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NOTICE OF FILING SUPPLEMENTAL AUTHORITY

October 25, 2024

***Via* ECF**
U.S. Court of Appeals for
the Ninth Circuit

Re: *Jason Fyk v. Facebook, Inc.*, No. 24-465
Appellant's Supplemental Authority in Further Support of Appeal

Dear your Honors:

Plaintiff-Appellant ("Fyk") commenced the above-captioned appeal in March 2024. Briefing closed on July 1, 2024, and the Court recently submitted the appeal on the briefs and record. *See* [D.E. 24.1].

Per Fed.R.App.P. 28(j) and 9th Cir.R. 28-6, Fyk supplementally submits *Republican National Committee v. Google, LLC*, No. 2:22-cv-01904, 2024 WL 3595538 (E.D. Cal. Jul. 31, 2024) and *Doe v. Snap, Inc.*, 144 S.Ct. 2493 (Jul. 2, 2024). The *RNC* decision confirms §230(c)(1) protects *only* passive hosting, *Doe* serves as an ominous harbinger from SCOTUS.

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> In *Dryoff* …, the Ninth Circuit found that the defendant was immune … under subsection (c)(1) for [hosting] a third-party's posts about heroin use which ultimately led to the deceased's death because the plaintiff was attempting to hold the defendant liable for the ***harm caused by that content***. 934 F.3d at 1097–98. In this case, by contrast, there is no allegation that Google published or failed to remove some potentially harmful content that caused an injury leading to the RNC's claims; rather, the challenge is to Google's decision to restrict the availability of, or to *not* publish, the RNC's emails.
>
> Further, if, as Google claims, subsection (c)(1) applied to the decision to remove content (as opposed to [hosting] it), subsection (c)(2) would be rendered superfluous. … [S]ubsections (c)(2)(A) and (B)… explicitly provide protection for the act of filtering, or not publishing, content provided by third parties.

RNC at *4 (footnote omitted) (emphasis added).

Fyk's Complaint contains "no allegation[s]" of "harm caused by [] content[;]" rather, Fyk challenges Facebook's decision to anticompetitively restrict and republish his materials. Moreover, Fyk has long-argued "… one portion of a statute cannot be read in a way that renders another portion of a statute superfluous / surplusage." *Fyk v. Facebook, Inc.*, 19-16232 [D.E. 12] at 37 (9th Cir. 2019).

"[P]latforms have increasingly used §230 as a get-out-of-jail free card." *Doe* at 2494. §230 is "narrow[ly] focus[ed], [yet] lower courts have interpreted §230 to 'confer sweeping immunity' for a platform's *own actions*." *Id.* at 2393. **"[T]here is *danger* in [this Court's] delay[ing] [reconciliation / rectification of Fyk's case]."** *Id.* (emphasis added).

Fyk v. Facebook
No. 24-465 (9th Cir.)
Supplemental Authority

Undersigned hereby certifies that the above body of this letter does not exceed 350 words per Fed. R. App. 28(j) and 9th Cir. R. 28-6; the body totals 350 words.

Submitted By:

/s/ Jeffrey L. Greyber

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Enclosures (*RNC* and *Doe*)

CC: Facebook, Inc., Counsel of Record *via* e-filing of equal date

2024 WL 3595538
Only the Westlaw citation is currently available.
United States District Court, E.D. California.

REPUBLICAN NATIONAL COMMITTEE,
Plaintiff,
v.
GOOGLE LLC, Defendant.

No. 2:22-cv-01904-DJC-JDP
|
Signed July 31, 2024

Synopsis

Background: Republican National Committee (RNC) brought action against email-service provider, asserting claim under California law for intentional interference with prospective economic relations and a violation of California's Unfair Competition Law (UCL), alleging that provider engaged in the intentional practice of diverting RNC's fundraising emails to users' spam folders for a few days at the end of every month for a period of seven months. The United States District Court for the Eastern District of California, Daniel J. Calabretta, J., 2023 WL 5487311, granted provider's motion to dismiss with leave to amend. RNC filed amended complaint. Provider moved to dismiss.

Holdings: The District Court, Daniel J. Calabretta, J., held that:

[1] provider was not entitled to immunity under Communications Decency Act (CDA);

[2] RNC had standing under Article III and UCL to seek injunctive relief under voluntary-cessation doctrine;

[3] there was no violation of UCL under unlawful prong;

[4] provider's alleged conduct was not tethered to California's common-carrier law for RNC to prevail on its claim under unfair prong of UCL;

[5] RNC's alleged harms and provider's alleged conduct as it related to its consumers did not support RNC's claim under balancing test of unfair prong of UCL;

[6] allegations that provider violated California's common-carrier doctrine could not establish an independently wrongful act so as to form basis for intentional-interference claim; and

[7] RNC failed to state a claim of intentional interference with prospective economic relations.

Motion granted.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

West Headnotes (54)

[1] **Federal Civil Procedure**⇨Insufficiency in general

A motion to dismiss for failure to state a claim may be granted if the complaint lacks a cognizable legal theory or if its factual allegations do not support a cognizable legal theory. Fed. R. Civ. P. 12(b)(6).

[2] **Federal Civil Procedure**⇨Insufficiency in general

Evaluation of plausibility, on a motion to dismiss for failure to state a claim, is a context-specific task drawing on judicial experience and common sense. Fed. R. Civ. P. 8(a)(2).

[3] **Telecommunications**⇨Privilege or immunity

Subsection of Communications Decency Act (CDA) providing interactive-computer-service providers immunity for decisions related to blocking and screening of offensive material

must be construed to protect defendants not merely from ultimate liability, but from having to fight costly and protracted legal battles. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(2)(A).

[4] **Telecommunications**⇨Privilege or immunity

When there's a close case on a claim under subsection of Communications Decency Act (CDA) providing interactive-computer-service providers immunity for decisions related to blocking and screening of offensive material, claim must be resolved in favor of immunity. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(2)(A).

[5] **Antitrust and Trade Regulation**⇨Particular cases
Telecommunications⇨Unauthorized access to or transmission of electronic communications; electronic surveillance
Torts⇨Pleading

Republican National Committee (RNC) plausibly alleged that email-service provider acted without good faith in diverting RNC's fundraising emails to users' spam folders, and thus, provider was not entitled to immunity under Communications Decency Act (CDA) for claim of intentional interference with prospective economic relations and violation of Unfair Competition Law (UCL), under California law, although provider explained that emails were marked as spam at high rate; RNC alleged that emails were not relegated as spam after filing lawsuit, that it sent more emails to users who had engaged with RNC emails more frequently and recently, so users would be less likely to mark them as spam, and that, four years prior, it sent four times as many emails with more frequency, without such diversion. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(2)(A).

[6] **Antitrust and Trade Regulation**⇨Privilege or immunity
Telecommunications⇨Privilege or immunity
Torts⇨Business relations or economic advantage, in general

Subsection of Communications Decency Act (CDA) providing immunity to interactive-computer-service provider as publisher or speaker of content provided by third party did not apply to provide immunity to email-service provider on Republican National Committee's (RNC) claims against provider under California law for intentional infliction with prospective economic relations and for violation of California's Unfair Competition Law (UCL), alleging that provider was not in good faith when diverting RNC's fundraising emails to users' spam folders; RNC did not allege that provider, as publisher or speaker, published or failed to remove potentially harmful content provided by third party that caused injury, but rather challenged provider's decision to restrict availability of, or to not publish, emails. Communications Act of 1934 § 230, 47 U.S.C.A. § **230**(**c**)(**1**).

[7] **Antitrust and Trade Regulation**⇨Privilege or immunity
Telecommunications⇨Privilege or immunity
Torts⇨Business relations or economic advantage, in general

Subsection of Communications Decency Act (CDA) providing immunity to interactive-computer-service providers that enable or make available technical means to restrict access to material did not apply to provide immunity to email-service provider on Republican National Committee's (RNC) claims against provider under California law for intentional infliction with prospective economic relations and for violation of California's Unfair

Competition Law (UCL), alleging that provider was not acting in good faith when taking unilateral action, not based on users' spam designations, in diverting RNC's emails to users' spam folders; provider was making filtering decisions at least in part, through use of its algorithm, and not merely providing technical means for filtering to its users. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(2)(B).

[8] **Antitrust and Trade Regulation**⇐Source of prohibition or obligation; lawfulness

The California's Unfair Competition Law (UCL) is an expansive law which encompasses anything that can properly be called a business practice and that, at the same time, is forbidden by law. Cal. Bus. & Prof. Code § 17200 et seq.

[9] **Antitrust and Trade Regulation**⇐Purpose and construction in general

The purpose of California's Unfair Competition Law (UCL) is to prevent unfair competitive conduct which harms both business competitors and the public. Cal. Bus. & Prof. Code § 17200 et seq.

[10] **Antitrust and Trade Regulation**⇐In general; unfairness

A plaintiff may prove a violation under California's Unfair Competition Law (UCL) by establishing any one of the unlawful, unfair, or fraudulent prongs. Cal. Bus. & Prof. Code § 17200 et seq.

[11] **Antitrust and Trade Regulation**⇐Injunction
Antitrust and Trade Regulation⇐Monetary Relief; Damages

California's Unfair Competition Law (UCL) is an equitable statute with limited remedies and allows only for restitution and injunctive relief. Cal. Bus. & Prof. Code § 17200 et seq.

[12] **Antitrust and Trade Regulation**⇐Monetary Relief; Damages
Antitrust and Trade Regulation⇐Measure and amount

Under California's Unfair Competition Law (UCL), compensation for a lost business opportunity is a measure of damages and not restitution to the alleged victims of unfair compensation. Cal. Bus. & Prof. Code § 17200 et seq.

[13] **Federal Courts**⇐Highest court

District Courts applying state law are bound by the decisions of the state's highest court.

[14] **Injunction**⇐Persons entitled to apply; standing

In order to possess standing under Article III, a plaintiff seeking injunctive relief must show (1) that it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to the challenged action of the defendant, and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S. Const. art. 3, § 2, cl. 1.

