Appeal No. 21-16997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK
Plaintiff–Appellant,

v.

FACEBOOK, INC.
Defendant-Appellee.

On Appeal from Denial of Motion for Relief Pursuant to Fed.R.Civ.P. 60(b) to Vacate and Set Aside Entry of Judgment of the United States District Court for the Northern District of California, 4:18-cv-05159 (Hon. Jeffrey S. White)

APPELLANT JASON FYK'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This is the second appeal involving Plaintiff / Appellant, Jason Fyk ("Fyk"), and Defendant / Appellee, Facebook, Inc. ("Facebook"), relating to Facebook's blocking of Fyk's Facebook business / pages, not for substance of content but because of Facebook's anti-competitive conduct, motivated by financial gain, resulting in tortious interference with (*i.e.*, the destruction of) Fyk's livelihood, as alleged in Fyk's underlying Verified Complaint. In the first appeal, Fyk challenged the District Court's dismissal of the case based on Facebook's assertion that it was entitled to immunity under Title 47, United States Code, Section 230(c)(1) regardless of whether or not its actions would have been unlawful outside the ether of the Internet.[1, 2] The United States District Court for the Northern District of California (Judge Jeffrey S. White presiding) exercised jurisdiction in this case under

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

[2] "**ER** __" refers to Plaintiff's / Appellant's Excerpt of Record. **ER** 176-204 is Fyk's August 22, 2018, Verified Complaint, 4:18-cv-05159-JSW [D.E. 1]; **ER** 158-175 is Facebook's November 1, 2018, Motion to Dismiss, [D.E. 20]; **ER** 108-157 is Fyk's December 14, 2018, Response in Opposition, [D.E. 27]; **ER** 90-107 is Facebook's December 28, 2018, Reply, [D.E. 31]; **ER** 86-89 is the District Court's June 18, 2019, dismissal Order, [D.E. 38]; and **ER** 84-85 is the District Court's June 18, 2019, related Judgment, [D.E. 39].

Title 28, United States Code, Section 1332, as the parties were / are diverse and the amount in controversy exceeded / 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 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 appeal challenges the District Court's erroneous decision to divest 230(c)(1) from the "Good Samaritan" requisite that *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019) requires for 230(c)(2) in denying the Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment (hereafter, "Motion for Reconsideration") filed on March 22, 2021, by Fyk.[3] The District Court erred by failing to distinguish between the CDA's immunity afforded to Facebook (in certain circumstances discussed below) for policing *content* versus no immunity for Facebook's *conduct,* which is fundamental to the CDA's immunity. This appeal stems from the legal error of the

[3] **ER** 21-83 is the Motion for Reconsideration, [D.E. 46] (with Exhibits A-D); **ER** 17-20 is Facebook's April 5, 2021, Response to Motion for Relief Pursuant to Fed. R. Civ. P. to Vacate and Set Aside Judgment, [D.E. 47] (hereafter, the "Response"); **ER** 5-16 is Fyk's April 12, 2021, Reply to Facebook's April 5, 2021, Response, [D.E. 48] (hereafter, the "Reply"); **ER** 3-4 is the District Court's November 1, 2021, Order Denying Motion for Relief Pursuant to Fed. R. Civ. P. 60(b), [D.E. 51] (hereafter, the "Order").

Order;[4] the material misstatement of facts subsumed in the Order,[5] and the resulting inequity of the Order denying Relief, a result inconsistent with the CDA.[6]

This case asks whether the "Good Samaritan" general provision expressed in 230(c) of the CDA, exclusively applies to the examination of section 230(c)(2) or does the "Good Samaritan" general provision apply to all of section 230(c) including section 230(c)(1)?

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[4] The District Court's failure to apply this Court's *Enigma* decision, which was / is controlling authority in the Ninth Circuit, compels Rule 60(b)(5) relief here.

[5] The District Court's continued adoption of factual misstatements made by Facebook regarding Fyk's businesses, rather than Fyk's factual allegations in his Verified Complaint (which must be considered true for the purposes of a Rule 12(b)(6) motion) warrant Rule 60(b)(3) relief here. The District Court should have accepted Fyk's Verified Complaint allegations as true and, correspondingly, that Facebook's *conduct* and not Fyk's *content* formed the basis of causes of action against Facebook (*e.g.*, Fyk's allegations that his case was a 230(c)(2)(A) case, not 230(c)(1)) and draw any reasonable inferences therefrom in Fyk's favor rather than ratifying Facebook's Motion to Dismiss arguments that this case was about 230(c)(1).

[6] In the District Court, there has never been a single hearing for Fyk to present argument about how Fyk contends that the CDA was misapplied or to proffer facts that might have afforded Fyk to allege facts to more clearly articulate the causes of action that are based on Facebook's *conduct*, rather than Fyk's *content*. Because Rule 60(b)(6) is the "grand reservoir" of power afforded to courts to uphold justice, especially where (as here) "extraordinary circumstances" exist, insofar as the District Court dismissed Fyk's case as framed by Facebook, rather than the actual allegations in Fyk's Verified Complaint.

This Court has jurisdiction pursuant to Title 28, United States Code, Section 1291 and its review of the Order is under an abuse of discretion standard. *See, e.g.*, *Starr v. City of Angels Camp*, 99 Fed.Appx. 792, 793 (9th Cir. 2004).

