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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:18-cv-05159-JSW

CONFORMED RESPONSE IN OPPOSITION TO DEFENDANT'S NOVEMBER 1, 2018, MOTION TO DISMISS

HEARING: FEB. 1, 2019, 9:00 A.M.

BEFORE: HON. JEFFREY S. WHITE

LOCATION: OAKLAND, CT. 5, FL. 2

STATEMENT OF RELEVANT FACTS

On August 23, Fyk filed his Verified Complaint (the "Complaint"), [D.E. 1], detailing Facebook's brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent practices that caused the destruction of his multi-million dollar business with over 25,000,000 followers. *Id.* at ¶ 1. Facebook's November 1 Motion to Dismiss ("M2D"), [D.E. 20], is disingenuous and inapposite because this lawsuit is about the "content provider" (Fyk) pursuing an "interactive computer service" (Facebook) in a **first-party** posture for destruction of his livelihood. On December 7, Fyk filed his M2D Response [D.E. 25], inadvertently tracking Local Rule rather than Standing Order page limitations; thus, this conformed brief.

Fyk's businesses / pages at their height were generating him hundreds of thousands of dollars a month, and his growth potential was limitless. *See, e.g.,* [D.E. 1] at ¶¶ 1-2, 15-16, n. 2 and n. 8. Competitors who Facebook did not cripple, as it did Fyk, are now valued in the hundreds of millions to billions of dollars range. *See, e.g.,* [D.E. 1] at ¶ 5. The M2D argues that Facebook is immune under Subsection (c)(1) of the CDA, omitting that such immunity is available when ***another*** "content provider" sues Facebook in a **third-party** posture (*e.g.*, car manufacturer suing a consumer website, Consumer Affairs, for hosting third-party consumer reviews about their car).[1, 2] **Again, Fyk is suing in a first-party posture over Facebook's own extensive wrongdoing**. The M2D's CDA nonsense is flawed procedurally (Section B), legally (Section C),

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[1] Legislative intent is critical for understanding Facebook's misuse of the CDA. The CDA was enacted in 1996 to regulate internet pornography. *See, e.g.,* 141 Cong. Reg. 88088 (1995) ("… the heart and soul of the [CDA] is to provide much-needed protection for families and children"); 66 N.Y.U. Ann. Surv. Am. L. 371, 379 (2010) (same); 35 Hastings Comm. & Ent. L.J. 455, 456 (2013) (same, adding that "Section 230 was added to support and encourage the proliferation of information on the Internet"). At Mr. Zuckerberg's April 10, 2018, Congressional Testimony, Senator Ted Cruz acutely and accurately pointed out to Mr. Zuckerberg that "the predicate for Section 230 immunity under the CDA is that you are a neutral public forum." But Facebook is anything but neutral – Facebook's Tessa Lyons, for example, publicly states the polar opposite of Senator Cruz's correct statement, yet further evidencing Facebook's misunderstanding, misapplication, and/or systemic abuse of the CDA: "And we approach integrity in really three ways. The first thing that we would do is we remove anything that violates our Community Standards," which such Facebook "Community Standards" are found nowhere in the express language of the CDA, which such legislation Facebook conflates with its own de-neutralizing business decisions aimed at re-distributing the hard-earned money of others (like Fyk) to Facebook and/or Fyk competitors who pay Facebook a lot more money than Fyk (*see* [D.E. 1] and below). A "neutral" thing is not something to wield against others in a non-neutral "immunity" fashion (as here).

[2] This third-party understanding of Subsection (c)(1) immunity is so elementary that it finds its way into Wikipedia. *See* https://en.wikipedia.org/wiki/Communications_Decency_Act.

equitably (Section D), and factually (Section E). Facebook's Rule 12(b)(6) nonsense is legally, procedurally, and factually flawed (Section F). The M2D must be denied.

STATEMENT OF ISSUES TO BE DECIDED

Legally, equitably, procedurally, and/or factually speaking, can Facebook somehow enjoy the limited third-party immunity prescribed by Subsection 230(c)(1) of the CDA in this first-party action? And has Fyk somehow "fail[ed] to state a claim upon which relief can be granted" pursuant to Rule 12(b)(6)?

MEMORANDUM OF LAW

A. LEGAL STANDARDS

Federal Rule of Civil Procedure 12(b) provides, in pertinent part, that "…a party may assert the following defenses by motion: … (6) failure to state a claim upon which relief can be granted … ." *Id.; see also Finkelstein, M.D. v. AXA Equitable Life Ins. Co.*, 325 F. Supp. 3d 1061 (N.D. Cal. 2018); *Cunningham v. Mahoney*, No. C 10-03211 JSW, 2010 WL 11575083 (N.D. Cal. Dec. 7, 2010). A Rule 12(b)(6) motion tests the formal sufficiency of a claim, it is not for resolving a fact / merit contest between the parties. *See, e.g.,* 5B Wright & Miller, *Fed. Prac. & Proc. 3d* § 1356, 354. For brevity's sake, the CDA is attached as Exhibit A and incorporated herein.