[15] **Antitrust and Trade Regulation**⇐Private entities or individuals

California's Unfair Competition Law (UCL) has a similar standing requirement to that of federal standing under Article III for a plaintiff seeking injunctive relief. U.S. Const. art. 3, § 2, cl. 1; Cal. Bus. & Prof. Code § 17204.

[16] **Antitrust and Trade Regulation**⇐Private entities or individuals

Email-service provider's alleged intentional diversion of Republican National Committee's (RNC) fundraising emails to users' spam folders at the end of each month for a period of seven months was likely to be repeated, and thus RNC had standing under Article III and California's Unfair Competition Law (UCL) to seek injunctive relief under voluntary-cessation doctrine, even though provider appeared to have stopped diverting RNC's emails; RNC would be sending same type of emails to provider's users at same volume, and there had been no clear explanation for why filtering was stopped or a binding assurance from provider that it would not begin again. U.S. Const. art. 3, § 2, cl. 1; Cal. Bus. & Prof. Code § 17200 et seq.

[17] **Federal Courts**⇐Voluntary cessation of challenged conduct

Defendant's voluntary cessation of a challenged business practice does not deprive a federal court of its power to determine the legality of the practice.

[18] **Federal Courts**⇐Voluntary cessation of challenged conduct

Although a defendant appears to have stopped allegedly illegal conduct, a case should not be considered moot if the defendant voluntarily ceases the allegedly improper behavior in response to a suit, but is free to return to it at any time.

[19] **Injunction**⇐Persons entitled to apply; standing

The fact that a party takes curative actions only after it has been sued fails to provide sufficient assurances that it will not repeat the violation to justify denying an injunction, for purposes of Article III standing under voluntary-cessation doctrine. U.S. Const. art. 3, § 2, cl. 1; Cal. Bus. & Prof. Code § 17200 et seq.

[20] **Antitrust and Trade Regulation**⇐Source of prohibition or obligation; lawfulness

There was no violation of California's Unfair Competition Law (UCL) under unlawful prong, arising out of Republic National Committee's (RNC) action against email-service provider, alleging that provider intentionally diverted RNC's fundraising emails to users' spam folders; only other potentially viable claim, intentional interference with prospective economic relations, was itself dependent on establishing independently wrongful act, which was wrongful apart from interference itself, such that RNC could not bootstrap its claims onto one another by asserting that intentional interference violated UCL, then relying on UCL violation to support intentional-interference claim, and RNC seemed to have abandoned that theory, having not raised it in opposition to provider's motion to dismiss. Cal. Bus. & Prof. Code § 17200 et seq.

1 Case that cites this headnote

[21] **Antitrust and Trade Regulation**⇐Source of prohibition or obligation; lawfulness

The unlawful prong of California's Unfair Competition Law (UCL) requires that the plaintiff sufficiently plead some separate unlawful offense. Cal. Bus. & Prof. Code § 17200 et seq.

[22] **Torts**⇐Knowledge and intent; malice

Under California law, the tort of intentional interference with prospective economic relations requires an intentional act on the part of the defendant designed to disrupt the relationship.

[23] **Antitrust and Trade Regulation**⇐In general; unfairness

The unfair prong of California's Unfair Competition Law (UCL) creates a cause of action for a business practice that is unfair even if not proscribed by some other law.

[24] **Antitrust and Trade Regulation**⇐In general; unfairness

Whether conduct is unfair, for purposes of unfair prong of California's Unfair Competition Law (UCL), can be determined in one of two ways: (1) by establishing that the conduct offends some legislatively declared policy (the tethering test), or (2) by weighing the utility of the conduct against the harm to the consumer (the balancing test). Cal. Bus. & Prof. Code § 17200 et seq.

[25] **Antitrust and Trade Regulation**⇐Questions of law or fact

The determination of whether a practice is unfair under California's Unfair Competition Law (UCL) is a legal question decided by the court, not a factual question decided by a jury. Cal. Bus. & Prof. Code § 17200 et seq.

[26] **Antitrust and Trade Regulation**⇐In general; unfairness

Tethering test for unfair prong of California's Unfair Competition Law (UCL) requires that the alleged conduct be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition; the UCL is intended to provide a remedy for such conduct where the law may not otherwise provide one. Cal. Bus. & Prof. Code § 17200 et seq.

[27] **Antitrust and Trade Regulation**⇐In general; unfairness

While conduct of a defendant does not need to be a direct violation of the law, which would otherwise collapse the unlawful prong of California's Unfair Competition Law (UCL) into the unfair prong, to determine whether something is sufficiently tethered to a legislative policy for the purposes of the unfair prong, California courts require a close nexus between the challenged act and the legislative policy; although the UCL's scope is sweeping, it is not unlimited. Cal. Bus. & Prof. Code § 17200 et seq.

[28] **Antitrust and Trade Regulation**⇐In general; unfairness
Civil Rights⇐Websites and Online Services; Internet

District court would decline to judicially extend protections of California's Unruh Civil Rights Act to political affiliation through California's Unfair Competition Law (UCL) by declaring it tethered to Unruh Act, in Republican National Committee's (RNC) action against email-service provider, alleging that provider engaged in political-affiliation discrimination by intentionally diverting RNC's fundraising emails to users' spam folders and that conduct was similar enough to causes of action already dismissed to make conduct at least tethered to those laws even if not a direct violation; extending protections to political affiliation would circumvent what was conscious legislative decision to not provide such protection, and court would decline to do that which legislature had left undone. Cal. Civ. Code § 51.

[29] **Antitrust and Trade Regulation**⇐In general; unfairness
Constitutional Law⇐Unfair trade practices

California's common-carrier law did not reflect a legislatively-declared policy that its standards should apply to electronic means of communication, like email, as would provide basis for satisfying tethering test for unfair prong of California's Unfair Competition Law (UCL), in action by Republican National Committee's (RNC), alleging that email-service provider intentionally diverted RNC's fundraising emails to users' spam folder; reading email into the common-carrier law would implicate significant policy and constitutional free speech considerations under the First Amendment that the California Legislature had not addressed. U.S. Const. Amend. 1; Cal. Bus. & Prof. Code § 17200 et seq.

[30] **Constitutional Law**⇐Particular Issues and Applications in General

Deciding on a third-party speech that will be included in or excluded from a compilation, and then organizing and presenting the included items, is expressive activity of its own under the First Amendment; when the government interferes with such editorial choices by ordering the excluded to be included, it alters the content of the compilation. U.S. Const. Amend. 1.

[31] **Antitrust and Trade Regulation**⇐Purpose and construction in general

California's Unfair Competition Law (UCL) is not intended to grant courts the authority to make complex policy determinations under the guise of judicial decisionmaking. Cal. Bus. & Prof. Code § 17200 et seq.

[32] **Antitrust and Trade Regulation**⇐In general; unfairness

In determining unfair prong of California's Unfair Competition Law (UCL), the balancing test involves an examination of the business practice's impact on its alleged victim, balanced against the reasons, justifications, and motives of the alleged wrongdoer; court must weigh the utility of a defendant's conduct against the gravity of the harm to the alleged victim. Cal. Bus. & Prof. Code § 17200 et seq.

[33] **Antitrust and Trade Regulation**⇐In general; unfairness

In assessing whether and to what extent a

business practice is harmful, as required for the balancing test of the unfair prong of California's Unfair Competition Law (UCL), a court will look to whether it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Cal. Bus. & Prof. Code § 17200 et seq.

[34] **Antitrust and Trade Regulation**⇐Purpose and construction in general

Purpose of California's Unfair Competition Law (UCL) is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services, not necessarily to address any conduct that might be viewed as unfair. Cal. Bus. & Prof. Code § 17200 et seq.

[35] **Antitrust and Trade Regulation**⇐Private entities or individuals

A plaintiff may still bring a claim under California's Unfair Competition Law (UCL) even if it has not suffered harm as a consumer or competitor. Cal. Bus. & Prof. Code § 17204.

[36] **Antitrust and Trade Regulation**⇐Private entities or individuals

A private plaintiff has standing to bring a claim under California's Unfair Competition Law (UCL) if he or she has suffered injury in fact and has lost money or property as a result of the unfair competition; however, the allegedly unfair practice must still harm consumers or competitors in order to violate the UCL. Cal. Bus. & Prof. Code § 17204.

[37] **Antitrust and Trade Regulation**⇐In general; unfairness
Antitrust and Trade Regulation⇐Private entities or individuals

Republican National Committee (RNC) was neither a user of provider's email services nor provider's competitor, and thus harms RNC allegedly suffered by provider's intentional diversion of RNC's fundraising emails to users' spam folders did not support RNC's claim under balancing test of unfair prong of California's Unfair Competition Law (UCL) for political-affiliation discrimination, absent a showing that diversion of emails injured consumers or competitors; provider's alleged unfair practice must still have harmed consumers or competitors in order to violate UCL and for RNC to have standing to bring claim under UCL, even if RNC may have suffered an injury in fact and lost money or property as a result of unfair practice. Cal. Bus. & Prof. Code § 17204.

[38] **Antitrust and Trade Regulation**⇐In general; unfairness

Email-service provider's alleged practice of engaging in political-affiliation discrimination by intentionally diverting Republican National Committee's (RNC) fundraising emails to users' spam folders did not rise to level of being immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers for RNC to prevail on its claim against provider under balancing test of unfair prong of California's Unfair Competition Law (UCL), despite practice allegedly causing substantial monetary injury to RNC; provider's users were not harmed in same way as RNC, given that having small number of unwanted emails diverted to spam on occasion was not substantially injurious, and provider was not alleged to have diverted emails to force users to pay large sums of money to get emails back. Cal. Bus. & Prof. Code § 17204.

[39] **Antitrust and Trade Regulation**⇐In general; unfairness

A common unfair practice, for purposes of conduct that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers under balancing test of unfair prong of California's Unfair Competition Law (UCL), is a scheme that seeks to exploit consumers. Cal. Bus. & Prof. Code § 17200 et seq.

[40] **Antitrust and Trade Regulation**⇐In general; unfairness

Under balancing test of unfair prong of California's Unfair Competition Law (UCL), a practice that minimally harms some consumers but does not provide a clear benefit to the defendant is not an unfair practice, for purposes of conduct that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Cal. Bus. & Prof. Code § 17204.

