No. 19-16232

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Petitioner-Appellant,

v.

FACEBOOK, INC.

Respondent-Appellee.

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

APPELLEE'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant Facebook, Inc. states that it has no parent corporation and that no publicly held corporation owned 10% or more of its stock as of March 31, 2019, the date set forth in its 2019 Proxy Statement.

Dated: November 18, 2019 KEKER, VAN NEST & PETERS LLP

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INTRODUCTION

Whether in his complaint, his trial court papers, or his appellate brief, Appellant Jason Fyk substitutes clarity with complexity and confusion. He transforms what is an otherwise straightforward business dispute into an impenetrable yarn brimming with irrelevant conspiracy theories, meandering asides, page-long block quotes. None of this is necessary. Indeed, at its heart, this case is quite simple.

Mr. Fyk created a series of Facebook pages. At some point, Facebook allegedly disabled certain of those pages for violation of its policies. (Mr. Fyk thinks it was, instead, to make room for its own sponsored advertisements and to "strong-arm" him into paying to advertise.) Mr. Fyk ultimately decided to sell the pages to a third party. This third party allegedly then republished some of the pages on the Facebook platform.

In a well-reasoned order, the District Court dismissed Mr. Fyk's claims after finding they were barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1) (hereinafter CDA § 230(c)(1)). The District Court correctly held that the CDA barred all of Mr. Fyk's claims because they sought to hold Facebook liable as the "publisher or speaker" of content created and provided by Mr. Fyk himself. Undeterred, Mr. Fyk now brings this appeal.

Although Mr. Fyk asserts a host of arguments on appeal, his brief trains

most of its attention on two contentions: (1) that Facebook cannot avail itself of CDA § 230(c)(1) because it somehow "developed" the content at issue when the purchaser of Mr. Fyk's pages allegedly decided to publish those pages on Facebook; and (2) that CDA § 230(c)(1) is not available when a defendant removes the plaintiff's own content from its platform. Mr. Fyk did not advance the first argument in the proceedings below and so it is waived. No matter, it along with the second contention is without basis. Ninth Circuit authority holds that *Facebook* could not have "developed" the content at issue if it simply permitted another party to use the Facebook platform to publish content Mr. Fyk had originally created and developed. Ninth Circuit authority also holds that CDA § 230(c)(1) can be used to shield a defendant for claims stemming from its decision to remove from its platform content the plaintiff developed himself.

This Court should affirm the District Court's order.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332. The District Court entered final judgment in this case on June 18, 2019 after granting Facebook's Motion to Dismiss without leave to amend. *Fyk v. Facebook, Inc.*, Case No. 18-05159-JSW (N.D. Cal. June 18, 2019), Dkt. 39.

ISSUES PRESENTED

(1) Did the District Court err in granting Facebook's motion to dismiss on the ground that the CDA § 230(c)(1) bars Mr. Fyk's claims?

(2) Did the District Court err in determining that Facebook was not estopped from asserting a CDA § 230(c)(1) defense?

(3) Did the District Court err by failing to convert Facebook's motion to dismiss to a Rule 56 motion for summary judgment?

STATEMENT OF THE CASE

Summary of Factual Allegations

Mr. Fyk was "facing bankruptcy and eviction" when he started using Facebook's free platform "in the hopes of experiencing the American Dream." ER 10 at ¶ 15; ER 19 at ¶ 32. Mr. Fyk created various "humorous" Facebook pages "designed to get a laugh out of Fyk's viewers/followers." ER 10 at ¶ 15; ER 14 at ¶ 22. Initially, those pages attracted a wide following, allegedly generating hundreds of thousands of dollars per month in advertising and net traffic revenue. ER 14 at ¶ 22. According to Mr. Fyk, however, Facebook devalued those pages over time through various forms of alleged unlawful interference such that he was eventually forced to sell them to a competitor for the "relatively nominal approximate" sum of $1,000,000. ER 22 at ¶ 42. Those pages were "realistically valuated by some in the nine figure range," according to Mr. Fyk. *Id*. Thus, Mr. Fyk estimates that

Facebook "has deprived" him of hundreds of millions ("if not billions") of dollars. ER 26 at ¶ 55.

Mr. Fyk alleges that Facebook's "meddling" took myriad forms. Most notably, Facebook allegedly blocked or deleted content found to violate Facebook's Community Standards. *E.g.*, ER 13 at ¶ 20. Mr. Fyk contends that these actions were "incorrect" and that Facebook was "unresponsive[] to [his] subsequent pleas for appeal and/or customer service." ER 14 at ¶ 21. He also contends that Facebook had no valid basis to block his content because Facebook did not block similar content on other users' Facebook pages. ER 15 at ¶ 23. Instead, Mr. Fyk insists that Facebook selectively enforced its Community Standards to strong-arm him into participating in Facebook's optional paid reach program,[1] which Facebook purportedly implemented "overnight and pursuant to corporate greed." ER 10 at ¶ 14; *see also* ER 11-13 at ¶¶ 18-19.