B. FACEBOOK'S M2D IS A THINLY VEILED PRE-DISCOVERY MOTION FOR SUMMARY JUDGMENT (FED. R. CIV. P. 12(C) AND 12(D))

We assume the procedural underpinning of Facebook's Subsection (c)(1) dismissal effort is Rule 12(c), which brings Rule 12(d) into play. In stark contrast to a Subsection (c)(1) third-party posture, Fyk ("information content provider") is suing Facebook ("interactive computer service") in a first-party posture based on Facebook's wrongful destruction (actionable under all four claims for relief) of Fyk's businesses / pages (*i.e.*, destruction of Fyk's past and future publications or speeches) *via* banning, ads account blocking, domain blocking, unpublishing, and/or deleting of Fyk's businesses / pages, silencing his voice and/or eliminating his reach and distribution. Facebook's destruction of Fyk's businesses / pages was based on a pre-suit contention that Fyk's content violated "Community Standards" or "terms;" *i.e.*, violated Subsection (c)(2)(A).[3] *See* [D.E. 1] at ¶ 23. Because Facebook's novel Subsection (c)(1) argument is a "matter outside

[3] Attached as **Exhibit B** (incorporated herein) is a representative sampling of screenshots of the written representations Fyk received from Facebook pre-suit in relation to its crippling of his businesses / pages. Exhibit B evidences that Facebook's "justification" for the crippling of the businesses / pages was that the

the pleadings," the Court should "exclude[ ]" the Subsection (c)(1) argument or treat the argument "as one for summary judgment under Rule 56 [and allow] [a]ll parties … a reasonable opportunity [*i.e.*, discovery] to present all material that is pertinent to the motion [for summary judgment]." Fed. R. Civ. P. 12(d).[4]

C. FACEBOOK'S INTERPRETATION / APPLICATION OF SUBSECTION (c)(1) "IMMUNITY" IS LEGALLY AMISS

The legal untenableness of Facebook's novel Subsection (c)(1) twist is twofold. First, it is readily apparent from even just Wikipedia (citing the *Harvard Journal of Law & Technology*), *see* n. 2, *supra*, that Subsection (c)(1) affords third-party immunity under some circumstances, but by no means first-party immunity. Second, Subsection (c)(1) does not immunize folks from themselves.

1. Subsection (c)(1) Of The CDA Affords Some Third-Party Immunity, Not First-Party

Subsection (c)(1) and the well-settled case interpretation of same in no way immunizes Facebook from its destructive acts here. Subsection (c)(1) immunity is afforded to Facebook where (as not here) it is being pursued by someone else for Fyk's publications or speeches (*i.e.*, content / "information provided") or by Fyk for someone else's publications or speeches (*i.e.*, content / "information provided").

The cases cited in the M2D are inapposite or misconstrued by Facebook. In *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009), cited at page four of the M2D, Nemet Chevrolet, Ltd. was suing Consumeraffairs.com over consumer reviews that others had posted on the Consumeraffairs.com platform about Nemet Chevrolet, Ltd. Consistent with Fyk's interpretation of Subsection (c)(1), the district court in *Nemet Chevrolet, Ltd.* concluded (and the Fourth Circuit affirmed) that "the allegations contained in the Amended Complaint [d]o not sufficiently set forth a claim asserting that [Consumeraffairs.com] authored the content at issue." *Id.* at 253. In affirming, the Fourth Circuit held, in pertinent part, that Consumeraffairs.com was an "'information content provider' under § 230(f)(3) of the

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content of same purportedly violated Facebook's "Community Standards" / "terms," which, if anything, implicates Subsection (c)(2)(A). There is no hint in Exhibit B that Facebook's crippling of Fyk's businesses / pages was based on Facebook being pursued by other third-parties based on the content of Fyk's businesses / pages. Facebook plainly cannot pull that off because, among other things, it re-established the (virtually) identical content of Fyk's businesses / pages for the new owner of same after Fyk's Facebook-induced fire sale of same to a competitor who Facebook apparently liked better at the time. *See, e.g.*, [D.E. 1] at ¶ 45. "At the time" because, since this suit, Facebook is now making things very difficult for the new owner.

[4] *See also, e.g., Spy Phone Labs, LLC v. Google, Inc.*, No. 15-cv-03756-KAW, 2016 WL 6025469, at *8 (N.D. Cal. Oct. 14, 2016) (a CDA immunity defense, at least as to Subsection (c)(2)(A), "cannot be determined at the pleading stage[,]" but may be raised "at a later stage, such as summary judgment").

CDA," and, most critically, that "interactive computer service providers [are not] legally responsible for information created and developed by *third parties*." *Id.* at 254 (emphasis added) (citing *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc)). Instructively, the Fourth Circuit also held that "Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them." *Id.* at 254 (citing *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007)). *Nemet Chevrolet, Ltd.* further confirms reality – that Subsection (c)(1) immunity pertains to third-party liability. **The case *sub judice* is a first-party case**.

Same with *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), cited at pages one, five, and seven of the M2D. In *Barnes*, the plaintiff sued over defendant's alleged failure to remove indecent posts of (or pertaining to) her made by her ex-boyfriend on the Yahoo!, Inc. platform. Barnes sought to remove Yahoo!, Inc. from Subsection (c)(1) immunity based on her arguments that Yahoo!, Inc. served as a "publisher" in relation to the subject indecent posts, which such removal is doable under certain circumstances (discussed below). The *Barnes* court concluded, however, that the "publisher" of the indecent posts was the third-party ex-boyfriend, thereby finding that Subsection (c)(1)'s third-party liability immunity applied to Yahoo!, Inc. Again, the case *sub judice* is a first-party case involving Facebook's wrongful destruction of Fyk's businesses / pages, not a third-party case against Facebook over some notion that someone else's post about Fyk on the Facebook platform was indecent and Facebook should have taken the third-party's post down.

This remains true for *Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011), *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010), *Perfect 10, Inc. v. CCBill, LLC*, 481 F.3d 751 (9th Cir. 2007) / *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir. 2007), and *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003). This case is about the content of a first-party (Fyk) being wrongly destroyed by an "interactive computer service" (Facebook).