[41] **Torts**⇐Prospective advantage, contract or relations; expectancy

To plead the tort of intentional interference with prospective economic relations under California law, a plaintiff must plead: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff, (2) the defendant's knowledge of the relationship, (3) intentional acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

[42] **Torts**⇐Knowledge and intent; malice
Torts⇐Improper means; wrongful, tortious or illegal conduct

Plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations under California law must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself.

[43] **Torts**⇐Improper means; wrongful, tortious or illegal conduct

Under California law, an act is "independently wrongful," as required to support a claim for intentional interference with prospective economic relations, if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.

1 Case that cites this headnote

[44] **Telecommunications**⇐Common carrier or public utility status
Torts⇐Business relations or economic advantage, in general

Under California law, email-service provider was not a common carrier subject to any duties of a common carrier, and thus, allegations that provider violated the common law's common-carrier doctrine, by intentionally diverting Republican National Committee's (RNC) fundraising emails to users' spam folders, resulting in a loss of numerous potential donations, could not establish an independently wrongful act so as to form a basis for RNC's claim against provider for intentional

interference with prospective economic relations; there was no legislatively declared policy that electronic means of communication, like email, should be subjected to common-carrier standards. Cal. Bus. & Prof. Code § 17200 et seq.

[45] **Torts**—Improper means; wrongful, tortious or illegal conduct

While industry standards and professional rules may satisfy the requirement that a plaintiff prove an independently wrongful act for a claim of intentional interference with prospective economic relations under California law, the conduct must be proscribed by some determinable legal standard that provides for, or gives rise to, a sanction or means of enforcement for a violation.

1 Case that cites this headnote

[46] **Torts**—Improper means; wrongful, tortious or illegal conduct

That a defendant's conduct may be unethical or may have violated industry standards is insufficient to support a claim for intentional interference with prospective economic relations, under California law, without a determinable means by which to enforce the industry standard or rule.

[47] **Torts**—Pleading

Under California law, Republican National Committee (RNC) failed to sufficiently allege that email-service provider's intentional diversion of its fundraising emails to users' spam folders, resulting in loss of numerous potential donations, violated established industry, trade, or professional rules or standards, such that provider's email diversion was an independently wrongful act for RNC to support its claim against provider for intentional interference with prospective economic relations; RNC failed to explain in its amended complaint or its opposition to provider's motion to dismiss what the industry, trade, or professional rules or standards were, how or where those standards and rules were clearly established, or how they were enforceable.

[48] **Torts**—Pleading

Under California law, Republican National Committee (RNC) failed to adequately plead probability of economic benefit stemming from pre-existing relationship with class of email-service provider's users who had previously donated to RNC, as element of claim for intentional interference with prospective economic relations, and thus RNC failed to state claim for intentional interference against providers for causing loss of potential donations by intentionally diverting RNC's fundraising emails to users' spam folders, despite RNC sufficiently alleging requisite relationship; RNC alleged only that users requested and engaged with its emails and had previously donated, without any other facts to establish that those users would donate in future, establishing at most, a hope for future benefit.

[49] **Torts**—Existence of valid or identifiable contract, relationship or expectancy

Intentional-interference claim under California law, which requires plaintiff to identify a particular relationship or opportunity with which a defendant's conduct is alleged to have interfered, does not require plaintiff to name an individual; rather, the purpose of the requirement is to distinguish between established and speculative relationships.

[50] **Torts**⇐Existence of valid or identifiable contract, relationship or expectancy

Under California law, for a plaintiff to satisfy requirement to identify particular relationship or opportunity on a claim for intentional interference, it is enough that the defendant was aware its actions would frustrate the legitimate expectations of a specific, albeit unnamed, party.

[51] **Torts**⇐Existence of valid or identifiable contract, relationship or expectancy

California courts have narrowly construed probability-of-an-economic-benefit element, for purposes of a claim for intentional interference, requiring specific facts to show that a benefit was almost certain.

[52] **Torts**⇐Existence of valid or identifiable contract, relationship or expectancy

Under California law, the fact that a plaintiff asserting an intentional-interference claim has a preexisting business relationship with a party is not sufficient; the plaintiff must provide details about the impending contract or other economic benefit.

[53] **Torts**⇐Existence of valid or identifiable contract, relationship or expectancy

Under California law, the failure to specify what the terms were when the contracts were being negotiated, e.g., whether those contracts fell through before, during, or after defendant's alleged acts, and how much money, if any, plaintiff lost as a result dooms an intentional-interference claim under probability-of-an-economic-benefit element.

[54] **Federal Civil Procedure**⇐Form and sufficiency of amendment; futility

Republican National Committee (RNC), which was given leave to amend complaint, failed to establish a plausible theory of unfairness or unlawfulness for its claim under California's Unfair Competition Law (UCL) and to allege an independently wrongful act to support its intentional-interference claim under California law, and thus amendment to RNC's complaint was futile, in its action against email-service provider for its alleged intentional diversion of RNC's fundraising emails to users' spam folders; RNC had not provided any indication that there were additional facts it could allege to establish the elements of the claims. Cal. Bus. & Prof. Code § 17200 et seq.

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ORDER

DANIEL J. CALABRETTA, UNITED STATES DISTRICT JUDGE

*1 In response to the Court's prior Order dismissing its complaint, Plaintiff, the Republican National Committee ("RNC"), has filed an amended complaint based on Defendant Google LLC's alleged practice of diverting the RNC's emails to Gmail users' spam folders. Google again argues that it is immune from suit under section 230 of the Communications Decency Act, which prohibits civil liability for restricting access to objectional communications — including spam — in good faith. Now, though, the RNC has alleged additional facts that, if proven at trial, would show that Google was not acting in good faith such that section 230's immunity does not apply. Specifically, the RNC alleges that once it filed this lawsuit in October 2022, the email diversions ceased, despite the RNC sending even *more* emails leading up to and during the November 2022 election. Moreover, the RNC emphasizes that it targeted its emails to users that had engaged with RNC emails more recently and more frequently, and that Google's own data showed that the RNC's spam rate was within the limits suggested by Google.

Turning to the merits, however, the Court concludes that the RNC has not stated a claim under California's Unfair Competition Law ("UCL") or for intentional interference with economic relations. While the RNC may be correct that Google's alleged conduct (if proven) is "unfair" in a colloquial sense, the RNC is unable to point to any legislative policy that is implicated by the alleged conduct. Nor can it point to a sufficient harm to *users* of Gmail — which is the focus of the UCL — that would suggest Google's practices are unfair. And the RNC has not shown Google's alleged conduct has violated any other law, which is a necessary element of intentional interference with economic relations. Accordingly, the Court GRANTS Google's Motion to Dismiss, this time with prejudice.

I. Background

A. Factual Background

In its previous Order dismissing the RNC's first Complaint, the Court discussed the factual allegations of this case which it will not repeat in detail here. (*See* Order (ECF No. 53).) Briefly, the RNC, which oversees the Republican Party's political operations, alleges that for a period of seven months leading up to the 2022 midterm elections, Google intentionally diverted nearly all of the RNC's fundraising emails to Gmail users' spam folders for a few days toward the end of every month. (First Am. Compl. ("FAC") (ECF No. 58) ¶¶ 1–4, 20.) The email diversions have allegedly cost the RNC numerous potential donations. (*Id.*) The RNC contends that Google was motivated by political animus, and targeted the end of the month because that is historically when the RNC's fundraising is most successful. (*Id.* ¶¶ 2–3, 48.)

In response to the Court's previous Order holding that the RNC had not plausibly alleged that Google acted without good faith sufficient to overcome the jurisdictional bar of section 230 of the Communications Decency Act, 47 U.S.C. § 230, the RNC includes additional factual allegations in the operative FAC. First, following the initiation of this lawsuit on October 21, 2022, the end-of-month spam diversions ceased despite the RNC's email volume and user-reported spam rates remaining essentially unchanged. (*Id.* ¶ 49.) Second, the RNC alleges that despite Google's explanation that the RNC's user-reported spam rates were high, the rates were actually within the industry limit during the relevant period. (*Id.* ¶¶ 42, 72, 82, 9–98, 103.) Third, the RNC provides information about its efforts to comply with industry best practices and reduce user-reported spam rates by targeting the bulk of its email volume to only the most engaged users through a process called audience segmentation, and by engaging with email marketing platforms to monitor email performance. (*Id.* ¶¶ 27–32.)

*2 As in the original complaint, the RNC also includes allegations that Google's conduct is unfair under the UCL, and that because it violates the UCL and industry standards, Google's conduct constitutes intentional interference with economic relations. (*Id.* ¶¶ 144–151, 158.)

B. Procedural Background

The RNC filed its initial Complaint on October 21, 2022. (Compl. (ECF No. 1).) The Court granted Google's Motion to Dismiss the Complaint, finding that section 230 of the Communication Decency Act barred Plaintiff's claims. (Order (ECF No. 53).) The Court also found that Counts One, Two, and Five through Seven failed as a matter of law, and that Counts Three and Four were not

sufficiently alleged. The Court granted leave to amend to establish that Google's conduct fell within the lack of good faith exception to section 230, and to plead additional facts to support Counts Three and Four, the intentional interference with economic relations and UCL claims. (*Id.* at 15, 30, 37.)

In response to the filing of the FAC, Google filed the present Motion to Dismiss. (Mot. to Dismiss ("MTD") (ECF No. 60).) The matter is fully briefed with the filing of an Opposition, (Opp'n (ECF No. 64)), Reply (Reply (ECF No. 65)), and Defendant's Letter Brief (ECF No. 70). The Court held oral argument on March 14, 2024 with Thomas Vaseliou, Thomas McCarthy, and Michael Columbo appearing for Plaintiff and Michael Huston and Sunita Bali appearing for Defendant. The matter was submitted following the hearing.