On December 1, 2021, Fyk filed his Notice of Appeal from a Judgment or Order of a United States District Court, along with his Representation Statement. **ER** 205-207. On December 2, 2021, the Time Schedule Order was entered, prescribing February 1, 2022, as Fyk's opening brief deadline. Thereafter, an enlargement of the February 1, 2022, deadline was procured, extending that deadline to March 3, 2022.

ISSUES PRESENTED

This appeal asks:

(1) In denying Fyk's request for Federal Rule of Civil Procedure 60(b)(5) relief, did the District Court err in holding that the anti-competitive animus non-immunity holding of *Enigma*[7] only applies to a 230(c)(2) challenge, notwithstanding the fact that **(a)** the "Good Samaritan" general directive / general provision / intelligible principle (with anti-competitive animus being the antithesis of "Good Samaritanism") is applicable to all of 230(c) (whether that be 230(c)(1) or

[7] *See Enigma Software Group USA, LLC v. Malwarebytes, Inc.* 946 F.3d 1040 (9th Cir. 2019) (wherein this Court determined that conduct driven by an anti-competitive animus does not enjoy CDA immunity at the 230(c) Good Samaritan threshold), cert. denied *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13, 208 L. Ed. 2d 197 (2020).

230(c)(2)), based on commonsense, the very title of 230(c) (*i.e.*, express statutory language), and what a general directive / general provision / intelligible principle handed down by Congress is supposed to be; and / or **(b)** the express language of 230(c)(2)(B) pulls in 230(c)(1), further demonstrating that "Good Samaritanism" is not a general directive / general provision / intelligible principle that can somehow be selectively applied to just Section 230(c)(2) as the District Court and Facebook wrongly think; *i.e.*, further demonstrating that this Court's anti-competitive animus non-immunity *Enigma* holding is not (nor could be consistent with canons of statutory construction; *e.g.*, whole text, harmonious reading, irreconcilability, and / or surplusage tenets) isolated to a 230(c)(2) scenario? Put differently, is an Interactive Computer Service ("ICS," such as Facebook or Malwarebytes),[8] entitled to *any* CDA immunity when the ICS' *action* is motivated by an anti-competitive animus (as was alleged by Enigma against Malwarebytes, and as was alleged by Fyk against Facebook)?[9]

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[8] "Interactive Computer Service" is defined in 230(f)(3).

[9] Here, Fyk alleged that Facebook took *action* against Fyk's Facebook businesses / pages, which had the effect of destroying Fyk's businesses that were valued at the time in the nine-figure range, so that Facebook could make more money after steering Fyk's businesses / pages into the hands of a Fyk competitor that paid Facebook appreciably more money. The content remained the same, but Facebook did not take discretionary CDA action against the better paying commercial Facebook user. *See* [D.E. 1], **ER** 176-204. Justice Thomas posits, *see Malwarebytes*, 141 S.Ct. 13: (a) The first logical point for 230(c) immunity analysis is the "Good Samaritan" general directive overarching all of 230(c). If an ICS' action is not that of a "Good Samaritan," then the immunity analysis stops at the 230(c) threshold; (b)

(2) Did the District Court err in determining that Fyk was not entitled to Rule 60(b)(6) relief commensurate with a showing of "extraordinary circumstances"?

(3) Did the District Court err in denying Fyk's unopposed request for Rule 60(b)(3) relief to the extent that the requested relief is predicated on the District Court's having erroneously relied upon Facebook's (mis)characterization of Fyk's content as the basis of the lawsuit, rather than the actual claims and factual allegations in Fyk's Verified Complaint, which sounded in tort and California code, and which derived from Facebook's *conduct*? The District Court's dismissal without

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If an ICS (*e.g.*, Facebook) takes *no action* over the content of an Information Content Provider ("ICP," like Fyk, with "Information Content Provider" being defined in 230(f)(3)), then Facebook enjoys immunity under 230(c)(1); (c) if an ICS takes *action* over the content of an ICP, then, under 230(c)(2)(A), the ICS enjoys no immunity for such action unless such action is demonstrably taken in "good faith," which such "good faith" analysis is merits-based (*i.e.*, not at the initial pleading stage) and, for all intents and purposes, an extension of the "Good Samaritan" general directive; and (d) If an ICS provides an ICP #1 (like a parent / ICP / user concerned with protecting their child from Internet pornography) with the tools / services needed to eradicate the kind of Internet garbage contemplated by 230(c)(2)(A) posted by another ICP #2, then the ICS enjoys immunity under 230(c)(2)(B) just like with respect to 230(c)(1) (with the language of 230(c)(2)(B) expressly relating back to 230(c)(1)) because in either the 230(c)(1) or 230(c)(2)(B) setting, the ICS took *no direct action* over the content of a user. The proper application of 230(c) (non-)immunity should not be a guessing game, which is the practical result of the mixed jurisprudence in the past twenty-six years since the CDA's enactment. *See Malwarebytes, Inc.*, 141 S.Ct. at 13 (wherein Justice Thomas provides a detailed Statement of the judicial abuse across the country, including from within California's court system, that has turned Section 230 into legal morass leaving no clear interpretation about the limits of immunity).

leave to amend, and subsequent judgment, denial of reconsideration – all without oral argument – violated Fyk's Due Process rights.

