Case No. 21-16997

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JASON FYK,
Petitioner-Appellant,

v.

FACEBOOK, INC.,
Respondent-Appellee.

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

APPELLEE'S ANSWERING BRIEF

KEKER, VAN NEST & PETERS LLP
PAVEN MALHOTRA, #258429
PMALHOTRA@KEKER.COM
WILLIAM S. HICKS, #256095
WHICKS@KEKER.COM
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400

Attorneys for Respondent-Appellee
FACEBOOK, INC.

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Meta Platforms, Inc. (f/k/a Facebook, Inc.) is a publicly traded company and has no parent corporation; no publicly held corporation owns 10% or more of its stock.

Dated: May 4, 2022

KEKER, VAN NEST & PETERS LLP

By: */s/ William S. Hicks*
PAVEN MALHOTRA
WILLIAM S. HICKS

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I. INTRODUCTION

In 2018, Appellant Jason Fyk sued Appellee Facebook, Inc.[1] after it disabled some of his Facebook pages for violation of its policies. Facebook moved to dismiss Fyk's lawsuit, and the District Court granted that motion after determining that each of his claims was barred under Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1) (hereinafter, "Section 230(c)(1)"). A panel of the Ninth Circuit affirmed that decision in June 2020.[2] Seven months later, the U.S. Supreme Court denied Fyk's Petition for Writ of Certiorari.

Undeterred, Fyk then returned to the District Court where he filed a motion for relief from judgment under Rule 60(b).[3] The District Court denied that motion. Fyk now appeals the District Court's decision denying Rule 60(b) relief.

Fyk's primary contention is that the Ninth Circuit's 2019 decision in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*[4] marked a change in the controlling law that resuscitates his underlying legal claims. More specifically, he

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[1] On October 28, 2021, Facebook, Inc. changed its name to Meta Platforms, Inc. Because the original complaint was filed prior to the name change and for ease of reference, Defendant-Appellee continues to refer to the Defendant identified in the pleadings as "Facebook, Inc." as "Facebook, Inc." here.

[2] *Fyk v. Facebook, Inc.*, 808 F. App'x 597 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1067 (2021) (hereinafter, "*Fyk I*").

[3] Fed. R. Civ. P.

[4] 946 F.3d 1040 (9th Cir. 2019).

contends that *Enigma* announced a "general directive" holding that neither Section 230(c)(1) nor its sister Section 230(c)(2) protects content moderation decisions like those made by Facebook if such decisions were motivated by anticompetitive animus. Fyk argues that the District Court erred by rejecting this reading of *Enigma*. Fyk's argument is meritless, however, and the District Court properly rejected it.

The District Court correctly recognized that *Enigma* considered only whether Section 230(c)(***2***)[5] "immunizes blocking and filtering decisions that are driven by anticompetitive animus."[6] *Enigma* never mentions Section 230(c)(1), much less does it provide any "general directive" that applies to all of 230(c).

Moreover, this Court's decision in *Fyk I* already analyzed and rejected the very argument Fyk presents for a second time in the current appeal. In that decision, which was issued five months after *Enigma* was decided, this Court rejected Fyk's argument that Section 230(c)(1)'s application turns on the interactive computer service provider's motives in removing content. *Fyk I*, 808 F. App'x at 598. Consequently, any holding in *Enigma* concerning the availability of Section 230(c)(2) immunity for decisions that were allegedly driven by

[5] Section 230(c)(2) of the CDA applies to certain actions "taken in good faith." 47 U.S.C. § 230(c)(2)(A). Section 230(c)(1) includes no such requirement.

[6] *Enigma*, 946 F.3d at 1050; ER 4.

anticompetitive motives is irrelevant when assessing the scope of protections available under Section 230(c)(1). Through the instant appeal, Fyk seeks simply to rewrite the Communications Decency Act and relitigate issues that he has already argued and lost.

Accordingly, this Court should affirm the District Court's order.

II. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332. The District Court entered final judgment in this case on June 18, 2019, after granting Facebook's Motion to Dismiss without leave to amend.[7] On November 21, 2021, the District Court denied Fyk's Rule 60(b) motion seeking to vacate and set aside the order and judgment of dismissal.