II. Legal Standard for Motion to Dismiss

[1]A party may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The motion may be granted if the complaint lacks a "cognizable legal theory" or if its factual allegations do not support a cognizable legal theory. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)). The court assumes all factual allegations are true and construes "them in the light most favorable to the nonmoving party." *Steinle v. City & County of San Francisco*, 919 F.3d 1154, 1160 (9th Cir. 2019) (quoting *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995)). If the complaint's allegations do not "plausibly give rise to an entitlement to relief," the motion must be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

[2]A complaint need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), not "detailed factual allegations," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). But this rule demands more than unadorned accusations; "sufficient factual matter" must make the claim at least plausible. *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. In the same vein, conclusory or formulaic recitations of elements do not alone suffice. *Id.* (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). This evaluation of plausibility is a context-specific task drawing on "judicial experience and common sense." *Id.* at 679, 129 S.Ct. 1937.

III. Discussion

A. Section 230 Immunity

i. Section 230(c)(2)(A)

[3] [4]Section 230 of the Communications Decency Act affords interactive computer service providers immunity from liability for decisions related to blocking and screening of offensive material. 47 U.S.C. § 230(c)(2)(A). "To assert an affirmative defense under section 230(c)(2)(A), a moving party must qualify as an 'interactive computer service,' that voluntarily blocked or filtered material it considers 'to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable,' and did so in 'good faith.' " *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011) (quoting 47 U.S.C. § 230(c)(2)(A)). Section 230 must be construed to protect defendants "not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (*en banc*). In "close cases" section 230 claims "must be resolved in favor of immunity." *Id.* at 1174.

***3** [5]Based on the allegations in the prior Complaint, this Court previously found this to be such a "close case" and ultimately decided in favor of immunity for Google. The Court found that Google had established the first two elements of section 230(c)(2)(A): *first,* it is an interactive computer service, and *second,* the RNC's emails, as mass marketing emails, could reasonably be considered spam, which falls under the "harassing, or otherwise objectionable" umbrella. The sticking point was whether the RNC had alleged enough facts to make it plausible that Google had not filtered the emails in "good faith." In its previous Complaint, the RNC did not provide sufficient facts specific to Google's treatment of the RNC's emails to elevate the RNC's allegations above the level of speculation. In the FAC, though, the RNC has

met its burden by pleading additional facts to make it at least plausible that Google acted without good faith.

Perhaps the strongest allegation that Google acted without good faith is that the RNC's emails were not relegated to spam after the RNC filed this lawsuit. As the RNC alleges, the drop in inboxing typically occurred at the end of each month, but, after filing suit in October 21, 2022 and following the midterm election, the RNC experienced no mass diversion at the end of October or any month thereafter. (FAC ¶¶ 4, 49, 51.) The RNC alleges that it did not make any substantive changes to its email practices which would account for the change, and in fact sent more emails in November 2022 than during any other month in which it had experienced the end of month drop. (*Id.* ¶¶ 49, 51.)

The RNC has also provided facts to refute Google's explanations for the monthly drop in inboxing, making the RNC's claims that Google was intentionally diverting the emails more plausible. Google's primary explanation is that users had been marking the RNC's emails as spam at a high rate, which the algorithm compiled over the month and which led the algorithm to divert emails at a higher rate toward the end of the month. (MTD at 16–17.) In response the RNC provides facts that call that explanation into question. First, the RNC alleges that it engages in "audience segmentation" that allows the RNC to send more targeted emails to certain users. (FAC ¶¶ 27–32.) Essentially, the RNC sends more emails to users who had engaged with RNC emails more frequently and more recently, and so would ostensibly be much less likely to report those emails as spam. In contrast, the RNC sends fewer and less frequent emails to users who are less likely to engage and may be more likely to view the emails as spam. (*Id.*) Second, the RNC alleges that according to data provided by Google, the RNC's user-reported spam metric was low and within the limits suggested by Google. (*Id.* ¶¶ 82–87.) There was no significant change in the spam rate each month which would account for the monthly drop; and, notably, there was no significant change in user reported spam, either.

Google has also argued that the monthly spam diversion may have been because of the greater volume and frequency of emails sent towards the end of each month. The RNC has acknowledged that it sent more emails at the end of each month, but now alleges that the drop in inboxing would occur even *before* the RNC increased the volume of emails, meaning that the diversion was not responding to such an increase. (FAC ¶ 75.) In other words, according to the RNC, the mass diversion would occur despite the RNC's email practices remaining relatively the same in the weeks prior to the mass diversions. (*Id.* ¶¶ 70, 75.) To further refute Google's argument, the RNC also alleges that in 2020 it sent four times as many emails with more frequency, sometimes hourly, but did not experience the same type of mass spam diversion. (*Id.* ¶ 50.)

Overall, while there may be technical reasons to account for the abrupt end to the months-long inboxing pattern, the timing and the lack of a clear reason for the monthly diversions makes the RNC's allegation that Google acted without good faith in diverting the RNC's emails to spam sufficiently plausible at this early stage of the proceedings. Accordingly, Google is not entitled to immunity under section 230(c)(2)(A).

ii. Applicability of subsections (c)(1) and (c)(2)(B)

*4 [6]Google has reprised its argument that it is also immune from liability under section 230 subsections (c)(1) and (c)(2)(B). As the court previously determined, subsection 230(c)(2)(A) is the most applicable for the claims at issue because it applies where a service provider has taken steps to "restrict access to," among other material, "harassing, or otherwise objectionable" content, which is precisely what the RNC has alleged Google did by filtering its emails to spam. Subsection (c)(1), in contrast, provides that no service provider "shall be treated as the publisher or speaker of any information provided by another information content provider."

Although Google claims it is carrying out a traditional publishing function by choosing *not* to publish certain emails to inboxes, subsection (c)(1) turns on whether the asserted claim "inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009), *as amended* (Sept. 28, 2009); *accord* *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019). Such is the case for claims that the service provider should be held liable for the injuries that arise from publishing allegedly harmful content produced by another user or failing to remove harmful content. *See, e.g.*, *Barnes*, 570 F.3d at 1101 (collecting cases where section **230(c)(1)** has been applied to claims of defamation, violation of anti-discrimination laws, fraud, negligent misrepresentation, false light, and ordinary negligence). For example, in *Dyroff v. Ultimate Software Group,*

Inc., the Ninth Circuit found that the defendant was immune from suit under subsection (c)(1) for publishing a third-party's posts about heroin use which ultimately led to the deceased's death because the plaintiff was attempting to hold the defendant liable for the harm caused by that content. 934 F.3d at 1097–98.[1] In this case, by contrast, there is no allegation that Google published or failed to remove some potentially harmful content that caused an injury leading to the RNC's claims; rather, the challenge is to Google's decision to restrict the availability of, or to *not* publish, the RNC's emails.

Further, if, as Google claims, subsection (c)(1) applied to the decision to *remove* content (as opposed to publishing it), subsection (c)(2) would be rendered superfluous. Rather, it is subsections (c)(2)(A) and (B) that explicitly provide protection for the act of filtering, or not publishing, content provided by third parties. *Compare Barnes*, 570 F.3d at 1103 (holding that allegations that service provider failed to take down injurious content was barred by section **230(c)(1)** because plaintiff effectively sought to hold provider liable for publishing the content) *with Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011) (holding email service provider was immune from suit for filtering spam emails under section 230(c)(2)(A)). Subsections (c)(2)(A) and (B) provide protection for actions that restrict access to or availability of content, or enable a user to do the same, respectively.

*5 [7]Finally, subsection (c)(2)(B) is not at issue in this case because the RNC is specifically alleging that Google took unilateral action that was "*not* based on users' spam designations." (Opp'n at 23.) Google concedes that it filters emails that its algorithm designates as spam, not necessarily just those emails that users themselves designate as spam. (MTD at 4–5.) If Google can show that the decisions to filter were in fact based on a user's individualized feedback such that Google was effectively just providing the user with the means to filter the RNC's emails, Google may then be entitled to immunity under subsection (c)(2)(B). But, taking the RNC's allegations as true, it was Google making the filtering decisions, at least in part, not Google merely providing the technical means for filtering to its users.

Accordingly, section 230 subsections (c)(1) and (c)(2)(B) do not apply in this case. And section 230(c)(2)(A) — which could potentially apply — does not bar this suit given the RNC's allegations that Google was not operating in good faith.

B. Plaintiff's Claims

The Court previously dismissed many of the RNC's claims with prejudice after finding that, as a matter of law, the claims were not cognizable. The Court granted leave to amend only two causes of action: Count Three, alleging violation of California's Unfair Competition Law, and Count Four, alleging Intentional Interference with Prospective Economic Relations. (Order at 30, 37.) The RNC has included each of the other causes of action in its FAC "to make clear it is not abandoning them and to preserve its right to appeal." (FAC at 42, n.7.) For the same reasons stated in its prior Order dismissing those causes of action, the Court dismisses them here, too. Accordingly, the Court will proceed with addressing only the Third and Fourth Causes of Action.

i. UCL

[8] [9] [10]The California Unfair Competition Law prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Pro. Code § 17200, *et seq.* The UCL is an expansive law which encompasses "anything that can properly be called a business practice and that at the same time is forbidden by law." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999). The purpose of the UCL is to prevent unfair competitive conduct which harms both business competitors and the public. *Rubin v. Green*, 4 Cal. 4th 1187, 1200, 17 Cal.Rptr.2d 828, 847 P.2d 1044 (1993). A plaintiff may prove a UCL violation by establishing any one of the "unlawful," "unfair," or "fraudulent" prongs. *See Cel-Tech.*, 20 Cal. 4th at 180, 83 Cal.Rptr.2d 548, 973 P.2d 527.

[11] [12] [13]At the outset, Google has asserted that the RNC has not alleged cognizable relief under the UCL. The UCL is an equitable statute with limited remedies and allows only for restitution and injunctive relief. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150, 131 Cal.Rptr.2d 29, 63 P.3d 937 (2003). "Compensation for a lost business opportunity is a measure of damages and not restitution to the alleged victims." *Id.* (quoting *MAI Sys. Corp. v. UIPS*, 856 F. Supp. 538, 542 (N.D. Cal. 1994)). While the RNC has pled damages, it has not articulated a theory of restitution

and thus only has standing to pursue relief if it can seek an injunction. The RNC appears to recognize this point, arguing in its Opposition only that it has standing due to its request for injunctive relief.[2] (Opp'n at 17–18.) Google argues that because the conduct has ceased, the RNC no longer has standing to see injunctive relief such that the UCL claim should be dismissed.