STATEMENT OF THE CASE / RELEVANT FACTS

Fyk was the owner-publisher of several Facebook businesses / pages. For years, Fyk used social media to create and post humorous content on Facebook's purported "free" social media platform. Fyk's content was extremely popular and, ultimately, Fyk had more than 25,000,000 documented followers at peak on his Facebook pages / businesses. According to some ratings, Fyk's Facebook page (WTF Magazine) was ranked the fifth most popular page on Facebook, ahead of competitors like BuzzFeed, College Humor, Upworthy, and large media companies like CNN. Fyk's large Facebook presence resulted in his pages becoming income generating business ventures, generating hundreds of thousands of dollars a month in advertising and lead generating activities, which such value was derived from Fyk's high-volume fan base distribution. *See, e.g.*, **ER** 177-178 at ¶¶ 1-2, 5; **ER** 180 at ¶ 15; **ER** 181 at ¶ 16.

Between 2010 and 2016, Facebook implemented an "optional" paid for reach program. Facebook began selling distribution, which it had previously offered for free and, in doing so, Facebook became a direct competitor of users like Fyk. This advertising business model "create[d] a misalignment of interests between [Facebook] and people who use [Facebook's] services," Mark Zuckerberg,

Understanding Facebook's Business Model (Jan. 24, 2019), which incentivized(s) Facebook to selectively and tortiously interfere with users' ability to monetize by removing content or distribution from non-paying / low-paying users in favor of Facebook's higher paying, "sponsored," "high[er] quality participants in the ecosystem." Mark Zuckerberg Interview / Public Discussion With Mathias Döpfner (Apr. 1, 2019). *See, e.g.,* **ER** 181-182 at ¶¶ 17-18.

A high-ranking Facebook executive bluntly told Fyk that Fyk's business was disfavored compared to other businesses that opted into paying Facebook extraordinary sums of advertising money. *See, e.g.,* **ER** 182 at ¶ 18; **ER** 194 at ¶47. Although Fyk reluctantly opted into Facebook's commercial program at a relatively low amount of money (in comparison to others, such as Fyk's competitor), Facebook reduced the reach / distribution / visibility of Fyk's pages / businesses by over 99% overnight. *See, e.g.,* **ER** 182-184 at ¶¶ 19-21. Then, in October 2016, Facebook fully de-activated ("restricted access to or availability of Fyk's material") several of Fyk's pages / businesses, totaling over 14,000,000 fans cumulatively, under the fraudulent aegis of "content policing" pursuant to Section (c)(2)(a). *See, e.g.,* **ER** 184-185 at ¶¶ 21-22. Facebook's content policing, however, was not uniformly applied or enforced due to Facebook's desire for financial gain. *See, e.g.*, **ER** 185-191 at ¶¶ 23-40.

In February and March of 2017, Fyk contacted a prior business colleague (and now competitor) who was more favored by Facebook, the competitor having paid over $22,000,000.00 in advertising. Fyk's competitor had dedicated Facebook representatives available to its team (whereas Fyk was not offered the same services) offering additional assistance directly from Facebook. Fyk asked his competitor if they could possibly have their Facebook representative restore Fyk's unpublished and / or deleted pages for Fyk. Facebook's response was to decline Fyk's competitor's request unless Fyk's competitor was to take ownership of the unpublished and / or deleted content / pages. Facing no equitable solution, Fyk sold his pages / businesses to the competitor at a "fire-sale" price. Facebook thereafter restored the *exact same* content (*i.e.*, in form, not in access or availability) that Facebook had previously restricted and maintained "violated" its purported "offensive" content Community Standard rules (*i.e.*, purportedly violative of (c)(2)(A)) while owned by Fyk but not when in the hands of Fyk's competitor). Facebook's preferred (*i.e.*, higher paying) "Sponsored Advertisers" do not suffer the same consequences as Fyk, simply because they pay more. *See, e.g.,* **ER** 192-194 at ¶¶ 41-47.

On August 22, 2018, Fyk sued Facebook in the District Court, alleging fraud, unfair competition, extortion, and tortious interference with his economic advantage based on Facebook's anti-competitive animus. *See* **ER** 194 at ¶ 49 through **ER** 202

at ¶ 72. Facebook filed a Rule 12(b)(6) motion, based largely on Section 230(c)(1) immunity. *See* **ER** 158-175. The District Court continued the proceedings, then vacated oral arguments and granted Facebook's motion on the papers, without affording Fyk leave to amend the Verified Complaint. The District Court misinterpreted / misapplied Section 230 protection / immunity. *See* **ER** 84-89.

Fyk appealed to this Court. The Ninth Circuit panel affirmed the District Court decision without oral argument in a cursory five-page Memorandum. *See* **ER** 52-57. Fyk filed a Petition for Hearing *En Banc*, which was summarily denied on July 21, 2020. The Ninth Circuit's affirmation of dismissal stood in stark contravention of the Ninth Circuit's own interpretation / application of Section 230 in another anti-competitive animus case (*Enigma*).