And there is more case law supportive of Fyk's position that Subsection (c)(1) is inapplicable here. For example, in *Song Fi, Inc. v. Google, Inc.,* 108 F. Supp. 3d 876 (N.D. Cal. 2015), the Court determined that YouTube was not immune under the CDA. In *Song Fi*, action was brought against operators of video-sharing website, alleging that the operators' decision to remove plaintiffs' music video from the publicly-accessible section of the website was inappropriate. The *Song Fi* court found that the phrase "otherwise

objectionable" as used in Subsection (c)(2) did not extend so far as to make operators of video-sharing website immune from suit based on California-law … tortious interference with business relations claims by users in relation to operators' decision to remove users' music video from publicly accessible section of website. The *Song Fi* court went on to find that the "obscene, lewd, lascivious, filthy, excessively violent [and] harassing" material suggested lack of congressional intent to immunize operators from removing materials from a website simply because materials posed a "problem" for operators. Though Facebook viewed Fyk as some sort of "problem," that does not mean he violated the CDA.[5]

Then there is *e-ventures Worldwide, LLC v. Google, Inc.*, 214CV646FTMPAMCM, 2017 WL 2210029, at *1 (M.D. Fla. Feb. 8, 2017) as another example, where, accepting as true e-ventures' allegations that Google's investigation and removal of e-ventures' content was motivated not by a concern over web spam, but by Google's concern that e-ventures was cutting into Google's revenues, the Court found Subsection (c)(1) did not immunize Google's actions. Then there is *Fair Housing Council,* 521 F.3d 1157 as another example, where Section 230 of the CDA was found inapplicable because Roomates.Com's own acts (posting surveys and requiring answers) were entirely Roomates.Com's doing. Then there is *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009), as another example, where it was found that where the interactive computer service was not acting as the information content provider and suit was based on state law claims of unfair business practices, the situation falls under the immunity carve out set forth in Subsection 230(e) of the CDA. *See* Ex. A.

As discussed in Section D and in the Complaint (and depicted in Exhibit B), the Subsection (c)(2) underpinning of *Song Fi* was the only pretext professed by Facebook when crippling Fyk's businesses /

[5] Facebook's goal is to eliminate businesses and competition by labeling them as "problems." Ms. Lyons has publicly said so: "The second area is reducing the spread of problematic content, and if we can reduce the spread of those links we reduce the number of people who click through and we reduce the economic incentive that they have to create that content in the first place." Reducing the economic advantage of folks like Fyk is what the First Claim for Relief is all about. More on the point of Facebook's strategy to interfere with the economic advantage of the approximate 70,000,000 businesses on Facebook that Mr. Zuckerberg disingenuously says he wishes to promote (*see* n. 7, *infra*), Ms. Lyons has publicly stated as follows: "So going after the instances of actors who repeatedly share this kind of content and reducing their distribution, removing their ability to monetize, removing their ability to advertise is part of our strategy." And Mr. Zuckerberg hypocritically shares that sentiment, stating at his April 10, 2018, Congressional Testimony that "… advertisers and developers will never take priority … as long as I'm running Facebook." "Hypocritically" when compared to that set forth in footnote seven below.

pages. Facebook's Subsection (c)(1) *carte blanche* blanket immunity about-face from Subsection (c)(2)(A) contravenes the CDA's content "proliferation" intent, *see* n. 1, *supra*, and Subsection (c)(1)'s well-settled application as a limited third-party immunity tool. Subsection (c)(1)'s limited **third-party** immunity is inapplicable in this pure **first-party** case. The M2D must be denied as a matter of law.

2. Subsection (c)(1) Was Not Meant To Immunize A Party From Itself When The Party Was Acting, In Whole Or In Part, As The "Information Content Provider"

The legislature certainly did not enact Subsection (c)(1) to immunize bad actors from themselves. More specifically and for example, Facebook deleted some of Fyk's businesses / pages, which is different from Facebook's unpublishings, bannings, ads account blocking, domain blocking, for examples. For example, Facebook deleted (without explanation) the She Ratchet business / page, which was a business / page that consisted of approximately 1,980,000 viewers / followers at the time of Facebook's foul play. *See* [D.E. 1] at ¶¶ 20-24. Facebook's deletion cut Fyk off from the business / page but preserved his page content on its own and for itself (as evidenced by Facebook's later publishing the same She Ratchet content for the Los Angeles competitor to whom Fyk's Facebook-induced fire sale was made). Then the following occurred: (1) The competitor to whom Fyk would eventually fire sell the She Ratchet business / page to (along with other businesses / pages, as detailed in the Complaint, *see, e.g.,* [D.E. 1] at ¶¶ 22, 42-45) requested Facebook's assurance of recovering the business / page following the fire sale; and (2) Facebook restored the value of the deleted She Ratchet business / page by publishing (yes, publishing) same for the Fyk competitor around the time the Facebook-induced fire sale of same went through, with the page content being (virtually) identical to that which it was when under Fyk's ownership. *See, e.g.*, [D.E. 1] at ¶ 45.