III. ISSUES PRESENTED

(1) Did the District Court abuse its discretion in denying Fyk's motion for relief under Rule 60(b)(5)?

(2) Did the District Court abuse its discretion in denying Fyk's motion for relief under Rule 60(b)(6)?

[7] ER 86-89; *Fyk v. Facebook, Inc.*, Case No. 18-05159-JSW (N.D. Cal. June 18, 2019), Dkt. 39.

(3) Did the District Court abuse its discretion in declining to grant relief pursuant to Rule 60(b)(3)?

IV. STATEMENT OF THE CASE

Procedural Background

On August 22, 2018, Fyk filed a complaint in the U.S. District Court for the Northern District of California alleging four causes of action: (1) intentional interference with prospective economic advantage, (2) violation of California Business & Professions Code Sections 17200-17210 (Unfair Competition), (3) civil extortion, and (4) fraud/intentional misrepresentation.[8] Fyk alleged that he had created a series of Facebook pages that "were humorous in nature, designed to get a laugh out of [his] viewers/followers."[9] At some point, Facebook disabled certain of those pages for violation of its policies.[10] Fyk alleged, however, that Facebook was actually motivated by a desire to make room for its own sponsored advertisements and to "strong-arm" Fyk into paying to advertise.[11]

[8] ER 193-202.

[9] ER 179.

[10] ER 182-84

[11] *See* ER 185-90. Fyk ultimately decided to sell the pages to a third party. *See* ER 191.

On November 1, 2018, Facebook moved the District Court to dismiss the Complaint because the claims were barred by Section 230(c)(1) and, in any event, because the Complaint failed to state any claim for relief.[12]

On June 18, 2019, the District Court issued an order dismissing Fyk's claims with prejudice as barred by Section 230(c)(1).[13] In a well-reasoned decision, the District Court correctly held that Section 230(c)(1) barred all of Fyk's claims because they sought to hold Facebook liable as the "publisher or speaker" of content created and provided by Fyk himself.[14]

In September 2019, Fyk appealed the District Court's order to this Court, arguing that the District Court had erred in its application of Section 230(c)(1).[15] Among other things, Fyk argued that the District Court erred in dismissing his Complaint because "Facebook [allegedly] 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

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[12] ER 158-75.

[13] *Fyk*, Case No. 18-cv-05159-JSW, Dkt. 38; ER 86-89 (hereinafter, the "June 2019 Order").

[14] *See* ER 87-89. The District Court did not address Facebook's contention that the Complaint failed to state any claims.

[15] SER 1-44.

rights under the Internet's 'Good Samaritan' law – Subsection 230(c) of the CDA.").[16]

On June 12, 2020, this Court issued its decision in *Fyk I*, affirming the District Court's June 2019 Order and holding that "[t]he district court properly determined that Facebook has § 230(c)(1) immunity from Fyk's claims in this case." *Fyk I*, 808 F. App'x at 597. In so holding, this Court expressly rejected Fyk's contention that the alleged motives of an interactive computer service provider are relevant to the analysis of Section 230(c)(1). As the Court explained, "[u]nlike 47 U.S.C. § 230(c)(2)(A), nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service." *Fyk I*, 808 F. App'x at 598.

In November 2020, Fyk filed a Petition for Writ of Certiorari to the U.S. Supreme Court challenging this Court's opinion in *Fyk I*.[17] The Supreme Court denied that Petition on January 11, 2021. *See Fyk v. Facebook, Inc.*, 141 S. Ct. 1067 (2021).

On March 22, 2021, Fyk moved the District Court to vacate and set aside its June 2019 Order under Rule 60(b)(5) and (6) on the purported basis that there had

[16] SER 94.