*6 [14] [15]In order to possess standing under Article III of the Constitution, "a plaintiff must show (1) that it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) The UCL has a similar standing requirement. *See* Cal. Bus. & Prof. Code § 17204; *see also* *California Med. Assn. v. Aetna Health of California Inc.*, 14 Cal. 5th 1075, 1087, 310 Cal.Rptr.3d 415, 532 P.3d 250 (2023) (noting that "the phrase 'injury in fact' [in the UCL] is borrowed from, and was intended to incorporate aspects of, the federal constitutional law of standing.").

[16] [17] [18] [19]Under both Article III and the UCL, the RNC has standing to seek injunctive relief under the voluntary cessation doctrine. "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' " *Friends of the Earth*, 528 U.S. at 189, 120 S.Ct. 693 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982)).[3] Although Google appears to have stopped the allegedly illegal conduct for now, "a case should not be considered moot if the defendant voluntarily ceases the allegedly improper behavior in response to a suit, but is free to return to it at any time." *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994), ***overruled on other grounds by*** *Bd. of Trs. of Glazing Health and Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (***en banc***). Here, the allegations suggest that the events at issue are likely to be repeated, such that injunctive relief remains viable. The RNC continues to send the same type of emails to Gmail users at the same volume, and there has been no clear explanation for why the filtering has stopped or a binding assurance from Google that it will not begin again. The fact that a party "takes curative actions only after it has been sued fails to provide sufficient assurances that it will not repeat the violation to justify denying an injunction." *E.E.O.C. v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987). The Court concludes that the RNC has sufficiently plead entitlement to injunctive relief, and therefore has standing to pursue its UCL claim. The Court now proceeds to the merits of the UCL claim.

1. Unlawful Prong

[20] [21] [22]The unlawful prong of the UCL requires that the plaintiff sufficiently plead some separate unlawful offense. *See* *Rivera v. BAC Home Loans Servicing, L.P.*, 756 F. Supp. 2d 1193, 1200–01 (N.D. Cal. 2010). As discussed above, the Court has previously dismissed most of the RNC's claims with prejudice. The only other potentially viable claim, intentional interference with prospective economic relations, is itself dependent on establishing an independently wrongful act which is "wrongful apart from the interference itself." *Korea Supply*, 29 Cal. 4th at 1154, 131 Cal.Rptr.2d 29, 63 P.3d 937.[4] While the RNC is correct that a UCL violation may support an intentional interference with economic relations claim, the UCL needs to have been violated for "reasons other than that [defendant] interfered with a prospective economic advantage." *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1110 (9th Cir. 2007) (quoting *Stevenson Real Est. Servs., Inc. v. CB Richard Ellis Real Est. Servs., Inc.*, 138 Cal. App. 4th 1215, 1224, 42 Cal.Rptr.3d 235 (2006)). In other words, the RNC may not "bootstrap" its claims on one another by asserting that the intentional interference violates the UCL, and then relying on that UCL violation to support its intentional interference claim. Although the RNC pleads this theory in the FAC (*See* FAC ¶ 144), it seems to have abandoned it, having not raised the argument in opposition. (*See* Opp'n at 12–16 (arguing only that the "unfair" prong is met).) Accordingly, the Court does not find a violation of the UCL under the unlawful prong.

2. Unfair Prong

*7 [23] [24] [25]"The unfair prong of the UCL 'creates a cause of action for a business practice that is unfair even if not proscribed by some other law.' " *Day v. GEICO Cas. Co.*, 580 F. Supp. 3d 830, 844 (N.D. Cal. 2022) (quoting *Cappello v. Walmart Inc.*, 394 F. Supp. 3d

1015, 1023 (N.D. Cal. 2019)). Whether conduct is unfair can be determined in one of two ways: (1) by establishing that the conduct offends "some legislatively declared policy" (the "tethering" test), or (2) by weighing the utility of the conduct against the harm to the consumer (the "balancing" test).[5] *Id.* at 844–45 (citing *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007) and *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012)). While the California Supreme Court has rejected the balancing test in favor of the tethering test for competitor suits under the UCL, it has failed to clarify whether the tethering test is the sole test that should apply to consumer suits as well. *Cel-Tech*, 20 Cal. 4th at 186–87, 83 Cal.Rptr.2d 548, 973 P.2d 527; *see Nationwide Biweekly Admin., Inc. v. Superior Ct. of Alameda Cnty.*, 9 Cal. 5th 279, 304, 261 Cal.Rptr.3d 713, 462 P.3d 461 (2020) (acknowledging split in California appellate courts but declining to address whether the tethering test also applies to consumer suits). In the absence of such guidance, the Ninth Circuit has endorsed the use of the balancing test for consumer suits, but has in practice reviewed unfairness under both the balancing and tethering tests. *See Lozano*, 504 F.3d at 735 (stating that the two tests are not mutually exclusive); *Davis*, 691 F.3d at 1170 (finding that plaintiff failed to state a claim under either the balancing or tethering test); *see also Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1215 (9th Cir. 2020). The RNC argues that it meets the unfair prong under either of these tests, which the Court will consider in turn.[6]

a. Tethering test

[26] [27]The tethering test requires that the alleged conduct be "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Cel-Tech*, 20 Cal. 4th at 186–87, 83 Cal.Rptr.2d 548, 973 P.2d 527. The UCL is intended to provide a remedy for such conduct where the law may not otherwise provide one. *See, e.g., Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 566, 71 Cal.Rptr.2d 731, 950 P.2d 1086 (1998), *abrogated by statute on other grounds* (finding a civil right of action under the UCL for violating a criminal law prohibiting the sale of tobacco to minors); *In re Zoom Video Commc'ns Inc. Priv. Litig.*, 525 F. Supp. 3d 1017, 1047 (N.D. Cal. 2021) (gathering video and audio of minors without parental consent violated the public policy of protecting minors' personal information online). While the conduct does not need to be a direct violation of the law (which would otherwise collapse the unlawful prong into the unfair prong), "[t]o determine whether something is sufficiently 'tethered' to a legislative policy for the purposes of the unfair prong, California courts require a close nexus between the challenged act and the legislative policy." *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 866 (9th Cir. 2018). "Although the unfair competition law's scope is sweeping, it is not unlimited." *Cel-Tech*, 20 Cal. 4th at 182, 83 Cal.Rptr.2d 548, 973 P.2d 527. Under the tethering test, the RNC argues that Google's conduct is similar enough to causes of action that this Court has already dismissed to make the conduct at least tethered to those laws even if the conduct is not a direct violation of the laws.

*8 [28]*First*, the RNC argues that discrimination based on political affiliation violates the public policy espoused in the Unruh Act despite the Court's finding that the Unruh Act contains no such policy. As the Court discussed in its previous Order, the California Legislature has so far declined to protect political affiliation under the Unruh Act. While the RNC is correct that the UCL is intended to combat "new schemes" that the legislature has not yet explicitly addressed, "[i]f the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination." *Cel-Tech*, 20 Cal. 4th at 182, 83 Cal.Rptr.2d 548, 973 P.2d 527. There is nothing novel about political affiliation discrimination. The Court discussed in its prior Order that California courts have in the past suggested that political affiliation discrimination might violate the Unruh Act. *See, e.g., Harris v. Cap. Growth Invs. XIV*, 52 Cal. 3d 1142, 1161 n.10, 278 Cal.Rptr. 614, 805 P.2d 873 (1991). But since the *Harris* case, the California Legislature has amended the Unruh Act at least six times to add other protected categories, and yet has not added political affiliation. (Order at 26.) "We generally presume the Legislature is aware of appellate court decisions," *Therolf v. Superior Court of Madera County.*, 80 Cal. App. 5th 308, 335, 295 Cal.Rptr.3d 683 (2022), and so "its inaction on this subject ... is significant." *Beverage v. Apple, Inc.*, 101 Cal. App. 5th 736, 320 Cal.Rptr.3d 427 (2024). The California Legislature's inaction in this area is far from establishing a "legislatively declared policy" of prohibiting discrimination based on political affiliation.

The RNC attempts to analogize to *Candelore v. Tinder, Inc.*, which held that in addition to violating the Unruh Act, age discrimination in pricing also violated the unfair prong of the UCL. The age discrimination analyzed in *Candelore* differs from political affiliation

discrimination in several key respects. First, the *Candelore* court determined that age discrimination in pricing was actually violative of the Unruh Act, and was not just tethered to it. 19 Cal. App. 5th 1138, 1145, 228 Cal.Rptr.3d 336 (2018). Consistent with the California Supreme Court's decision in *Marina Point, Ltd. v. Wolfson*, the *Candelore* court held that age discrimination violates the Unruh Act when age is used as an arbitrary proxy for generalized characteristics.[7] *Id.* at 1145, 1151–52, 228 Cal.Rptr.3d 336; *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 740, 180 Cal.Rptr. 496, 640 P.2d 115 (1982). No court has similarly held that political affiliation discrimination directly violates the Unruh Act, and, important here, the Legislature has never indicated a policy against political affiliation discrimination, either.

Notably, California has recognized a public policy against age discrimination in several other contexts. The California Legislature has explicitly codified the *Marina Point* decision by prohibiting age discrimination in housing. *See* Cal. Civ. Code § 51.2(a)–(b). The California Fair Employment and Housing Act also prohibits age discrimination in employment. *See* Cal. Gov't Code § 12940. These specific statutes evince a legislatively declared policy against age discrimination, at least in select contexts. In contrast, there is no evidence of California public policy against political affiliation discrimination. The closest the Legislature has come is to prohibit violence or threats of violence based on political affiliation under the Ralph Civil Rights Act, which is meaningfully different from prohibiting discrimination on the basis of political affiliation as a general matter. Cal. Civ. Code § 51.7; *see, e.g.*, *Black Lives Matter-Stockton Chapter v. San Joaquin Cnty. Sheriff's Off.*, 398 F. Supp. 3d 660, 679 (E.D. Cal. 2019) (threats of violence based on association with Black Lives Matter would violate the Ralph Civil Rights Act); *Campbell v. Feld Ent., Inc.*, 75 F. Supp. 3d 1193 (N.D. Cal. 2014) (same based on association with animals rights activist group). Accordingly, the many statements of legislative policy against age discrimination from which the *Candelore* court drew are absent in the political affiliation context.