At the time of SheRatchet deletion, Facebook illegally acquired "ownership" of Fyk's content (*i.e.*, "information provided" by Fyk on the Facebook "interactive computer service" platform).[6] When Facebook published She Ratchet for the Fyk competitor to whom the Facebook-induced fire sale was made, Facebook became the independent "publisher" / "information content provider" of the same content it had stolen from Fyk. Facebook's theft and re-publishing of the (virtually) identical content Fyk had published was motivated by Facebook's desire to enrich Fyk's competition, thereby enriching Facebook as it enjoyed a far more

[6] Facebook publicly recognizes Fyk as the "owner" of his content / "information provided." *See, e.g.,* https://www.facebook.com/communitystandards ("[y]ou own all of the content and information you post").

lucrative relationship with that competitor than with Fyk … that competitor has paid Facebook millions whereas Fyk paid Facebook approximately $43,000.00. *See, e.g.,* [D.E. 1] at ¶¶ 19, 46, 52.[7]

Moreover, in addition to indirectly interfering and competing with Fyk, **Facebook is a direct competitor that is not entitled to CDA immunity**. In addition to serving as an "interactive computer service" for which CDA immunity may apply (though not in this context), Facebook also serves as an "information content provider" (defined in CDA Subsection (f)(3), *see* Ex. A) at least with respect to its Sponsored Story Advertising News Feed scheme, and accordingly enjoys no CDA immunity. *See, e.g., Fraley*, 830 F. Supp. 2d at 802-803. In this vein, Facebook directly interferes with the economic advantage of others who are doing nothing wrong (First Claim for Relief) in an unfairly and deceptively competitive manner (Second and Fourth Claims for Relief) **directly** for its own benefit. Mr. Zuckerberg stated in his April 10, 2018, Congressional Testimony that "what we allow is for advertisers to tell us who they want to reach and *then we do the placement."* (emphasis added). For context on Facebook's "placement," Fyk has blocked on his personal News Feed, for example, sites called NowThis and UNILAD, and yet Facebook keeps forcing those sites into Fyk's personal News Feed, further evidencing that the user has no control of the user's News Feed (contrary to Facebook's pronouncements about user control) and Facebook jams its sponsored unsolicited material (*i.e.*, "spam") into the user's News Feed anyway to make Facebook money (NowThis and UNILAD doubtless pay Facebook money). Judge Koh recognized or acknowledged as much too: "Although Facebook's Statement of Rights and Responsibilities provides that members may alter their privacy settings to 'limit how your name and [Facebook] profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us,' members are unable to opt out of the Sponsored Stories service altogether." *Id.* at 792.

[7] These actions are in stark contrast to what Facebook's professed mission (or "social contract") supposedly is: "Our mission is all about embracing diverse views. We err on the side of allowing content, even when some find it objectionable, unless removing the content can prevent a specific harm. Moreover, at times we allow content that might otherwise violate our standards if we *feel* it is newsworthy, significant, or important to the public interest." *See* Facebook's public domain "Community Standards," https://www.facebook.com/communitystandards (emphasis added); *see also* Mr. Mark Zuckerberg's April 10, 2018, Congressional Testimony ("I am very committed to making sure that Facebook is a platform for all ideas, that is a very important founding principle of what we do"); *id.* ("For most of our existence, we focused on … and for building communities and businesses").

The "placement," in one form, is Facebook's steering / displacing of businesses that do not pay Facebook as much money (like Fyk's businesses / pages) to competitors who pay Facebook millions (like the Fyk competitor out of Los Angeles who was the benefactor in the Facebook-induced fire sale of Fyk's businesses). The "placement," in another form, is Facebook's manipulation of the News Feed to bring its sponsored posts (*i.e.*, posts in which Facebook is the money-making partner) to the top and shove other News Feed posts down where users are less likely to see same despite the News Feed supposedly being something wherein the user is allowed to read what he / she chooses … in Facebook's words:

> It is helpful to think about [News Feed] for what it is, which is a ranking algorithm … and the problem that the News Feed ranking algorithm is solving is what order should I show your stories in News Feed. The News Feed ranking algorithm prioritizes them … now we do this whole process for every story in your inventory … inventory is the collection of stories from the people that you friend and the pages that you follow … You're a lot more likely to see a story that's in the first spot on your News Feed than the one that's in the 3000th spot.

Ms. Lyons' public speech, uploaded on April 13, 2018. In that same public speech, Ms. Lyons elaborates on Facebook's direct competition mindset: "If [a News Feed post] says sponsored that means that someone spent money in order to increase its distribution." One of the benefactors of a sponsored News Feed post is the introducer / supporter / partner of the post (in many cases, Facebook), as Judge Koh recognized. *See Fraley*, 830 F. Supp. 2d at 790 ("Facebook generates its revenue through the sale of advertising [*i.e.,* sponsored ads with Facebook as the paid sponsor / partner] targeted at its users").

Facebook's unilateral placement of its "spam" News Feed material (from which Facebook profits) to the top of a user's News Feed, *see, e.g.,* [D.E. 1] at ¶¶ 35-40, and burying the News Feed material users' want / solicit (like Fyk's material) in the "3000th spot" (as Facebook's Tessa Lyons admits in the commentary cited above) is the epitome of the Second Claim for Relief (Unfair Competition) and quite deceitful in the vein of the Fourth Claim for Relief (fraud / intentional misrepresentation), tying in directly to the destruction of economic advantage (the First Claim for Relief) of folks (like Fyk) who earn ad and web-trafficking monies through posts that users actually want to see … entitling Facebook to no immunity. *See, e.g.*, *Fraley* and *Fair Hous. Council*.