On November 2, 2020, Fyk filed a Petition for Writ of Certiorari to the Supreme Court of the United States (the "Petition"). Notwithstanding Justice Thomas' October 13, 2020, invitation for the SCOTUS to take up an appropriate case wherein the "correct interpretation of §230," *Malwarebytes*, 141 S.Ct. at 18, could be assessed, the SCOTUS denied Fyk's Petition without comment. *See* **ER** 58-83.

With case law having evolved since the time the District Court dismissed Fyk's case against Facebook (along with other bases for reconsideration under Rule 60), Fyk filed his Motion for Reconsideration on March 22, 2021. By Order dated

November 1, 2021, the District Court cursorily denied same, prompting Fyk to lodge an appeal with this Court on December 1, 2021. The District Court's denial of Fyk's Motion for Reconsideration ignored (or cursorily misapplied) this Circuit's controlling *Enigma* authority.

In this appeal, Fyk seeks the opportunity to have his case heard on the merits *via* the application of controlling authority of this Circuit; and in doing so, giving effect to Fyk's constitutionally guaranteed Due Process rights. This is especially so, considering this Court handed down a different fate to Malwarebytes than Facebook and to Enigma than Fyk in *identical* (at least on the anti-competitive animus front) circumstances. What has transpired so far for Fyk was wrong, unjust, and should be undone by this Court.

SUMMARY OF THE ARGUMENT

As discussed in **Section A** below, the District Court erred in denying Fyk's request for Rule 60(b)(5) relief by narrowing / limiting this Court's *Enigma* 230(c) holding to only a 230(c)(2) setting. This Court's *Enigma* holding was not exclusive to a 230(c)(2) setting – this Court, in *Enigma*, properly applied the "Good Samaritan" general provision overarching all of 230(c) (both 230(c)(1) and 230(c)(2)) to the reality that ICS action, driven by anti-competitive animus, is the antithesis of "Good Samaritanism" and is accordingly entitled to no 230(c) immunity.

As discussed in **Section B** below, the District Court erred in denying Fyk's request for Rule 60(b)(6) relief in deciding "extraordinary circumstances" were not present. The Order cites to *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009) for the proposition that "extraordinary circumstances" need to be present in order for Rule 60(b)(6) relief to be afforded. The District Court did not engage in an analysis of the "extraordinary circumstances" guideline / considerations outlined by this Court in *Phelps*.[10] As discussed in Section B below, applying the *Phelps* factors to this case, Fyk was / is plainly entitled to Rule 60(b)(6) relief just like Phelps was.

As discussed in **Section C**, the District Court Order ignored certain aspects of the Motion for Reconsideration, namely Fyk's request for Rule 60(b)(3) relief. As to Rule 60(b)**(3),** the District Court wrongly denied Fyk's request for Rule 60(b)**(5)** relief by narrowing this Court's *Enigma* 230(c) holding to only a 230(c)(2) setting (as discussed in Section A), the District Court bootstrapped its dismissal finding that Fyk's case was a 230(c)(1) challenge (as misleadingly argued by Facebook), rather than a 230(c)(2)(A) challenge (as actually alleged in Fyk's Complaint).[11] The

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[10] Not surprisingly, neither Facebook's Response nor the District Court's Order analyzed *Phelps*, but merely cited *Phelps* for the undeniable proposition that "extraordinary circumstances" must be present for Rule 60(b)(6) relief to be afforded and went on to syllogistically assert that no "extraordinary circumstances" exist.

[11] Almost three years ago in this action that commenced almost four years ago, the District Court dismissed Fyk's 230(c)(2)(A) case (as actually pleaded in the Verified Complaint, [D.E. 1], **ER** 176-204) by adopting Facebook's dismissal argument that Fyk's case was somehow a 230(c)(1) challenge. The District Court parlayed its approximate three-year-old dismissal erroneously characterizing Fyk's Verified

District Court's overlooking a standalone basis under Rule 60 for vacating dismissal / judgment in this case was improper, especially considering Facebook's Response did not even rebut Fyk's request for Rule 60(b)(3) relief.

ARGUMENT

A. Rule 60(b)(5) Relief Is Warranted – This Court's Enigma Anti-Competitive Animus Non-Immunity Holding Was Not Limited Exclusively To A 230(c)(2) Setting

The Order reads, in pertinent part, as follows: "By contrast, the Ninth Circuit's *Enigma* opinion did not involve the application of 230(c)(1); instead, the court examined 230(c)(2)." [D.E. 51] at 2, **ER** 4. This is wrong for at least two reasons.

First, properly interpreted, it is plain that *Enigma's* holding that there is no immunity where there is anti-competitive animus flows from the "Good Samaritan" general directive that applies to all of 230(c). Indeed, one cannot be both a Good Samaritan and an anti-competitor at the same time, it is *prima facie* impossible. The following from this Court's *Enigma* decision punctuates this reality:

Complaint as a 230(c)(1) challenge into a denial of the Motion for Reconsideration based on an equally incorrect view that this Court's *Enigma* anti-competitive animus 230(c) immunity preclusion holding was limited to only a 230(c)(2) setting. Neither the District Court nor Facebook addressed Rule 60(b)(3) in the reconsideration motion practice that is the subject of this appeal.

