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)

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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)** 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 /

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[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' 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."

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 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

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

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

[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.

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 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*

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[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 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).

(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.

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 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

[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.

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 Samaritan" 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

[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.

("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 adjudicated on a motion on the pleadings. *See, e.g.*, *Spy Phone Labs, LLC*

[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.

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 Facebook 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.

[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).

- 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 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 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.

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[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 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.

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 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.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2020, 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.

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