Subsection (c)(1) immunity is only afforded to an "interactive computer service" under some situations, not to the "publisher" (*i.e.*, "information content provider"). But Facebook's conduct as to the She Ratchet business / page and Sponsored Stories advertisements News Feed scheme, for examples, took it

outside the shoes of an "interactive computer service" and inside the shoes of "information content provider," in whole or in part; thus, Facebook is not Subsection (c)(1) immune. *See, e.g.*, *Fair Hous. Council*, 521 F.3d at 1165 ("the party responsible for putting information online may be subject to liability, even if the information originated with a user," citing *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003)); *Fraley*, 830 F. Supp. 2d 785 (denying the CDA motion to dismiss, as Facebook's being both an "interactive computer service" and an "information content provider" went beyond a publisher's traditional editorial functions when it allegedly took members' information without their consent and used same to create new content published as endorsements of third-party products or services); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1247 (N.D. Cal. 2014) (denying the CDA motion to dismiss wherein LinkedIn sought immunity as an interactive computer service, with the court endorsing, at least at the dismissal stage, plaintiffs' claim that LinkedIn provided no means by which a user could edit or otherwise select the language included in reminder emails and that true authorship of the reminder emails laid with LinkedIn); *Jurin*, 695 F. Supp. 2d at 1122 (holding, in part, that "[u]nder the CDA an interactive computer service qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue," citing *Carafano*, 339 F.3d at 1123). Facebook's attempt to distance itself from the "information content provider" role in have its cake and eat it too fashion translates to: "Accuse your enemy of what you are doing. As you are doing it to create confusion." ~ Karl Marx. The M2D must be denied as a matter of law.

D. FACEBOOK'S SUBSECTION (c)(1) LITIGATION ARGUMENTS MUST BE ESTOPPED AND/OR HAVE BEEN WAIVED

Facebook is estopped from enjoying (or has waived) Subsection (c)(1) immunity. The United States Supreme Court counsels against allowing the kind of "bait and switch" that is Facebook's seismic shift from Subsection (c)(2)(A) to (c)(1), albeit within the phrase of art that is "Mend the Hold," which is legalese for estoppel and, to some extent, waiver.[8] *See, e.g., Railway Co. v. McCarthy*, 96 U.S. 258, 6 Otto 258, 24 L.Ed. 693 (1877). *See also Harbor Ins. Co. v. Continental Bank Corp*., 922 F.2d 357, 363 (a party's "hok[ing] up a phony defense … and then when that defense fails (at some expense to the other party) tr[ying] on another

[8] Glaringly applicable forms of estoppel include "estoppel," *see* Bryan A. Garner, *Black's Law Dictionary* 247 (2001 2d pocket ed.) (defining same), "equitable estoppel," *see id.* (defining same), "quasi-estoppel," *see id.* (defining same), and "estoppel by silence," *see id.* (defining same).

defense for size, can properly be said to be acting in bad faith"); *Tonopah & T.R. Co. v. Commissioner of Internal Revenue*, 112 F.2d 970, 972 (9th Cir. 1940); *Connally v. Medlie*, 58 F.2d 629 (2d Cir. 1932).

As Exhibit B illustrates, Facebook's professed "basis" to Fyk for destroying his businesses / pages was that the content of same purportedly violated Facebook's "Community Standards" or "terms," *see, e.g.,* [D.E. 1] at ¶ 23, which sounds in Subsection (c)(2)(A) (content-oriented). Fyk heavily relied, to his detriment in time and money, on Facebook's professed "basis" for its businesses / pages crippling,[9] which, again, such "basis" was content-oriented or intentionally nebulous so as to keep Fyk guessing as to why Facebook was destroying his livelihood. It would be improper to allow Facebook to cripple Fyk's businesses / pages on one ground (purported violation of "Community Standards" / "terms," implicating Subsection (c)(2)(A)) and try to avoid liability on different grounds (Subsection (c)(1)) when that ground is challenged (this suit).

Moreover, Facebook's inequitable recast from Subsection (c)(2)(A) to (c)(1) would still fail under ordinary statutory construction principles. If Facebook's interpretation of Subsection (c)(1) was correct (which it is not), Subsection (c)(1) and Subsection (c)(2)(A) would be the exact same thing under these circumstances (or perhaps altogether). The legislature would not put redundant law on the books; *i.e.*, our interpretation / application of Subsection (c)(1) (and related case law) is correct.

E. FACEBOOK'S M2D IS REPLETE WITH SKEWED STATEMENTS

Here is a sampling of things said by Facebook in its M2D that are wrong:

[9] As to "reliance," we point to the sale of the subject businesses / pages to a competitor, this lawsuit, and/or a pre-suit letter writing campaign with defense counsel, as examples. As to "monetary detriment," Facebook's Motion scoffs at our classification of the approximate $1,000,000.00 being "relatively nominal." *See, e.g.*, [D.E. 20] at 1-2. The "relatively nominal" nature of the monies recovered by Fyk in relation to his Facebook-induced fire sale of the subject businesses / pages, however, is very serious and real. There was no letup in sight of Fyk's impressive growth curve, *see, e.g.,* [D.E. 1] at n. 2, but for Facebook's unlawful destruction of his businesses / pages. The competitor who reaped the benefits of the Facebook-induced fire sale of the subject businesses / pages was smaller than / less successful than Fyk at the time of Facebook's destruction of the subject businesses / pages. It is believed that that competitor grew to a worth of ~ $100,000,000.00. *See* [D.E. 1] at ¶¶ 5, 15. As another example, it is believed that another Fyk competitor (BuzzFeed) who Facebook did not mess with like it did with Fyk and who Fyk was once bigger than / more successful than is presently valued at ~ $1,700,000,000.00. *See* [D.E. 1] at ¶¶ 5, 15. The range of Fyk's value (and, thus, some of his damages in this case) but for Facebook's wrongful destruction of his businesses / pages was between $100,000,000.00 and $1,700,000,000.00 (maybe more). So, put in proper perspective (*see, e.g.,* [D.E. 1] at ¶¶ 5, 42), the approximate $1,000,000.00 relating to Fyk's Facebook-induced fire sale (when Facebook had rendered the subject businesses / pages valueless) was, in fact, "relatively nominal."