[17] App. Opening Br. at 10.

been an intervening change in the controlling law.[18] In particular, Fyk argued that this Court's 2019 decision in *Enigma Software Grp. USA, LLC v. Malwarebytes*, Inc., 946 F.3d 1040, 1050 (9th Cir. 2019), and Justice Thomas's subsequent "statement respecting the denial of certiorari" of the *Enigma* decision, changed the controlling precedent applied by the District Court.[19] According to Fyk, the *Enigma* decision "establishes clear, new precedent confirming that immunity is unavailable when a plaintiff alleges anticompetitive conduct."[20]

On November 1, 2021, the District Court issued an order denying Fyk's Rule 60 motion.[21] The District Court held that the Ninth Circuit's *Enigma* opinion "did not reverse any case law upon which the Order was based" because it "did not involve the application of 230(c)(1); instead, the court examined 230(c)(2)."[22] The District Court also explained that "Justice Thomas's statement, made 'respecting the denial of certiorari' to the *Enigma* opinion, is not the holding of the Supreme Court and it therefore does not 'constitute[] binding precedent.'"[23] The District

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[18] ER 21-34 (3/22/2021 Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment) (hereinafter, the "Rule 60 Motion").

[19] ER 25.

[20] ER 26.

[21] ER 3-4 (11/01/2021 Order Denying Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) (hereinafter, the "November 2021 Order" or "Order").

[22] ER 4.

[23] *Id.*

Court further held that Fyk had failed to establish the "extraordinary circumstances" required for relief under Rule 60(b)(6).[24]

Fyk's Appeal

Fyk advances three arguments on appeal.

First, he argues that the District Court abused its discretion when it declined to vacate the June 2019 Order pursuant to Rule 60(b)(5). In particular, he challenges the District Court's determination that *Enigma* did not change the controlling law concerning Section 230(c)(1).[25]

Second, Fyk contends that the District Court abused its discretion when it determined that he failed to show the "extraordinary circumstances" required to vacate a final judgment pursuant to Rule 60(b)(6).[26] Specifically, Fyk contends that the District Court erred by not analyzing certain factors that this Court has identified for determining when a change in law constitutes "extraordinary circumstances" sufficient to reopen a final judgment.

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[24] *Id*.

[25] App. Opening Br. at 4-5.

[26] App. Opening Br. at 6.

Finally, Fyk argues that the District Court abused its discretion by declining to vacate the dismissal order under Rule 60(b)(3) based on Facebook's alleged "false characterization of Fyk's content" in its motion to dismiss.[27]

V. STANDARD OF REVIEW

This Court reviews the denial of a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) for an abuse of discretion. *Riley v. Filson*, 933 F.3d 1068, 1071 (9th Cir. 2019). A district court's exercise of its discretion may not be reversed absent "a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005). "An appeal from a denial of a Rule 60(b) motion brings up only the denial of the motion for review, not the merits of the underlying judgment." *Floyd v. Laws*, 929 F.2d 1390, 1400 (9th Cir. 1991).

A district court may grant relief under Rule 60(b)(3) only if the moving party establishes by clear and convincing evidence "that a judgment was obtained by fraud, misrepresentation, or misconduct, and that the conduct complained of prevented the moving party from fully and fairly presenting the case." *In re M/V*

[27] App. Opening Br. at 23.

Peacock on Compl. of Edwards, 809 F.2d 1403, 1404–05 (9th Cir. 1987); *accord De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000).

Rule 60(b)(5) provides for relief from a final judgment only when "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). "[T]o grant a Rule 60(b)(5) motion to modify a court order, a district court must find 'a significant change either in factual conditions or in law.'" *S.E.C. v. Coldicutt*, 258 F.3d 939, 942 (9th Cir. 2001) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)). "Relief from a court order should not be granted, however, simply because a party finds 'it is no longer convenient to live with the terms' of the order." *Id*.

"A movant seeking relief under Rule 60(b)(6) [must] show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). The standard for a Rule 60(b)(6) motion is high, and that relief should only be granted "sparingly" to avoid "manifest injustice." *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1173 (9th Cir. 2017).

VI. SUMMARY OF ARGUMENT

In the proceedings below, Fyk sought relief under Rule 60(b)(5) and (b)(6) on the same purported basis that there had been an intervening change in the

controlling legal authority. But in declining to grant Rule 60(b)(5) relief, the District Court correctly concluded that Fyk had failed to identify any such change. Contrary to Fyk's argument on appeal, the District Court properly determined that the Ninth Circuit's *Enigma* opinion was limited to Section 230(c)(***2***). *Enigma* did not change (or even mention) the controlling law concerning Section 230(c)(***1***).