- "This dispute concerns § 230, the so-called "Good Samaritan" provision of the Communications Decency Act of 1996, enacted primarily to protect minors from harmful online viewing." *Enigma*, 946 F.3d at 1044.
    - This is the very first line of this Court's *Enigma* decision, which makes clear that the case dealt with the 230(c)-threshold consideration that is the "Good Samaritan" general directive, not just 230(c)(2). Just because the *Enigma* case apparently had a 230(c)(2) backdrop by no means confined this Court's overarching conclusions / holdings that "Good Samaritanism" (applicable to all of 230(c)) cannot allow conduct of an anti-competitive animus to enjoy CDA immunity.
- In line with Judge Fisher's *Zango v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009) concurring advisements against turning 230 immunity into a weapon available to chill competition, this Court held as follows in *Enigma*: "We conclude, however, that Enigma's allegations of anticompetitive animus are sufficient to withstand dismissal." *Id.* at 1045.
    - The same should have been determined here in relation to Fyk's allegations of Facebook's anti-competitive animus.
- "The CDA, which was enacted as part of the Telecommunications Act of 1996, contains this 'Good Samaritan' provision that, in subparagraph B,

immunizes internet-service providers from liability for giving internet users the technical means to restrict access to [certain content].” *Id*.

- Just because this Court found that the “Good Samaritan” general directive of 230(c) applies to 230(c)(2) settings does not mean that this Court found that the “Good Samaritan” general directive / general provision / intelligible principle does not apply to other subsections of 230(c). There is, in fact, no way that this Court could have so determined since the “Good Samaritan” general directive so plainly qualifies the immunity analysis under all of 230(c).

- One of Congress’ goals in enacting the CDA was to “‘to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.’” *Id.* at 1047 (citing 47 U.S.C. § 230(b)).
    - Why did Fyk not receive the benefit of a competitive free market? Why was Facebook’s anti-competitive conduct allowed to crush Fyk’s livelihood? Why did Malwarebytes have to act as a “Good Samaritan” in regards to Enigma but Facebook did not have to act as a “Good Samaritan” in regards to Fyk?
- “We must today recognize that interpreting the statute to give providers unbridled discretion to block online content would, as Judge Fisher warned, enable and potentially motivate internet-service providers to act for their own,

and not the public, benefit. Immunity for filtering practices aimed at suppressing competition, rather than protecting internet users, would lessen user control over what information they receive, contrary to Congress's stated policy." *Id.* at 1051 (internal citations omitted).

- Nowhere in this holding is the Court's *Enigma* determinations confined to 230(c)(2). Nor could it have been – conduct that quashes competition is not immune anywhere within the four corners of the CDA.

- "Because we hold that § 230 does not provide immunity for blocking a competitor's program (*i.e.,* materials) for anticompetitive reasons, and because Enigma has specifically alleged that the blocking here was anticompetitive, Enigma's claims survive the motion to dismiss. We therefore reverse the dismissal of Enigma's state-law claims and we remand for further proceedings." *Id.* at 1052.

  - Again, nowhere in the Court's holding is the exception to immunity for anti-competitive animus confined to just 230(c)(2). Again, nor could it have been since the "Good Samaritan" general directive (which such "Good Samaritan" is the polar opposite of conduct / action driven by anti-competitive animus) applies to all of 230(c).

    - Fyk alleged that Facebook's actions against him were grounded in anti-competitive conduct just like Enigma alleged. Thus, Fyk

should have enjoyed the same result as Enigma; *i.e.*, Fyk's case should not have been dismissed.

- "As we have explained with respect to the state law claims, *Zango* did not define an unlimited scope of immunity under § 230, and immunity under that section does not extend to anticompetitive conduct." *Id.* at 1054.
    - This Court's exception to immunity for anti-competitive animus applied to 230(c), not just 230(c)(2). And, again, that had to be the case and makes perfect sense because the "Good Samaritan" general directive / general provision / intelligible principle (from which this Court's anti-competitive animus non-immunity holdings flowed) applies to all of 230(c).
        - Here, why was Facebook afforded an "unlimited scope of immunity"? Why were Fyk's allegations of anti-competitive animus not worthy of surviving dismissal as was the case for Enigma? Why has the legal system thus far protected Enigma but not Fyk under the same circumstances?

This Court's decision in *Enigma*, after Fyk's first appeal before this Court, corrected the same kind of anti-competitive animus that Fyk alleges here against Facebook. On this ground, Fyk respectfully requests that this Court reverse the Order and remand to the District Court for the vacating and setting aside of dismissal /

judgment, to give Fyk a chance at a real day in court on the merits; *i.e.*, affording Fyk the Due Process he is constitutionally entitled to and under this Court's decision in *Enigma*. Indeed, as pointed out by Justice Thomas in his *Malwarebytes* statement, providing litigants like Fyk an opportunity to have the merits of their case heard does not guarantee victory, it simply provides those litigants a chance to articulate the facts and present evidence:

> Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail.

Malwarebytes, 141 S.Ct. at 18. Fyk deserves the right to raise his claims in the first place, and a chance to prove the merits of his claims.