Facebook's Representations	The Truth
Facebook falsely suggests that the Complaint takes issue with Facebook not treating "similar" content of others (like Fyk competitors) the way it treated Fyk. *See, e.g.,* [D.E. 20] at p. 1, ln. 27; p. 3, ln. 6; p. 6, ln. 10.	Actually, the Complaint speaks of Facebook not interfering with the content of others that was "identical" to Fyk's content; *i.e.*, wrongly discriminating against or singling out Fyk. *See, e.g.,* [D.E. 1] at p. 8, lns. 10-12; n. 8, p. 16, lns. 24-28 – n. 8, p. 17, lns. 21-23; p. 16, lns. 3-8.
Facebook implies Facebook is not a direct competitor, so as to try to capture this case in the CDA net it has cast in the entirely wrong direction. [D.E. 20] at p. 6, ln. 13 (calling itself, intentionally so, the "unidentified advertiser"); p. 6, ln. 23 (misrepresenting that Facebook did not create content).	Actually, Facebook has acted as a direct competitor (or "information content provider"), and the Complaint says plenty about that reality. *See, e.g.,* [D.E. 1] at 18, ln. 23 – p. 19, ln. 11; p. 9, ln. 13 – p. 13, ln. 1 (discussing Facebook's "claim jumping" scheme); p. 13, ln. 2 – p. 14, ln. 20 (discussing Facebook's Sponsored Story advertisement News Feed scheme); p. 15, ln. 1 – p. 17, ln. 6 (discussing Facebook's stealing and re-distributing of Fyk's businesses to a Los Angeles competitor who paid Facebook more money than Fyk); p. 20, lns. 10-19; p. 21, ln. 25 – p. 23, ln. 7 (punctuating Facebook's direct competition schemes).
Facebook misleads / downplays what it did to Fyk's content by calling itself a mere "moderator." [D.E. 20] at p. 4, ln. 7.	Actually, Facebook did not just "moderate" Fyk's content, it destroyed / devalued, stole, and/or re-distributed his content. *See, e.g.*, [D.E. 1] at p. 1, lns. 6-7; p. 1, lns. 23-26; p. 2, lns. 4-7, 15-16; p. 3, lns. 16-20; p. 5, ln. 21 – p. 6, ln. 2; p. 6, lns. 3-22; p. 7, lns. 11-16; p. 7, ln. 17 – p. 9, ln. 12; p. 10, ln. 24 – p. 11, ln. 7; p. 11, lns. 10-13 – p. 12, ln. 3; p. 13, lns. 2-6, 16-19; p. 14, lns. 1-3, 9-20 and n. 7; p. 15, ln. 8 – p. 17, ln. 12.
Facebook misrepresents that Facebook "delet[ed] content from [Fyk's] page," so as to downplay its destruction of Fyk. [D.E. 20] at p. 7, lns. 16-17.	Actually, Facebook did not just delete some Fyk content on his businesses / pages, it crushed all of Fyk's businesses / pages. *See, e.g.,* [D.E. 1] at p. 7, ln. 17 – p. 8, ln. 4; p. 15, ln. 8 – p. 17, ln. 6
Facebook misrepresents that Fyk's Facebook-induced fire sale of the subject businesses / pages was "voluntar[y]." [D.E. 20] at p. 11, ln. 19.	Actually, the Complaint says what the M2D says a few sentences later, that Facebook left Fyk "with no reasonable alternative" other than to fire sell the subject businesses / pages that Facebook's wrongdoing had rendered valueless (for Fyk at least, but not for the Los Angeles competitor in Facebook's good graces at the time). *See, e.g.*, [D.E. 1] at p. 5, lns. 20-21; p. 9, lns. 7-12; p. 15, lns. 8-17; p. 16, lns. 8-14; p. 21, lns. 25-27; p. 26, lns. 1-4.
Facebook misrepresents part of the fraud / intentional misrepresentation that the Complaint takes issues with, trying to take the sting out of the Fourth Claim for Relief by contending that Facebook never represented to Fyk that his participation in the Facebook paid for reach program extended into	Actually, the fraud / intentional misrepresentation concerning the Facebook paid for reach program was, for examples, (1) the sham worthlessness (*i.e.*, fraud) of same, *see, e.g.,* [D.E. 1] at p. 18, lns. 12-17; p. 24, lns. 3-11; (2) the supposed optional nature of the not-so-optional paid for reach program, *see, e.g.,* [D.E. 1] at p. 5, lns. 2-9; p. 5, n. 3, (3) Facebook's never telling Fyk (*i.e.*, misrepresentation) that it could at any time completely shut him out of his ads account, thereby disallowing his participation in the paid for reach program, and/or (4) never providing Fyk with an explanation (*i.e.*, misrepresentation) as to why he was shut out of his ads account, *see,*

"perpetuity." *See* [D.E. 20] at p. 13, lns. 6-10.	*e.g.,* [D.E. 1] at p. 5, ln. 19; p. 6, lns. 7, 27; p. 7, lns. 4-5; p. 15, lns. 5-7; p. 23, ln. 16.

It would be unjust (at minimum) to afford any relief to an untruthful, misrepresentative, misleading, and/or incoherent movant. The M2D must be denied as a matter of fact.

F. THE COMPLAINT'S AVERMENTS SUFFICIENTLY SUPPORT EACH CLAIM FOR RELIEF (FED. R. CIV. P. 12(b)(6))

Preliminarily, it is important to note that the elements for each of the four claims for relief set forth in the Complaint are taken from the California Civil Jury Instructions and/or California Code.[10] There are a wealth of supportive averments for each claim for relief in the Complaint, especially when viewed in a light most favorable to the complainant (which is the law). And there is far more Facebook wrongdoing; but, even amidst a *Twombly* backdrop, we did our best to adhere to Federal Rule of Civil Procedure 8(a)(2) – "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* Per this Court's recitation of *Twombly* in *Cunningham* and *Finkelstein, M.D.* (*see* Section A, *supra*), Fyk pleaded plenty "factual content t[o] allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Cunningham*, 2010 WL 11575083 at *2.