The District Court was also correct in denying Fyk's request for Rule 60(b)(6) relief, which was based on the same supposed change in law. Fyk argues that the District Court erred by purportedly failing to analyze certain factors outlined in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), for determining whether a "clear and authoritative" change in law constitutes "extraordinary circumstances." But the District Court was not obliged to analyze such factors, having correctly determined at the outset that the law had not changed.

As for Fyk's Rule 60(b)(3) argument, Fyk failed to properly raise that issue before the District Court, and so it is waived. Even had Fyk preserved that issue for appeal, his argument would fail on the merits because the District Court's dismissal order is not based on any misconduct on the part of Facebook, nor has Fyk demonstrated that the conduct complained of prevented him from fairly presenting his case.

As Fyk has not satisfied his burden, this Court should affirm the District Court's Order denying relief under Rule 60(b).

VII. ARGUMENT

A. The District Court did not abuse its discretion in holding that the *Enigma* decision did not change the relevant underlying law.

Rule 60(b)(5) provides for relief from a final judgment only when "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). "[I]n order to grant a Rule 60(b)(5) motion to modify a court order, a district court must find 'a significant change either in factual conditions or in law.'" *Coldicutt*, 258 F.3d at 942 (quoting *Rufo*, 502 U.S. at 384). Here, Fyk's Rule 60 Motion failed to demonstrate that *Enigma* effected ***any*** change in the controlling law concerning Section 230(c)(1), much less a "significant change." Accordingly, the District Court properly denied Rule 60(b)(5) relief.[28]

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[28] Even had Fyk identified a significant change in law, Rule 60(b)(5) relief would not be warranted because the District Court's order of dismissal has no "prospective application." *Harvest v. Castro*, 531 F.3d 737, 748 (9th Cir. 2008) ("To be sure, Rule 60(b)(5) applies only to those judgments that have prospective application."). As explained in Facebook's response to Fyk's Rule 60 Motion, *see* ER 18, a judgment has "prospective application" only if "it is executory or involves the supervision of changing conduct or conditions." *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995) (internal quotes omitted). The District Court's dismissal order is not executory, nor does it require ongoing supervision. "That [Fyk] remains bound by the dismissal is not a 'prospective effect' within the meaning of rule 60(b)(5) any more than if [he] were continuing to feel the effects of a money judgment against him." *Id*. (quoting *Gibbs v. Maxwell House*, 738 F.2d 1153, 1155–56 (11th Cir.1984), and holding that a dismissal order did not have "prospective application").

Section 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The Communications Decency Act expressly preempts any cause of action that would hold an internet platform liable as a speaker or publisher of third-party speech.[29]

In *Barnes v. Yahoo!,* this Court explained that Section 230(c)(1) protects the exercise of a "publisher's traditional editorial functions" such as "reviewing, editing, and deciding whether to publish or to withdraw from publication third party content." 570 F.3d at 1102. "[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove." *Id*. at 1103. "[B]ecause such conduct is *publishing conduct* . . . [this Court] ha[s] insisted that section 230 protects from liability any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." *Id*. (internal quotations omitted and emphasis in original).

In its June 2019 Order, the District Court correctly dismissed Fyk's Complaint after concluding that all requirements for Section 230(c)(1) immunity were met. In affirming that decision, this Court expressly rejected Fyk's argument

[29] 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with" the CDA.).

that Section 230(c)(1) does not immunize editorial decisions taken with discriminatory or anticompetitive motives.[30] As this Court explained in *Fyk I*, "[u]nlike 47 U.S.C. § 230(c)(2)(A), ***nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions*** of the provider of the interactive computer service." *Fyk I*, 808 F. App'x at 598 (emphasis added). In *Fyk I*, this Court also "reject[ed] Fyk's argument that his case is like *Fair Housing* [*v. Council of San Fernando Valley v. Roommates.Com, LLC*][31] because Facebook allegedly 'discriminated' against him by singling out his pages." *Id*. In rejecting that contention, this Court explained that Fyk's argument "mistakes the alleged illegality of the particular content at issue in *Fair Housing* with an anti-discrimination rule that we have never adopted to apply § 230(c)(1) immunity." *Id*.

