No. 19-16232

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK
Plaintiff-Appellant,

v.

FACEBOOK, INC.
Defendant-Appellee.

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)

APPELLANT'S OPENING BRIEF

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)

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

Attorneys for Plaintiff-Appellant

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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]

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[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).

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.

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) immunizes Facebook from its own active[5] hand in **(a)** its unlawfully destroying / devaluing the subject businesses / pages while in Fyk's name

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[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.

[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).

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 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

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[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.

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 immunity in order to tortiously interfere with other businesses

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

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)**

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[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.

applying (c)(1) immunity in a manner that contravenes canons 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 interactive 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]

[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.*,

Rather, upon information and belief, that 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

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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 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, 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).

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*.

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:

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[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.

- "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 parties 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

[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

(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) 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

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faith" / motivation assessment) fit the (c)(2)(A) paradigm because there was plainly zero "good faith" underlying Facebook's motivation for crippling Fyk.

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.

[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).

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 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).

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

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 competitor (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 other California district courts

[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.

(*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

[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.

that this Court clear the muddied water that is the CDA, which such muddied 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.

Dated: September 18, 2019

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

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2019, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM / ECF system. Participants in the case who are registered CM / ECF users will be served by the appellate CM / ECF system.

/s/ Michael J. Smikun, Esq.
Michael J. Smikun, Esq.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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