All of Facebook's arguments set forth in the M2D (at pages eight through fourteen) are the epitome of premature, unsubstantiated red-herrings. Facebook can someday try to persuade the Court that the facts of this case are analogous to whatever facts were present in the 12(b)(6) case law cited in the M2D; but, on a legal sufficiency motion, that time is not now. For now, *Twombly* is the measure, and the incredibly detailed Complaint has plainly stated causes of action upon which relief can someday be granted. But, to be safe, we now address the cause of action elements the M2D glossily claims are missing.

1. Civil Extortion (Pages 8-10 Of The M2D)

Facebook claims that Fyk fails to state a Civil Extortion claim "because he does not and cannot allege that Facebook wrongly threatened to withhold from him anything that he had a right to possess." [D.E. 20 at 8]. Onward in this vein, Facebook misrepresents that "the Complaint does not identify any contractual provision or any law giving him the right to maintain content on Facebook or to prevent Facebook from

[10] As to elements of the First Claim For Relief, *see, e.g.,* Cal. Civ. Jury Inst. 2202; Second Claim for Relief, *see, e.g.*, Cal. Code §§ 17200-17210; Third Claim for Relief, *see, e.g.,* Cal. Penal Code §§ 518-519 (also applies to civil extortion); Fourth Claim for Relief, *see, e.g.,* Cal. Civ. Jury Inst. §§ 1900-1902.

promoting the content of other Facebook users or advertisers." *Id.* at 9. Wrong – Facebook publicly admits Fyk's "ownership" of his content. *See* n. 6 *supra*; *see also* Mr. Zuckerberg's April 10, 2018 Congressional Testimony.[11] Facebook's own words (footnote six above and Mr. Zuckerberg's Congressional Testimony) would create a contract (at best) or work an estoppel (at worst), but, either way, Facebook cannot legitimately disclaim its own words in order to throw this lawsuit out.

Then, Facebook tries to delegitimize Fyk's "fear" and its "threat" by misrepresenting to the Court that the Complaint only contains a "vague allegation" about representations made to Fyk by a "high ranking Facebook executive." First, that is enough at the 12(b)(6) stage and the fact that we were respectful enough not to include that individual's name in the Complaint by no means renders that individual's critical statement to Fyk "vague." Second, the Complaint is replete with detailed allegations of "fear" and "threat." *See, e.g.*, [D.E. 1] at ¶¶ 18-19, 25-35, 47, 67-71.[12] This 12(b)(6) aspect of the M2D must be denied.

2. Unfair Competition (Pages 10-12 Of The M2D)

Perhaps the most instructive case to look at (not cited in the M2D) is *Fraley.* There, as discussed above, the unfair competition was in the form of Facebook's Sponsored Story advertisement News Feed scheme, and the *Fraley* court denied Facebook's attempt to dismiss the unfair competition aspect of that complaint. Here, the Complaint is replete with allegations as to that scheme and how that scheme crippled Fyk's ad and web-trafficking money-making abilities with Facebook burying his posts underneath its own sponsored posts contrary to and in disregard for users' preferences. *See, e.g.*, [D.E. 1] at ¶¶ 35-40. But, here, there is more to Facebook's unfair competition than that which was present in *Fraley*. Here, for example, the Complaint thoroughly avers that Facebook steered Fyk's businesses / pages to a Los Angeles competitor

[11] Senator Hatch: "Now, Mr. Zuckerberg, I remember well your first visit to Capitol Hill, back in 2010. You spoke to Senate Republican High-Tech Task Force, which I chair. You said back then that Facebook would always be free. Is that still your objective?" Mr. Zuckerberg: "Senator, yes."

[12] ¶ 18 (discussing Facebook's unilateral implementation of a not-so-optional "paid for reach program," creating Fyk's "[f]ear (analogized in averments twenty-five through thirty-five, *infra*, to 'claim jumping') that if Fyk did not engage in Facebook's new 'optional' paid for reach program, he would be blacklisted in the form of having his businesses heavily curtailed or altogether eliminated…"); ¶ 19 (discussing that Fyk's very real fear induced him into relenting to Facebook's extortion; *i.e.*, investing $43,000.00 into the worthless paid for reach program); ¶¶ 25-35 (discussing the very real fear / threat of Facebook's jumping Fyk's claim; *i.e.*, hijacking his businesses / pages); ¶ 47 (discussing Fyk's fear of or the threat of Facebook's singling him out); *id.* at n. 3 (discussing how Facebook aimed to put folks on "hospice" who did not work with / pay Facebook – putting one on "hospice" equals fear); ¶¶ 67-71 (summary / punctuation).

who paid Facebook more money. *See, e.g.*, [D.E. 1] at ¶¶ 6, 41-46. Then Paragraphs 58-66 of the Complaint thoroughly sum up or punctuate Facebook's unfair competition.

Oddly, the M2D tries to conflate the Second Claim for Relief (unfair competition, cognizable under California Business & Professions Code Sections 17200-17210) with anti-trust. The Complaint's Second Claim for Relief is not an anti-trust action. The *Fraley* court points out what an unfair competition cause of action is (which is not an anti-trust action):

> [The] UCL … does not prohibit specific activities but instead broadly prescribes 'any unfair competition, which means any unlawful, unfair **or** fraudulent business practice or act. The UCL is designed to ensure 'fair business competition' and governs both anti-competitive business practices and consumer injuries. Its scope is 'sweeping,' and its standard for wrongful business conduct is 'intentionally broad' … . Each of the three UCL prongs provides a 'separate and distinct theory of liability' and an independent basis for relief.