Fyk now seeks to vacate the District Court's June 2019 Order under Rule 60(b)(5)[32] on the purported basis that the *Enigma* decision somehow changed the

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[30] *See* SER 12 ("[T]his 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."); SER 0041 (arguing that Facebook forfeited CDA immunity by alleging taking action "in direct competition with Fyk").

[31] 521 F.3d 1157, 1172 (9th Cir. 2008) (holding that defendant who "both elicit[ed] . . . allegedly illegal content and ma[de] aggressive use of it in conducting its business" was not entitled to immunity under Section 230(c)(1)).

[32] Under Rule 60(b)(5), a court may relieve a party from a final judgment, among other reasons, if "the judgment . . . is based on an earlier judgment that has been

controlling law concerning Section 230(c)(1). According to Fyk, *Enigma* "establishes clear, new precedent confirming that immunity is unavailable when a plaintiff alleges anticompetitive conduct – a decision that directly contradicts . . . the Ninth Circuit's narrower conclusion [in *Fyk I*] that 'nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service.'"[33] Fyk is mistaken.

As an initial matter, this Court decided *Fyk I* months ***after*** the *Enigma* decision.[34] Thus, this Court's confirmation in *Fyk I* that "nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service," *Fyk I*, 808 F. App'x at 598, conclusively refutes Fyk's assertion that this Court's earlier *Enigma* decision changed the controlling law concerning Section 230(c)(1) in the manner he suggests.

Moreover, the Ninth Circuit's *Enigma* decision does not even address Section 230(c)(1). As the District Court rightly explained in denying Fyk's request for Rule 60(b)(5) relief, the legal question in *Enigma* was "whether § 230(c)(***2***)[35]

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reversed or vacated." Fed. R. Civ. P. 60(b)(5).

[33] ER 26; *see also* App. Opening Br. at 4-5.

[34] This Court issued its decision in *Enigma*, 946 F.3d 1040, on December 31, 2019. That opinion amended and superseded an earlier decision, which issued on September 12, 2019. *Id.* at 1044. This Court's opinion in *Fyk I* issued on June 12, 2020.

[35] This Court has repeatedly recognized, including in *Fyk I*, that subsections (c)(1) and (c)(2) of the CDA provide separate and independent grants of immunity. *See*

immunizes blocking and filtering decisions that are driven by anticompetitive animus." *Enigma*, 946 F.3d at 1050 (emphasis added); *id*. at 1045 ("This appeal centers on the immunity provision contained in § 230(c)(***2***) of the Communications Decency Act ('CDA'), 47 U.S.C. § 230(c) (1996).") (emphasis added).[36] The *Enigma* decision never once mentions Section 230(c)(1), much less does it purport to reverse Ninth Circuit precedents interpreting that subsection. Thus, the District Court did not abuse its discretion in holding that *Enigma* "did not reverse any case law upon which the Order was based."[37]

In his opening brief, Fyk argues repeatedly that the *Enigma* holding is not "confined" to subsection (c)(2) of the CDA.[38] Fyk is incorrect. The issue presented

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Fyk I, 808 F. App'x at 598 ("We reject Fyk's argument that granting § 230(c)(1) immunity to Facebook renders § 230(c)(2)(A) mere surplusage. As we have explained, § 230(c)(2)(a) 'provides an *additional* shield from liability.'") (quoting *Barnes*, 570 F.3d at 1105); *id*. ("[T]he persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but any provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue can take advantage of subsection (c)(2).").

[36] The *Enigma* Court answered that question in the negative, narrowly holding that "if a provider's basis for objecting to and seeking to block materials is because those materials benefit a competitor, the objection would not fall within any category listed in [§ 230(c)(2)(A)] and the immunity would not apply." 946 F.3d at 1052; *id*. at 1045 ("We hold that the phrase 'otherwise objectionable' [in § 230(c)(2)(A)] does not include software that the provider finds objectionable for anticompetitive reasons.").

[37] ER 4.