*9 As the Court previously determined, "had the California Legislature intended to give broader protections to individuals on the basis of their political affiliation ... it would have done so." (Order at 26). The Court declines to judicially extend the protections of the Unruh Act to political affiliation through the UCL by declaring it "tethered" to the Unruh Act. To do so would be to circumvent what the Court has already observed is a conscious legislative decision to not provide such protection. (*See* Order 24–27.) "[The Court] decline[s] the invitation to do that which the Legislature has left undone." *Korens v. R. W. Zukin Corp.*, 212 Cal. App. 3d 1054, 1059, 261 Cal.Rptr. 137 (1989), ***reh'g denied and opinion modified*** (Aug. 28, 1989).

[29] *Second*, the RNC argues that the conduct is tethered to the policy underlying California's common carrier law, specifically that California law "reflects the public policy that messages should be delivered to and received by the designated recipient reasonably and without discrimination," and that Google's conduct is "comparable" to a violation of the California common carrier law, despite the Court's prior finding that the California common carrier law does not apply to email or email carriers. (Opp'n at 14–15). As the Court has discussed in the prior Order, California's common carrier law has historically been applied to services that physically carry persons or goods, like stagecoaches, busses, and ski lifts. (Order at 16.) While the California Supreme Court did interpret the law to include telephone services, *see* *Goldin v. Pub. Utilities Comm'n*, 23 Cal. 3d 638, 662, 153 Cal.Rptr. 802, 592 P.2d 289 (1979), there is no *legislatively declared* policy that electronic means of communication like email should be subject to common carrier standards. *See* *Cel-Tech*, 20 Cal. 4th at 186–87, 83 Cal.Rptr.2d 548, 973 P.2d 527.

[30] [31] Reading email into the common carrier law would implicate significant policy and Constitutional considerations that the California Legislature has not addressed. As the Court previously discussed, "if email providers are common carriers, they would have an obligation to deliver each of the messages that were entrusted to them" including unwanted and spam emails that could be harmful and disruptive to email users and providers. (Order at 22.) And such a regulation would impose on email providers' First Amendment rights. As the Supreme Court recently recognized:

> [d]eciding on the third-party speech that will be included in or excluded from a compilation — and then organizing and presenting the included items — is expressive activity of its own .... When the government interferes with such editorial choices — say, by ordering the excluded to be

included — it alters the content of the compilation.

Moody v. NetChoice, LLC, —- U.S. ——, 144 S. Ct. 2383, 2402, —- L.Ed.2d —— (2024). Under this standard, a law that would require email providers to treat political content in a certain manner at least implicates the First Amendment.[8] Although a legislature may determine that such a regulation is nonetheless justified, the UCL is not intended to grant courts the authority to make these kinds of complex policy determinations under the guise of judicial decisionmaking. *See* *Wolfe v. State Farm Fire & Cas. Ins. Co.*, 46 Cal. App. 4th 554, 565, 53 Cal.Rptr.2d 878 (1996) (warning against judicial intervention in complex areas of policy via the UCL); *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1362, 137 Cal.Rptr.3d 293 (2012) (collecting cases where California courts have declined to rule on UCL claims implicating complex policy decisions), *as modified on denial of reh'g* (Feb. 24, 2012). The California Legislature is properly in a position to balance these concerns, and without the necessary legislatively declared policy required under the tethering test, this Court may not do so in its stead.

b. Balancing test

*10 [32] [33]The UCL balancing test is less clearly defined than the tethering test. *See* *Cel-Tech*, 20 Cal. 4th at 185, 83 Cal.Rptr.2d 548, 973 P.2d 527 (criticizing the balancing test for being "amorphous" and "provid[ing] too little guidance to courts"). The balancing test "involves an examination of [the business practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim ...." *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886–87, 85 Cal.Rptr.2d 301 (1999) (quoting *State Farm Fire & Cas. Co. v. Superior Ct.*, 45 Cal. App. 4th 1093, 1103–04, 53 Cal.Rptr.2d 229 (1996), ***abrogated on other grounds by*** *Cel-Tech*, 20 Cal. 4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527). In assessing whether and to what extent a business practice is harmful, the court will look to whether it is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Davis*, 691 F.3d at 1169 (quoting *S. Bay*, 72 Cal. App. 4th at 887, 85 Cal.Rptr.2d 301).

[34] [35] [36] [37]As this description of the balancing test indicates, when assessing the harm, the Court must look only at the harm suffered by the *consumers*, that is, Gmail users, not by the RNC. *See* *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 867 (9th Cir. 2018). "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services," not necessarily to address any conduct that might be viewed as unfair. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 949, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002), *as* ***modified*** (May 22, 2002); ***see also*** *Bank of the W. v. Superior Ct.*, 2 Cal. 4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545 (1992) (describing the history of the UCL). Because the RNC is not a Gmail user or Google competitor, the harms it has allegedly suffered are not properly considered under the UCL. *See, e.g.*, *Hodsdon*, 891 F.3d at 867 (declining to look to the *practice* of utilizing child and slave labor, but rather only examining the conduct which affected the *consumer* of the chocolate products, namely the failure to disclose these labor practices). The RNC has not cited, and the Court cannot find, any case where an unfair practice claim was based on a harm not suffered by either a consumer or competitor.[9] *See, e.g.*, *California Med. Assn.*, 14 Cal. 5th at 1090, 310 Cal.Rptr.3d 415, 532 P.3d 250 (finding standing to sue under the UCL based on the plaintiff's separate economic injury despite the fact that plaintiff was neither a consumer or competitor of the defendant, but noting the alleged harm under the UCL was to participating physicians).

*11 [38]Focusing on the injury to consumer, the RNC asserts that Google's alleged practice of diverting emails to spam harms Gmail users by making it more difficult for them to access their emails and engage with politics. Taking all the RNC's allegations as true and in the light most favorable to it, at its worst Google's alleged conduct, as it applies to consumers, consists of delivering nearly all of the RNC's emails to users' inboxes without issue, save for one or two days over the course of seven months when the messages were delivered to users' spam folders as opposed to their inboxes.[10]

[39] [40]While there is no case that clearly defines what constitutes conduct that is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," a review of the caselaw reveals several themes. A common unfair practice is a scheme that seek to exploit consumers. For example, having a product fail is not substantially injurious, but "charging customers exorbitant sums of money" to remediate the harm of the

inevitable failure is. *In re Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776, 798 (N.D. Cal. 2017). Similarly, hiding no-parking signs, then arranging for a towing company to remove the cars while receiving a kickback from the towing company is an unfair practice. *People v. James*, 122 Cal. App. 3d 25, 36, 177 Cal.Rptr. 110 (1981). In contrast, a practice that minimally harms some consumers but does not provide a clear benefit to the defendant is not an unfair practice. In *Puentes v. Wells Fargo Home Mortgage, Inc.* the court found that the practice of using a standard month for mortgage payments, which resulted in the plaintiffs being charged for two additional days of interest because they paid off their loan February — but provided defendant with no net monetary benefit overall — was not immoral, unethical, oppressive or unscrupulous, or substantially injurious. 160 Cal. App. 4th 638, 649, 72 Cal.Rptr.3d 903 (2008). And, most applicable here, declining to advertise another business's services but not excluding those services from the market is not an unfair practice. In *Drum v. San Fernando Valley Bar Assn.*, the court found that the bar association's refusal to sell its membership mailing list to a mediator not in good standing with the bar was not immoral, unethical or unscrupulous because the association did not otherwise prevent the consumers from being able to find or engage the mediator's services. 182 Cal. App. 4th 247, 257, 106 Cal.Rptr.3d 46 (2010); *cf. Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1133 (9th Cir. 2014) (withholding positive business reviews was not extortion under the UCL because Yelp had no obligation to provide positive reviews).

Here, the alleged conduct does not rise to the level of being "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." While political discrimination may fall under the umbrella of these terms, the Court must, again, focus on the business practice and the harms to the consumer. *See Hodsdon*, 891 F.3d at 867. Having a small number of wanted emails diverted to spam on occasion is not "substantially injurious" to Gmail users. Google is not alleged to have diverted the emails to force users to pay large sums of money to get their emails back; the users could access those emails at any time. Nor did Google realize any monetary benefit from diverting the RNC's emails. While the practice did allegedly cause substantial monetary injury to the RNC, the Gmail users were not harmed in a similar way.

***12** The allegations of political discrimination, if true, are certainly concerning and may have wide and severe implications for the future of political discourse. It may even be that Google's conduct is "unfair" in a colloquial, as opposed to a legal, sense. But it is not the role of this Court to decide these significant policy issues that must be addressed by a legislative body in the first instance. As broad as it is, California's Unfair Competition Law does not cover the conduct alleged by the RNC. Accordingly, the Court GRANTS the Motion to Dismiss as to the Third Cause of Action.

ii. Intentional Interference with Prospective Economic Relations

[41]To plead the tort of intentional interference with prospective economic relations, a plaintiff must plead: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Korea Supply*, 29 Cal. 4th at 1153, 131 Cal.Rptr.2d 29, 63 P.3d 937. The California Supreme Court has clarified that to meet the third element, "a plaintiff must plead and prove that the defendant's acts are wrongful apart from the interference itself." *Id.* at 1154, 131 Cal.Rptr.2d 29, 63 P.3d 937; *see Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393, 45 Cal.Rptr.2d 436, 902 P.2d 740 (1995).

1. Independently Wrongful Act

[42] [43]The Court previously dismissed the RNC's claim of intentional interference with prospective economic relations on the basis that the RNC had not plead some independent unlawful conduct to support this claim. "[A] plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." *Della Penna*, 11 Cal. 4th at 393, 45 Cal.Rptr.2d 436, 902 P.2d 740. "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply*, 29 Cal. 4th at 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937.