Fraley, 830 F. Supp. 2d at 810 (internal citations, which include Ninth Circuit cases, omitted and emphasis added). Even the case cited by Facebook in its M2D (*Levitt II*) says that there can be an anti-trust undertone to a UCL claim, but that a UCL claim also (as here) deals with things that "otherwise significantly threaten[ ] or harm[ ] competition." [D.E. 20] at 10.[13] And then the M2D inappositely states that a UCL claim has to be tied to some sort of legislative policy. Wrong – Facebook's own case (*Levitt II*) states, a UCL claim can also emanate from "actual or threatened impact on competition," which, again, is what the Second Claim for Relief of the Complaint is about. There being plenty of supportive averments in the Complaint for the UCL claim, the UCL being intentionally broad, and Facebook's twisting its case law in the wrong direction, this 12(b)(6) aspect of the M2D must be denied.

3. Fraud / Intentional Misrepresentation (Pages 12-13 Of The M2D)

The M2D sparsely tries to focus the Court in on a small percentage of Complaint averments to create the misimpression that the Complaint is not specific enough. So, then, we show the Court how many averments support the Fourth Claim for Relief, though just about everything said about Facebook and what it has done to Fyk has a fraud / intentional misrepresentation undercurrent.[14] *See, e.g.,* [D.E. 1] at ¶¶ 14, 17, 19, ¶¶ 20-24, 30, 35-40, 42-45, 72-78 n. 4-5.[15] This 12(b)(6) aspect of the M2D must be denied.

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[13] And it is not just us talking about Facebook's unfair direct competitive tactics. *See* Exhibit C.

[14] And it is not just us talking about Facebook's fraudulent / misrepresentative ways. *See* Exhibit D.

[15] ¶¶ 14, 17 (going to the purported "free" nature of Facebook, which such freeness was false); ¶ 19 (discussing Fyk's approximate $43,000.00 investment in a Facebook product, the paid for reach program,

4. Intentional Interference With Prospective Economic Advantage / Relations (Pages 13-14 Of The M2D)

The M2D sparsely states that because the Complaint's other three claims for relief fail (which they plainly do not), the "derivative" First Claim for Relief cannot stand. The Complaint is very detailed as to how Facebook has destroyed Fyk's economic advantage / relations (both actual and prospective). Whether Facebook's destruction of Fyk's economic advantage / relations was underlain by Facebook's civil extortion, unfair competition,[16] and/or fraud / intentional misrepresentation, the First Claim for Relief must stand. The M2D does not quarrel with the fact that Facebook destroyed Fyk's economic advantage / relations – reason being, Facebook cannot genuinely do so … it undeniably destroyed Fyk's economic advantage / relations.[17] Rather, the M2D simply says "well, we think the other three claims for relief fail, though we are not going to provide detail as to how that is so, so the First Claim for Relief has gotta go." Such does not rise to the level of colorable argument, and it is pure argument nevertheless – no case (let alone one as serious as this) should be thrown out based on naked lawyer argument. This 12(b)(6) aspect of the M2D must be denied.

WHEREFORE, Plaintiff, Jason Fyk, respectfully requests entry of an order (1) denying the M2D [D.E. 20] filed by Defendant, Facebook, Inc., on November 1, 2018,[18] and (2) awarding any other relief to Fyk that the Court deems equitable, just, or proper.

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which was supposed to increase Fyk's reach and distribution, which proved false); ¶¶ 20-24 (discussing Facebook's Subsection (c)(2)(a) "justification" for crippling Fyk's businesses / pages, which such "justification" was the epitome of fraud and/or intentional misrepresentation because there was nothing Subsection (c)(2)(A) violative about Fyk's content); n. 4 (discussing Facebook's lies about the safe and welcoming nature of the disgusting content on other pages compared to Facebook's intentionally misrepresentative disproportionate treatment of Fyk's content); ¶ 30 and n. 5 (discussing Mr. Zuckerberg's misrepresentations about what Facebook supposedly is, whereas it was nothing of the sort when it came to Facebook's treatment of Fyk); ¶¶ 35-40 (discussing the purported misrepresentative "free" nature of Facebook, whereas the truth is that Facebook uses the platform to shift the hard-earned wealth of others into its pocket through myriad illegal methods or "strategies" as Facebook would call it); ¶¶ 42-45 (discussing Facebook's lies to Fyk that his content was supposedly CDA violative – "lies" because Facebook re-published the (virtually) identical content); ¶¶ 72-78 (summary / punctuation).

[16] For more on the First and Second Claims for Relief squaring, *see* footnotes five and nine.

[17] Facebook's intentional interference with Fyk's prospective economic advantage continues to this day – Facebook has stolen / converted / embezzled two successful Instagram accounts (Instagram Account Nos. 522601519 and 2817831134, and Facebook owns Instagram) in which Fyk is a partner and re-distributed them to a person named Sommer Ray Beaty (who is making millions because of Facebook's re-distribution), then telling Fyk that action would not be taken "without a valid court order."

[18] To the extent the Court somehow finds that there are insufficient facts to support his claims for relief, Fyk respectfully requests leave to amend his Complaint pursuant to Federal Rule of Civil Procedure 15.

Dated: December 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2018, I electronically filed the foregoing documents with the Clerk of the Court by using CM / ECF. I also certify that the foregoing document is being served this day on all counsel of record via Notices of Electronic Filing generated by CM / ECF, and via emails to defense counsel of record.

/s/ Jeffrey L. Greyber
Jeffrey L. Greyber, Esq.