This Court's *Enigma* decision constitutes a change in law, *after* the District Court's initial dismissal of Fyk's case and while Fyk's first appeal was pending, justifying Rule 60(b)(5) relief; *i.e.*, justifying the District Court's vacating and setting aside dismissal / judgment and allowing Fyk's case to proceed on the merits. The exception to CDA immunity that is conduct driven (*i.e., not content driven*) by anti-competitive animus (which is explicit in the CDA) was not yet a precedent in the Ninth Circuit until *Enigma*. *See, e.g., Malwarebytes*, 141 S.Ct. at 18 ("§ 230 should not apply when the plaintiff sues over a defendant's '*conduct* rather than for the *content* of the information,'" citing the concurring opinion of J. Tymkovich in

FTC v. Accusearch, Inc., 570 F.3d 1187, 1204 (10th Cir. 2009), emphasis in original). Had the *Enigma* decision been in existence mere weeks earlier, the District Court's decision would not have resulted in a dismissal at the initial pleading stage; *i.e.*, Fyk's Verified Complaint would have survived dismissal (just like Enigma's complaint) because Fyk appropriately alleged that Facebook's *conduct* was driven by an anti-competitive animus. The relevant judicial precedents now mandate that a different result would occur because disparate legal results (Enigma's case going one way, and Fyk's case going another way) under identical circumstances and analysis (here, Enigma alleging anti-competitive animus against Malwarebytes and Fyk alleging anti-competitive animus against Facebook) cannot co-exist, especially given consistency is key to justice and / or maintaining the public's faith in the judiciary.

Second, even if it was somehow the case that this Court's *Enigma* decision somehow determined that the "Good Samaritan" general directive somehow only applied to 230(c)(2) settings (rather than applied to all of 230(c) in accordance with the express statutory language, the very title of 230(c), and the very point of a general directive / general provision / intelligible principle handed down by Congress when tasking others, directly or indirectly, to carry out regulatory functions, such as Internet content policing here), the Court's *Enigma* decision would nevertheless implicate Section 230(c)(1) by way of the express wording of 230(c)(2)(B) that

relates back to 230(c)(1). Why does 230(c)(2)(B) implicate Section 230(c)(1)? Because the ICS is enjoying the same non-action immunity under slightly different contexts. Under 230(c)(1), if the ICS takes *no action* as to someone's content, the ICS cannot possibly be held liable for whatever happened to someone else's content. Under 230(c)(2)(B), the ICS takes *no action* as to the content of another when the ICS provides ICP #1 / user #1 with the tools / services needed to eradicate garbage posted by ICP #2 / user #2, which is the exact same end result as 230(c)(1) – if the ICS does not take any action as to one's content, the ICS enjoys immunity.

B. Rule 60(b)(6) Relief Is Warranted – "Extraordinary Circumstances" Exist

The District Court's Order summarily asserts: "Finally, Fyk has not shown the 'extraordinary circumstances' required under 60(b) for granting relief." 4:18-cv-05159-JSW, [D.E. 51] at 2, **ER** 4. The Order provides no analysis or explanation as to how Fyk's reconsideration circumstances differ from the factors set forth by this Court in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). Had the District Court actually engaged in an "extraordinary circumstances" analysis (rather than citing without analysis the *Phelps* citation found in Facebook's Response), Rule 60(b)(6) relief would have been afforded to Fyk.

Applying *Phelps* here:

> In this case, the lack of clarity in the law at the time of the district court's original decision, the diligence [Fyk] has exhibited in seeking review of his original claim, the lack of reliance by either party on the finality of the original judgment, the short amount of time between the

original judgment becoming final and the initial motion to reconsider, the close relationship between the underlying decision and the now controlling precedent that resolved the preexisting conflict in the law, and the fact that [Fyk] does not challenge a judgment on the merits … but rather a judgment that has prevented review of those merits all weigh strongly in favor of granting Rule 60(b)(6) relief. Accordingly, we reverse the denial of [Fyk's] motion and grant his request for relief from the judgment dismissing his [case]. On remand, the district court shall evaluate the merits of the [complaint] that [Fyk] presented [approximately four] years ago.

It has sometimes been said that the law is a study of 'those wise restraints that make men free.' Much of law consists of necessary rules that give order and structure to a free society. Some rules promote order by emphasizing the need for efficiency, including the need for efficient management of the judicial system. Other rules are employed in the service of protecting individuals' fundamental rights and are designed to ensure that such individuals receive the Due Process they are guaranteed by our Constitution. *See* U.S. CONST., amends. V, XIV. Yet far too often in recent years, concern for efficiency and procedure has overshadowed concern for basic fairness, and has transformed our fidelity to 'process' into an undue obsession with formalism and technicalities. In short, a concern for procedure has far too often obscured or eclipsed the equally important if not greater role to be played by our dedication to justice. It was, after all, in order 'to establish justice' that our Constitution was written. *Id.* pmbl.

[Fyk's] case represents the epitome of our obsession with form over substance. For [roughly four] years, [Fyk] has sat in [Facebook's prison] while he and his attorneys have struggled to have his claim that he is being imprisoned in violation of the Constitution evaluated on its merits. [Fyk] has traveled up and down the federal judiciary's apparatus … . In so doing, he has produced nearly [hundreds, if not thousands, of] pages of legal briefs, motions, and petitions. His arguments have been evaluated by no less than [four] federal judges and nine Supreme Court Justices—not including his petition[ ] for rehearing en banc … .

