Facebook explained in today's hearing that we decide what content to make available through our platform, a right protected by Section 230. Like many other technology companies, we rely on the discretion protected by this law to police bad behavior on our service."

Facebook spokespeople declined to answer questions about its insistence outside of court that it is not a publisher or media entity.

Daphne Keller, of the Stanford Center for Internet and Society, said Section 230 was designed to allow platforms like Facebook to do some moderation and make editorial decisions without generally being liable for users' posts: "They need to be able to make discretionary choices about content."

The law seemed to be on Facebook's side, she said, but added that it was an unusual case given the focus on app data access while previous cases have centered on more straight forward censorship claims.

Rebecca Tushnet, a Harvard law school professor, said it seemed Facebook was "owning up to the reality that we all see, that it has an important place in the media environment".

Kathleen Culver, a University of Wisconsin-Madison journalism professor, said Facebook must consider its ethical obligations outside of its legal responsibilities.

But, she added, it was difficult to define Facebook's media role using traditional terms like publisher: "What we're navigating is a space where the language

we have to date does not match the technology that has now been developed."