[38] *See, e.g.*, App. Opening Br. at 16 ("nowhere in the Court's holding is the exception to immunity for anti-competitive animus confined to just 230(c)(2)"); *id*.

in *Enigma* was limited to subsection (c)(2) of Section 230, and the Court's holding is strictly confined to that subsection. *Enigma*, 946 F.3d at 1049-52. This is unsurprising because the defendant in *Enigma* moved to dismiss under subsection (c)(2), and the district court in *Enigma* based its immunity decision on that subsection. *See id*. at 1048; *see also Galvan v. Alaska Dep't of Corr*., 397 F.3d 1198, 1204 (9th Cir. 2005) ("Courts generally do not decide issues not raised by the parties."). Nothing supports Fyk's contention that *Enigma* announced a "'Good Samaritan' general directive that applies to all of 230(c)."[39]

Accordingly, this Court should affirm the District Court's decision denying relief under Rule 60(b)(5).

B. Given Fyk's failure to identify any change in the controlling law, the District Court did not abuse its discretion in holding that Fyk failed to demonstrate the "extraordinary circumstances" required for relief under Rule 60(b)(6).

"A movant seeking relief under Rule 60(b)(6) [must] show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535. This Court has recognized that the standard for a Rule 60(b)(6) motion is high, and that relief should only be granted "sparingly" to avoid "manifest

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at 15

[39] App. Opening Br. at 13.

injustice." *Navajo Nation*, 876 F.3d at 1173. As Fyk failed to meet this standard, the District Court properly declined to grant relief under Rule 60(b)(6).[40]

In his opening brief, Fyk asserts that the District Court abused its discretion by purportedly failing to analyze certain factors outlined by the Ninth Circuit in *Phelps* for determining whether a change in law constitutes "extraordinary circumstances."[41] Fyk is wrong, and his reliance on *Phelps* is misplaced.

In *Phelps*, this Court recognized that a change in controlling law may in some circumstances present "extraordinary circumstances" if it is "clear and authoritative." *Phelps*, 569 F.3d at 1131. But the *Phelps* court also recognized that such a change will not always provide the extraordinary circumstances necessary to reopen a case. *Id*.[42] Thus, when a movant seeks Rule 60(b)(6) relief based on an alleged change in law, the first step in the analysis is to whether there has, in fact, been such a change. *Id*. Although the *Phelps* court goes on to outline various factors that districts courts may consider in determining whether a change in law (if one exists) constitutes "extraordinary circumstances," *see id.* at 1135-38,

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[40] *See* ER 4.

[41] *See* App. Opening Br. at 23 ("The District Court's [alleged] 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."); *id*. at 12.

[42] *See also Jones v. Ryan*, 733 F.3d 825, 839 (9th Cir. 2013) ("it is clear that a change in the law will not *always* provide the truly extraordinary circumstances necessary to reopen a case") (emphasis in original).

nothing in *Phelps* or any other case requires courts to consider these additional factors where, as here, the law has not changed.

In *Riley v. Filson*, for instance, the Ninth Circuit affirmed the denial of Rule 60(b)(6) relief based solely on its determination there had been no intervening change in law. *See* 933 F.3d at 1073. Because "there ha[d] been no change in the law, the central factor in this analysis," the *Riley* court did not reach the other *Phelps* factors. *Id*.; *see also id.* at 1071 ("Here, the key issue is whether there was 'a change in the law,' and so we do not need to reach the other five factors if there was no change.").

This case is no different. As discussed above, the District Court correctly rejected Fyk's argument that there was a change in the controlling law.[43] Having done so, the District Court did not abuse its discretion in declining to consider whether, if there had been such a change, other *Phelps* factors might have contributed to a finding of "extraordinary circumstances."

C. Fyk's request for relief under Rule 60(b)(3) is untimely and meritless.

Fyk's Rule 60(b)(3) argument fails at the outset because he did not properly raise it in his Rule 60 Motion. It is axiomatic that "an appellate court will not consider issues not properly raised before the district court." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Here, the argument section of Fyk's Rule 60

[43] ER 4.