Yet, in all this time, not a single federal judge has once examined the substance of [Fyk's] claims. All of this energy – and, more important to [Fyk], all of this *time* – has been spent evaluating one procedural

> question after another … in wading through this endless morass of procedural questions, and frequently answering them incorrectly, a crucially important point has been repeatedly overlooked: Over [approximately four] years ago, a man came to federal court and told a federal judge that he was being unlawfully [placed in Facebook prison] in violation of the rights guaranteed to him by the Constitution of the United States. [Approximately four years] later, not a single federal judge has ever once been allowed to seek to discover whether that claim is true.
>
> The United States Supreme Court has made clear that the equitable power embodied in Rule 60(b)(6) is the power 'to vacate judgments whenever such action is appropriate to accomplish *justice*.' Given that directive, we agree that 'the decision to grant Rule 60(b)(6) relief' must be measured by 'the incessant command of the court's conscience that justice be done in light of all the facts.' With that guiding principle in mind, we **REVERSE** the denial of [Fyk's] motion for reconsideration and **REMAND** to the district court for further proceedings consistent with this opinion.

Phelps, 569 F.3d at 1140-1142 (emphasis in original) (certain citations omitted). Here, Fyk's filings in conjunction with the subject reconsideration motion practice, [D.E. 46] / **ER** 21-83 and [D.E. 48] / **ER** 5-16, tracked almost all of the "extraordinary circumstances" *Phelps* factors. *See* [D.E. 46] at 10-12 / **ER** 30-32. Facebook's Response and the District Court's Order, conversely, amount to: "*Phelps* says there must be 'extraordinary circumstances' to afford Rule 60(b)(6) relief and such circumstances are not here because we summarily say that they do not exist without any analysis."

Notably, Facebook's Response did nothing to rebut the "extraordinary circumstances" advanced by Fyk. Again, all Facebook did in its Response was cite

Phelps; *i.e.*, it did not analyze the *Phelps* factors. It is axiomatic that whatever is not rebutted by an opponent (Facebook) should be deemed admitted in favor of the other party (Fyk).

The District Court's failure to apply the *Phelps* factors in considering Fyk's Motion for Reconsideration based on new law not in existence at the time of its initial dismissal was an abuse of discretion and warrants reversal.

C. Rule 60(b)(3) Relief Is Warranted – The Dismissal / Judgment That Was Subject To Reconsideration Was Improperly Predicated On Facebook's Misleading Characterization Of Fyk's Claims

As explained by Fyk in his earlier filings (both in District Court and in this Court), the District Court accepted Facebook's false characterization of Fyk's content in dismissing Fyk's case; *i.e.*, in depriving Fyk of his Due Process rights. An example discussed in past filings was the blatant lie in Facebook's Motion to Dismiss that one of Fyk's businesses / pages was dedicated to public urination, which such demonstrably false statement was featured by the District Court in the very first paragraph of the dismissal Order.

But the most egregious example of the District Court's acceptance of Facebook's distorted facts was the mischaracterization of Fyk's Verified Complaint as a 230(c)(1) case rather than the 230(c)(2)(A) case that this case actually was / is, as discussed in footnote 11 above. Facebook perpetuated the misleading argument to the Court because Facebook knew that 230(c)(2)(A) cases are generally not

subject to dismissal at the pleading stage because there are too many factual considerations at play when assessing the "good faith" (or "bad faith") of the ICS. Facebook engaged in a prestidigitation of Fyk's actual factual allegations in the Verified Complaint showing Facebook's *conduct* with Facebook's *argument* of Fyk's alleged (but false characterization of) *content*, to which the District Court fell victim. On a Rule 12(b)(6) motion, the District Court was required to accept as true at the pleading stage Fyk's factual allegations (which revolved around Facebook's conduct, not Fyk's content), concerning (among other illegalities) Facebook's anti-competitive animus towards and tortious interference with Fyk's businesses.

Rule 60(b)(3) relief is available where (as here) a Court's adverse ruling was predicated, in whole or in part, on a fraud on the court and upon new controlling case authority. If the District Court did not understand 230(c)(2)(A) (as Fyk pleaded the factual allegations), it should have permitted a hearing to allow Fyk to further explain / show why the Verified Complaint was / is a 230(c)(2)(A) case or permitted Fyk to amend his Verified Complaint to make even clearer how his case was brought pursuant to a 230(c)(2)(A). The District Court's disposition of the case was the result of having been misled by Facebook's mischaracterization of Fyk's claims. Worse, the District Court seized upon Facebook's false statement that one of Fyk's businesses / pages was dedicated to public urination, which was a patently false Facebook assertion and had no proper basis for appearing as a ground for the District

Court's order at the initial pleading and 12(b)(6) motion practice stage. Fyk's Verified Complaint allegations were to be taken as true with reasonable inferences drawn therefrom in favor of Fyk. Rule 60(b)(3) relief is warranted, the denial Order was fundamentally flawed by the District Court's adopting of Facebook's mischaracterization that Fyk's case was somehow a 230(c)(1) challenge.

Moreover, just as the District Court did not engage in an analysis of the *Phelps* "extraordinary circumstances" Rule 60(b)(6) factors (contrary to Fyk's Motion for Reconsideration that analyzed such factors), the Order also did not address Fyk's request for Rule 60(b)(3) relief (just like Facebook's Response – no mention of Rule 60(b)(3)). Again, it is axiomatic that whatever is not rebutted by an opponent (Facebook) should be deemed admitted in favor of the other party (Fyk).