[44]The RNC argues that Google's conduct is independently wrongful because it violates the UCL and "the common law's established common-carrier doctrine." (Opp'n at 20.) As determined above, the RNC has not established a violation of the UCL and so it cannot form the basis of the intentional interference claim. The common carrier argument similarly fails. The supposed common-law common carrier doctrine is derived from a — now vacated — out of circuit opinion assessing a different state's statutory common carrier law. In the opinion, the Fifth Circuit explicitly states that the historical common carrier doctrine "vests *States* with the power to impose nondiscrimination obligations on communication and transportation providers," and then surveys how some States have enacted various common carrier laws defining and regulating common carriers in different ways. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 470-72 (5th Cir. 2022) (emphasis added), *cert. granted in part sub nom. NetChoice, LLC v. Paxton*, —- U.S. —-, 144 S. Ct. 477, 216 L.Ed.2d 1313 (2023), and *vacated and remanded sub nom. Moody v. NetChoice, LLC*, —- U.S. —-, 144 S. Ct. 2383, —- L.Ed.2d —- (2024). The Court has already discussed at length in its prior Order why under California law — the law applicable here — Google is not a common carrier and thus not subject to any duties of a common carrier. (Order at 16–22.)

***13** [45] [46] [47]Additionally, the RNC briefly alleges that Google's conduct is independently wrongful because Google violated "established industry, trade or professional rules or standards, such as Google's own terms of service and implied warranties." (FAC ¶ 158.) While industry standards and professional rules may satisfy the requirement that a plaintiff prove an independently wrongful act, the conduct must be proscribed by some "determinable legal standard" that "provides for, or gives rise to, a sanction or means of enforcement for a violation." *Stevenson Real Est. Servs., Inc. v. CB Richard Ellis Real Est. Servs., Inc.*, 138 Cal. App. 4th 1215, 1223, 42 Cal.Rptr.3d 235 (2006). That a defendant's conduct may be "unethical" or may have violated industry standards is insufficient without a determinable means by which to enforce the industry standard or rule. *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, 95 Cal. App. 4th 1249, 1259, 116 Cal.Rptr.2d 358 (2002). For example, in *Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc.*, the court held that despite the American Industrial Real Estate Association's Rules of Professional Conduct establishing a well-defined standard for what was "permitted, required and prohibited" within the industry, a violation of the rules could not be considered independently wrongful under *Korea Supply* because there was no way for an aggrieved member to enforce the rules through, for example, a sanction, right of arbitration, or other internal remedy. *Stevenson Real Estate*, 138 Cal. App. 4th at 1222–24, 42 Cal.Rptr.3d 235. Here, the RNC fails to explain either in the FAC or its Opposition what the industry, trade, or professional rules or standards are, how or where those standards and rules are clearly established, or how they are enforceable. Accordingly, this allegation is not enough to establish an independently wrongful act.

The RNC has therefore failed to plead any independently wrongful conduct to support its claim.

2. Probability of an Economic Benefit

[48]The RNC's claim also fails for the independent reason that the RNC has not adequately pled the probability of an economic benefit. *See Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.*, 2 Cal. 5th 505, 511, 213 Cal.Rptr.3d 568, 388 P.3d 800 (2017). As stated above, a plaintiff must allege an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff.

[49] [50]While Google is correct that an intentional interference claim requires the plaintiff "to identify a particular relationship or opportunity with which the defendant's conduct is alleged to have interfered," this requirement does not require a plaintiff to *name* an individual. *Damabeh v. 7-Eleven, Inc.*, No. 5:12-CV-1739-LHK, 2013 WL 1915867, at *10 (N.D. Cal. May 8, 2013); *see Soil Retention Prod., Inc. v. Brentwood Indus., Inc.*, 521 F. Supp. 3d 929, 961 (S.D. Cal. 2021). Rather, the purpose of the requirement is to distinguish between established and speculative relationships. *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 524, 49 Cal.Rptr.2d 793 (1996). The requirement "does not mean the party must [be] identified by name; it [i]s enough that the defendant was aware its actions would frustrate the legitimate expectations of a *specific*, albeit unnamed, [party]." *Id.* (citing *Ramona Manor Convalescent Hosp. v. Care Enterprises*, 177 Cal. App. 3d 1120, 225 Cal.Rptr. 120 (1986), *as modified on denial of reh'g* (Mar. 5, 1986)); *see also Weintraub Fin. Servs., Inc. v. Boeing Co.*, No. CV-20-3484-MWF-GJSx, 2020 WL 6162801, at *8 (C.D. Cal. Aug. 7, 2020) (holding that the plaintiffs had "alleged a 'particular relationship or opportunity with

which the defendant's conduct ... interfered' rather than vague allegations regarding a relationship with an 'as yet unidentified' customer" despite not naming the buyer). With these principles in mind, the RNC has sufficiently alleged a pre-existing relationship with a class of Gmail users who had donated to the RNC in the past.

[51] [52] [53]Despite pleading the requisite relationships, the RNC has failed to plead the reasonable probability of an economic benefit stemming from these relationships. Overall, courts have narrowly construed this element, requiring specific facts to show that a benefit was almost certain. *See Roy Allan Slurry Seal, Inc.*, 2 Cal. 5th at 518, 213 Cal.Rptr.3d 568, 388 P.3d 800; *Pac. Gas & Elec. Co. v. Bear Stearns & Co.* 50 Cal. 3d 1118, 1136–1137, 270 Cal.Rptr. 1, 791 P.2d 587 (1990) (noting that courts "have been cautious in defining the interference torts, to avoid promoting speculative claims."). The fact that a plaintiff has a preexisting business relationship with a party is not sufficient; the plaintiff must provide details about the impending contract or other economic benefit. *See Soil Retention*, 521 F. Supp. 3d at 961 (requiring a plaintiff to allege "not just 'an economic relationship between the plaintiff and some third party' but also the [']probability of future economic benefit to the plaintiff.' " (quoting *Korea Supply*, 29 Cal. 4th at 1153, 131 Cal.Rptr.2d 29, 63 P.3d 937)). For example, the failure to specify "what the terms were, when the contracts were being negotiated (*e.g.*, whether those contracts fell through before, during, or after Defendant's alleged ... acts), and how much money, if any, Plaintiff lost as a result" dooms a claim. *Id.* at 962.

***14** Here, the RNC has alleged only that the users requested RNC emails, engaged with the emails, and have donated in the past without any other facts to establish that these users would donate in the future. (*See* FAC ¶¶ 2, 27-32, 53, 56; Opp'n at 18). The RNC has failed to point to any case where a past economic relationship standing alone was enough to show the reasonable probability of a future benefit, and the Court has been unable to find one in its own review. *See, e.g.*, *Putian Authentic Enter. Mgmt. Co., Ltd. v. Meta Platforms, Inc.*, No. 5:22-CV-01901-EJD, 2022 WL 1171034, at *5 (N.D. Cal. Apr. 19, 2022) (finding that description of "past customers, not future customers" did not suffice to establish interference with a future business benefit). Similarly, the fact that users request and "engage" with emails does not support the conclusion that a user would have also donated. Without more facts about the nature or frequency of the past donations to bolster the probability of a recurrence, the RNC has established "at most a hope for ... future benefit." *Blank v. Kirwan*, 39 Cal. 3d 311, 331, 216 Cal.Rptr. 718, 703 P.2d 58 (1985).

Thus, the RNC has failed to allege the elements necessary for its intentional interference with prospective economic relations claim. Accordingly, the Court GRANTS the Motion to Dismiss as to the Fourth Cause of Action.

iii. Leave to Amend

[54]Despite being given leave to amend to establish "a plausible theory of unfairness or unlawfulness" for its UCL claim, and to allege an independently wrongful act to support its intentional interference claim, the RNC has failed to do either. The RNC has not provided any indication that there are additional facts it could allege to establish these elements of its claims. Therefore, the Court finds that amendment would be futile. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009), *as amended* (Feb. 10, 2009) (denial of leave to amend appropriate where amendment would be futile because the plaintiff had no additional facts to plead).

IV. Conclusion

For the above reasons, IT IS HEREBY ORDERED that Google's Motion to Dismiss (ECF No. 60) is GRANTED. The RNC's claims are hereby DISMISSED WITH PREJUDICE.

All Citations

--- F.Supp.3d ----, 2024 WL 3595538

Footnotes

1 In its Motion to Dismiss, Google takes out of context the fact that *Dyroff* involved "features and functions" to organize and display content. (MTD at 25 (quoting *Dyroff*, 934 F.3d at 1098).) The Ninth Circuit discussed those

features to rebut the argument that the interactive computer service at issue there was creating content by the use of those features and functions. There is no such argument here. And unlike in *Dyroff*, where the causes of action were based on the *content* of the messages and thus were an attempt to treat the computer service as a publisher, none of the RNC's causes of action in this case seek to treat Google as a publisher.

2 At oral argument, the RNC argued for the first time that the UCL permits declaratory relief as well. The Court's review of the cited cases and other relevant caselaw proves otherwise. In *Weizman v. Talkspace, Inc.*, the Northern District of California did state that UCL remedies are limited to "restitution and prospective declaratory or injunctive relief." —— F. Supp. 3d ——, ——, No. 23-cv-00912-PCP, 2023 WL 8461173, at *3 (N.D. Cal. Dec. 6, 2023). However, the court relied on two California cases, including a decision of the California Supreme Court, which clearly state that the only available relief is restitution and injunctive relief. *See id.* (first citing *Korea Supply*, 29 Cal. 4th at 1144, 131 Cal.Rptr.2d 29, 63 P.3d 937 and then citing *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 130, 103 Cal.Rptr.3d 83 (2009)). District Courts are bound by the decisions of the state's highest court. *Armstrong v. Reynolds*, 22 F.4th 1058, 1073 (9th Cir. 2022). Thus, even if the *Weizman* decision's characterization of UCL remedies is not an unintentional error, that decision is not controlling. *Colopy v. Uber Technologies Inc.*, on the other hand, merely stands for the position that a UCL claim can serve as the predicate for a claim under the Declaratory Judgement Act, not that declaratory relief can support a UCL claim. *See* No. 19-CV-06462-EMC, 2020 WL 3544982, at *3 (N.D. Cal. June 30, 2020) ("[T]he Court can see no reason why, if relief is available under the UCL, a plaintiff would not be able to seek declaratory relief under the DJA.")