Motion mentioned Rule 60(b)(3) only once, in passing, at the end of a lengthy footnote.[44] "The summary mention of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal." *Hilao v. Est. of Marcos*, 103 F.3d 767, 778 n.4 (9th Cir. 1996). Accordingly, Fyk's request for relief pursuant to Rule 60(b)(3) has been waived. *Id.*; *see also, e.g., Aramark Facility Servs. v. Serv. Employees Intern. Union, Local 1877*, 530 F.3d 817, 824 n.2 (9th Cir. 2008) (arguments made in passing and inadequately briefed are waived). Although Fyk's reply brief includes a cursory discussion of Rule 60(b)(3), *see* ER 14, the District Court appropriately declined to address such arguments raised for the first time on reply. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief."); *accord Greisen v. Hanken*, 925 F.3d 1097, 1115 (9th Cir. 2019).

Even had Fyk properly raised the Rule 60(b)(3) issue before the District Court, his arguments would fail on the merits. To qualify for relief under Rule 60(b)(3), the moving party must establish by clear and convincing evidence "that a judgment was obtained by fraud, misrepresentation, or misconduct, and that the conduct complained of prevented the moving party from fully and fairly presenting

[44] *See* ER 29, n.3

the case." *In re M/V Peacock on Complaint of Edwards*, 809 F.2d at 1404–05. Fyk failed to make any such showing in his Rule 60 Motion, and his arguments on appeal fare no better.

On appeal, Fyk asserts that Facebook's motion to dismiss allegedly misrepresented that one of Fyk's Facebook pages was "dedicated to public urination," and that this "demonstrably false statement was featured by the District Court in the first very first paragraph of the dismissal Order." App. Opening Br. at 23-24.[45] But Fyk does not seriously contend that the District Court based its dismissal order on this alleged mischaracterization, as required to support relief from judgment under Rule 60(b)(3). Nor can he. The reasoning behind the District Court's dismissal was that Section 230(c)(1) barred Fyk's claims because they "seek to hold an interactive computer service [provider] liable as a publisher of third party content."[46] In the legal analysis reaching that conclusion, the District

[45] Fyk's Complaint alleges that Facebook "destroyed and/or severely devalued" various of his Facebook pages, including www.facebook.com/takeapissfunny. ER 183. As set forth in Mr. Fyk's Complaint, that page concerned "[t]ake the piss funny pics and videos" and had approximately 4,300,000 followers. *Id*. In the first paragraph of its dismissal order, the District Court noted by way of background that "Plaintiff had used Facebook's free online platform to create a series of, among other amusing things, pages dedicated to videos and pictures of people urinating." ER 86.

[46] ER 88-89.

Court did not rely upon, or even mention, the statement about which Fyk complains.

Moreover, this Court has already made clear that there was nothing improper about the District Court's statement. In addressing a similar argument made by Fyk in his initial appeal,[47] *Fyk I* explained that "[t]he district court did not deviate from the Rule 12(b)(6) standard by alluding to the allegation in Fyk's complaint that Facebook de-published one of his pages concerning urination, ***nor did that allusion affect the analysis***." *Fyk I*, 808 F. App'x at 597 n.1 (emphasis added).

Fyk also argues that Rule 60(b)(3) relief is warranted because the District Court supposedly accepted Facebook's "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."[48] But this makes no sense. On a 12(b)(6) motion, the district court is only required to accept factual allegations as true. *Whitaker v. Tesla Motors, Inc*., 985 F.3d 1173, 1177 (9th Cir. 2021). It is in no way obligated to accept as true a plaintiff's legal arguments or characterizations of the relevant law. Fyk provides no support for the radical notion that the defendant's assertion of a

[47] In his first appeal, Fyk argued that the District Court deviated from the Rule 12(b)(6) standard by "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." SER 12.

[48] App. Opening Br. at 23.

legal theory with which the plaintiff disagrees could ever provide a basis for Rule 60(b)(3) relief from a resulting judgment.

VIII. CONCLUSION

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

Dated: May 4, 2022

KEKER, VAN NEST & PETERS LLP

By: */s/ William S. Hicks*
PAVEN MALHOTRA
WILLIAM S. HICKS

STATEMENT OF RELATED CASES

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

Dated: May 4, 2022

KEKER, VAN NEST & PETERS LLP

By: */s/ William S. Hicks*
PAVEN MALHOTRA
WILLIAM S. HICKS

CERTIFICATE OF COMPLIANCE

I certify that:

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

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

Dated: May 4, 2022

By: */s/ William S. Hicks*
WILLIAM S. HICKS