CONCLUSION

The first logical point of 230(c) immunity analysis is the general directive found in the very title of 230(c) – "Good Samaritan[ism]." This is what this Court's *Enigma* decision necessarily declared. If an ICS (*e.g.*, Facebook) is not a Good Samaritan (one cannot be an anti-competitor and a Good Samaritan at the same time, that is *prima facie* oxymoronic), then the 230(c) immunity analysis stops there; *i.e.*, does not proceed to the subsections of 230(c). That is where the California judiciary should have snuffed out Facebook's immunity nonsense in this case years ago. If the

Good Samaritan threshold is cleared, then the immunity analysis of 230(c)'s subsections necessarily unfolds as follows.

230(c)(1) immunizes an ICS / provider / host / platform (*e.g.*, Facebook) when the ICS takes *no action* with respect to the content of another ICP / user (*e.g.*, Fyk)– it makes perfect sense that where there is no harm inflicted by a Facebook / Google / Twitter / *etc*. because there was *no action* taken by a Facebook / Google / Twitter / *etc*. as to another ICP's content.. Here, the Verified Complaint could not be any clearer in alleging Facebook *took action* to destroy Fyk and could not be any clearer that Fyk was / is not trying to treat Facebook as Fyk (the publisher); meaning, no immunity for Facebook under 230(c)(1) exists even assuming *arguendo* the threshold Good Samaritan general directive was somehow surmountable here.

230(c)(2)(A) immunizes an ICS / provider / host / platform when an ICS takes "good faith" restrictive *action* to eradicate filthy content posted by an ICP / user – it makes perfect sense that a Facebook / Google / Twitter / *etc*. should be able to delete child pornography posted by an ICP / user, for example, without fear of liability. This is how Facebook *acted* against Fyk, and the allegations of the Verified Complaint are clear in this regard; *e.g.*, the Verified Complaint alleges that Facebook destroyed one of Fyk's businesses / pages because Facebook deemed a screenshot of the Disney movie *Pocahontas* violative of 230(c)(2)(A). What should have happened (and what this appeal asks this Court to finally make happen) is that

Facebook's 230(c)(2)(A) *actions* should have been analyzed on the merits (during discovery) under a "good faith" lens.

Section 230(c)(2)(B) (which expressly relates back to 230(c)(1) because it is the same kind of *inaction* situation in a slightly different context) immunizes an ICS / provider / host / platform when the ICS takes *no action* with respect to the content of another ICP #2 / user #2 but provides the tools / services to an ICP #1 / user #1 to *take action* on the content of ICP #2 / user #2 – it makes perfect sense that a Facebook / Google / Twitter / *etc.* would not be subject to any liability for giving a parent / user / ICP (ICP #1) the tools needed to protect a child in eradication of pornography, for example, posted on the Internet by another user / ICP (ICP #2). The Section 230(c)(2)(B) setting simply does not apply in this case, so Facebook would not enjoy immunity under 230(c)(2)(B) either.

Here, an ICS (Facebook) *took action* on the content of an ICP (Fyk) – more specifically, Facebook destroyed Fyk's content while in Fyk's hands and restored (*took another action*) Fyk's identical (*in form not function*) content for a Fyk competitor who paid Facebook significantly more money than Fyk once Facebook had steered Fyk's content (*took another action*) to Fyk's competitor. This is the epitome of Facebook's anti-competitive animus, which this Court has properly determined in *Enigma* enjoys no 230(c) immunity at the "Good Samaritan" general directive threshold. That is where the District Court's 230(c) immunity analysis

should have stopped over three years ago such that merits-based resolution of this approximately four-year-old case was long ago underway. But we will say a bit more in an abundance of caution; *i.e.*, as if the Good Samaritan general directive in the very title of 230(c) somehow meant nothing to 230(c)(1) and / or 230(c)(2).

This case is the epitome of an ICS (Facebook) *taking action* on the content of an ICP / user (Fyk); thus, there is zero legitimacy to Facebook somehow enjoying 230(c)(1) inaction immunity here. This case was / is the epitome of "bad faith" ICS (Facebook) removal of the content of an ICP / user (Fyk); thus, there is zero legitimacy to Facebook somehow enjoying 230(c)(2)(A) "good faith" action immunity here. This case was / is nowhere even close to ICP #1 / user #1 taking action on the content of ICP #2 / user #2 by way of tools / services provided by an ICS (Facebook); thus, there is zero legitimacy to Facebook somehow enjoying 230(c)(B) immunity here. Simply put, *Facebook's active crippling of Fyk's businesses was conduct for which Section 230(c) immunity is unavailing to Facebook*.

This Court must reverse the District Court's denial of relief and must right approximately four years of legal injustice endured by Fyk under the exact same anti-competitive animus non-immunity analysis employed by this Court in providing justice to Enigma. If justice is to be served, this case must be remanded to the District

Court for vacating and setting aside of dismissal / judgment so that this case can finally move forward on the merits.

STATEMENT OF RELATED CASES

Fyk is unaware of another case pending before this Court involving the acute issues at play here.

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 7,257 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: March 3, 2022

Respectfully Submitted,

/s/ Constance J. Yu

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2022, 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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