3 At oral argument, Defendant suggested that the voluntary cessation doctrine did not apply to the UCL, citing to *Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440, 463, 30 Cal.Rptr.3d 210 (2005). However, the defendant in *Madrid* had not voluntarily ceased the activity, but, rather, the circumstances had changed such that the defendant would have been unable to carry out the same conduct in the future. Similar to the inquiry under Article III, *Madrid* clearly states that a plaintiff may seek injunctive relief under the UCL for misconduct which is "likely to recur." *Id.* at 464, 30 Cal.Rptr.3d 210.

4 *See infra* Section III.B.ii. The tort of intentional interference with prospective economic relations requires an intentional act on the part of the defendant designed to disrupt the relationship. *Korea Supply*, 29 Cal. 4th at 1153, 131 Cal.Rptr.2d 29, 63 P.3d 937. The California Supreme Court has clarified that such an act must be "wrongful apart from the interference itself" and that "an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id.* at 1154, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937.

5 While some courts have stated there is a third test for determining unfairness, looking to whether the practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," *see Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1214 (9th Cir. 2020), these factors appear to be part of the balancing test and do not constitute a distinct basis for finding unfairness. *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169–70 (9th Cir. 2012) (discussing the balancing test as that articulated by *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861 886–87, 85 Cal.Rptr.2d 301 (1999) and *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 718, 113 Cal.Rptr.2d 399 (2001), *as modified* (Nov. 20, 2001) in which the nature of the practice is part

of the balancing test). In a recent opinion, *Nationwide Biweekly Administration, Inc. v. Superior Court of Alameda County*, the California Supreme Court acknowledged that in the absence of guidance from that court, California appellate courts have adopted three different test: the tethering test, the *South Bay*/*State Farm* balancing test, and the more recent *Camacho*/FTC balancing test, articulated in *Camacho v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394, 1403, 48 Cal.Rptr.3d 770 (2006). 9 Cal. 5th 279, 304, n. 10, 261 Cal.Rptr.3d 713, 462 P.3d 461 (2020). California's high court, however, declined to resolve which was the appropriate test. The Ninth Circuit has recognized the tethering and *South Bay*/*State Farm* tests, but rejected the *Camacho*/FTC test "in the absence of a clear holding from the California Supreme Court." *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007). Because the California Supreme Court did not make such a clear holding about the viability of the FTC in Nationwide, the only two tests applicable in this Circuit are the tethering test and the *South Bay*/*State Farm* balancing test.

6 The determination of whether a practice is unfair under the UCL is a legal question decided by the court, not a factual question decided by a jury. *Nationwide Biweekly*, 9 Cal. 5th at 304, 261 Cal.Rptr.3d 713, 462 P.3d 461. Nevertheless, at this stage, the Court still presumes the truth of the allegations in the FAC, as weighing evidence is not appropriate in assessing a motion to dismiss. *Steinle*, 919 F.3d at 1160; *Rubenstein v. Neiman Marcus Grp. LLC*, 687 F. App'x 564, 566 (9th Cir. 2017).

7 Specifically, in *Marina Point*, the Court held that a landlord could not discriminate against children based on the arbitrary generalization that all children are noisy and disruptive, and in *Candelore*, the court held that Tinder could not base its pricing structure on a generalization about younger users' income. Other California courts have found that age discrimination is acceptable in certain circumstances and does not violate the Unruh Act. For instance, providing a discount to senior citizens who are likely on a fixed income, or making a fitness club more financially accessible to younger members are socially desirable practices and not "arbitrary discrimination." *See Starkman v. Mann Theatres Corp.*, 227 Cal. App. 3d 1491, 1499, 278 Cal.Rptr. 543 (1991); *Javorsky v. W. Athletic Clubs, Inc.*, 242 Cal. App. 4th 1386, 1405, 195 Cal.Rptr.3d 706 (2015).

8 The Court is in no way offering an opinion on whether such a law would in fact be unconstitutional but is rather observing a significant policy and Constitutional issue that the California Legislature would likely consider if it were to regulate email providers as common carriers.

9 A plaintiff may still bring a claim under the UCL even if it has not suffered harm as a consumer or competitor. "[A] private plaintiff has standing to bring a claim under the UCL ... if he or she has 'suffered injury in fact and has lost money or property as a result of [the] unfair competition.' " *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1253, 99 Cal.Rptr.3d 768 (2009) (quoting Cal. Bus. & Prof. Code § 17204, as amended by Prop. 64, § 3). In a recent opinion, the California Supreme Court determined that a plaintiff may assert a violation of the law on behalf of consumers, so long as the plaintiff has also been harmed in some, but not necessarily the same, way. *California Med. Assn. v. Aetna Health of California Inc.*, 14 Cal. 5th 1075, 1090, 310 Cal.Rptr.3d 415, 532 P.3d 250 (2023) ("UCL standing can be based on an organization's diversion of resources in response to a threat to its mission.") However, the allegedly unfair practice must still harm *consumers or competitors* in order to violate the UCL. *See id.* (despite resting its own standing on a diversion of resources theory, the plaintiffs argued that the

insurer's policy harmed participating physicians and interfered with their medical judgement); *Lagrisola v. N. Am. Fin. Corp.*, 96 Cal. App. 5th 1178, 1192–95, 314 Cal.Rptr.3d 941 (2023), ***review denied*** (Feb. 14, 2024) (finding that while the plaintiffs had established a sufficient economic injury, they had not sufficiently alleged an actionable unfair business practice where they could not show that the defendant had any obligation to have a lender license and did not misrepresent its license status to consumers).

10 The RNC has also claimed that Google misrepresents the nature of its services to users. (FAC ¶ 151.) However, this is fundamentally an allegation of fraud and the RNC has failed to plead facts sufficient to meet the Rule 9 fraud pleading standard, nor has it alleged that the users relied on these misrepresentations in choosing to set up a Gmail account, as the Court noted in its prior Order. (Order at 36–37.) *See* *O'Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 1003 (N.D. Cal. 2014).

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144 S.Ct. 2493
Supreme Court of the United States.

John DOE, THROUGH Next Friend Jane ROE
v.
SNAP, INC., dba Snapchat, L.L.C., dba Snap, L.L.C.

No. 23-961
|
Decided July 2, 2024

Case below, 2023 WL 4174061.

Opinion

The petition for a writ of certiorari is denied.

Justice THOMAS, with whom Justice GORSUCH joins, dissenting from the denial of certiorari.

When petitioner John Doe was 15 years old, his science teacher groomed him for a sexual relationship. The abuse was exposed after Doe overdosed on prescription drugs provided by the teacher. The teacher initially seduced Doe by sending him explicit content on Snapchat, a social-media platform built around the feature of ephemeral, self-deleting messages. Snapchat is popular among teenagers. And, because messages sent on the platform are self-deleting, it is popular among sexual predators as well. Doe sued Snapchat for, among other things, negligent design under Texas law. He alleged that the platform's design encourages minors to lie about their age to access the platform, and enables adults to prey upon them through the self-deleting message feature. See Pet. for Cert. 14–15. The courts below concluded that § 230 of the Communications Decency Act of 1996 bars Doe's claims. 47 U.S.C. § 230. The Court of Appeals denied rehearing en banc over the dissent of Judge Elrod, joined by six other judges. 88 F.4th 1069 (2023).

The Court declines to grant Doe's petition for certiorari. In doing so, the Court chooses not to address whether social-media platforms—some of the largest and most powerful companies in the world—can be held responsible for their own misconduct. Section 230 of the Communications Decency Act states 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." § **230**(**c**)(**1**). In other words, a social-media platform is not legally responsible as a publisher or speaker for its users' content.

Notwithstanding the statute's narrow focus, lower courts have interpreted § 230 to "confer sweeping immunity" for a platform's own actions. *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 592 U. S. ——, ——, 141 S.Ct. 13, 14, 208 L.Ed.2d 197 (2020) (statement of THOMAS, ***2494** J., respecting denial of certiorari). Courts have "extended § 230 to protect companies from a broad array of traditional product-defect claims." *Id.*, at ——– ——, 141 S.Ct. at 17 (collecting examples). Even when platforms have allegedly engaged in egregious, intentional acts—such as "deliberately structur[ing]" a website "to facilitate illegal human trafficking"—platforms have successfully wielded § 230 as a shield against suit. *Id.*, at ——, 141 S.Ct. at 17; see *Doe v. Facebook*, 595 U. S. ——, ——, 142 S.Ct. 1087, 1088, 212 L.Ed.2d 244 (2022) (statement of THOMAS, J., respecting denial of certiorari).

The question whether § 230 immunizes platforms for their own conduct warrants the Court's review. In fact, just last Term, the Court granted certiorari to consider whether and how § 230 applied to claims that Google had violated the Antiterrorism Act by recommending ISIS videos to YouTube users. See *Gonzalez v. Google LLC*, 598 U.S. 617, 621, 143 S.Ct. 1191, 215 L.Ed.2d 555 (2023). We were unable to reach § 230's scope, however, because the plaintiffs' claims would have failed on the merits regardless. See *id.*, at 622, 143 S.Ct. 1191 (citing *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 143 S.Ct. 1206, 215 L.Ed.2d 444 (2023)). This petition presented the Court with an opportunity to do what it could not in *Gonzalez* and squarely address § 230's scope.

Although the Court denies certiorari today, there will be other opportunities in the future. But, make no mistake about it—there is danger in delay. Social-media platforms have increasingly used § 230 as a get-out-of-jail free card. Many platforms claim that users' content is their own First Amendment speech. Because platforms organize users' content into newsfeeds or other compilations, the argument goes, platforms engage in constitutionally protected speech. See *Moody v. NetChoice*, 603 U. S. ——, ——, 144 S.Ct. 2383, ——,

—— L.Ed.2d —— (2024). When it comes time for platforms to be held accountable for their websites, however, they argue the opposite. Platforms claim that since they are *not* speakers under § 230, they cannot be subject to any suit implicating users' content, even if the suit revolves around the platform's alleged misconduct. See *Doe*, 595 U.S. at 1–2, 142 S.Ct. at 1088 (statement of THOMAS, J.). In the platforms' world, they are fully responsible for their websites when it results in constitutional protections, but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry. The Court should consider if this state of affairs is what § 230 demands. I respectfully dissent from the denial of certiorari.

All Citations

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