Mr. Fyk also alleges that Facebook engaged in unlawful interference during the alleged "fire sale" of his Facebook pages to a competitor. Specifically, Mr. Fyk alleges that Facebook "offer[ed] [his] competitor customer service before, during, and after the fire sale" in order to "redistribute Fyk's economic advantage" to the competitor. ER 22 at ¶ 43. Mr. Fyk further contends that, after that purported "fire

[1] "Paid reach" generally refers to a marketing strategy in which users pay to reach a wider audience.

sale," the "supposedly CDA violative Fyk businesses/pages that were fire sold were magically reinstated by Facebook within days of the fire sale's consummation." ER 23 at ¶ 45. According to Mr. Fyk, this shows that "there was absolutely nothing CDA violative about Fyk's businesses/pages" and that "Facebook just wanted to steer Fyk's businesses/pages (a/k/a assets, a/k/a economic advantage) to a competitor and otherwise eliminate Fyk by any means necessary." *Id*.

Procedural History

Mr. Fyk's Complaint, filed on August 22, 2018, alleged four causes of action: (1) intentional interference with prospective economic advantage, (2) violation of California Business & Professions Code Sections 17200-17210 (Unfair Competition), (3) civil extortion, and (4) fraud/intentional misrepresentation. Facebook moved to dismiss the Complaint on November 1, 2018, both because the claims were barred under the Communications Decency Act and because Plaintiff failed to state a claim for any of his causes of action.

On June 18, 2019, the District Court granted Facebook's motion to dismiss after finding that all of Mr. Fyk's claims are barred by CDA § 230(c)(1). *Fyk*, Case No. 18-cv-05159-JSW, Dkt. 38.[2] The District Court found that the claims "arise

[2] The District Court did not address Facebook's contention that the Complaint failed to state any claims.

from the allegations that Facebook removed or moderated his pages." ER 4. "Because the CDA bars all claims that seek to hold an interactive computer service [provider] liable as a publisher of third party content, the [District] Court [found] that the CDA precludes Plaintiff's claims." *Id*.

Mr. Fyk's Appeal

Mr. Fyk advances three arguments on appeal: (a) the District Court erred in holding that Mr. Fyk's claims were barred by CDA § 230(c)(1); (b) the District Court erred in determining that Facebook was not estopped from asserting a CDA § 230(c)(1) defense; and (c) the District Court applied the incorrect legal standard when it failed to convert Facebook's motion to dismiss to a Rule 56 motion for summary judgment.

STANDARD OF REVIEW

This Court reviews *de novo* a dismissal under Rule 12(b)(6) and can affirm on any ground supported by the record, even if not the ground the district court relied upon. *See Thompson v. Paul*, 547 F.3d 1055, 1058–59 (9th Cir. 2008); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 974 (9th Cir. 2017). Further, on a motion to dismiss, the court will take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party. *See Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

ARGUMENT

This Court should affirm the District Court's dismissal of Mr. Fyk's Complaint. The District Court correctly ruled that all of Mr. Fyk's claims were barred by the CDA. Mr. Fyk's claims fall squarely within the safe harbor protections of CDA § 230(c)(1). Courts have uniformly held that the CDA bars any claim that seeks to hold an interactive computer services provider liable for "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009); 47 U.S.C. § 230(c)(1). Yet this is exactly what Mr. Fyk seeks to do here.

A. The District Court correctly held that CDA § 230(c)(1) bars Mr. Fyk's claims.

CDA § 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The CDA expressly preempts any cause of action that would hold an internet platform liable as a speaker or publisher of third-party speech: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with" the CDA. 47 U.S.C. § 230(e)(3).

In *Barnes v. Yahoo!*, this Court explained that CDA § 230 protects the exercise of a "publisher's traditional editorial functions" such as "reviewing,

editing, and ***deciding whether to publish or to withdraw from publication*** third-party content." 570 F.3d at 1102 (emphasis added). "[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove." *Id.* at 1103. "[B]ecause such conduct is publishing conduct . . . we have insisted that section 230 protects from liability any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." *Id.* (internal quotations omitted).

CDA § 230(c)(1) warrants dismissal if three conditions are met: (1) Facebook is a provider of an "interactive computer service," (2) the content at issue was "provided by another information content provider," and (3) the claims at issue treat Facebook as the "publisher or speaker" of that content. 47 U.S.C. § 230(c)(1).

Mr. Fyk does not challenge the District Court's determination that the first and third conditions are satisfied. App. Opening Br. at 8-11. Rather, he argues that the second condition is not met here because (i) Facebook purportedly "developed" the content at issue, and (ii) CDA § 230(c)(1) does not confer immunity where a plaintiff seeks to hold an interactive computer service provider liable for blocking the plaintiff's own content. Both arguments fail.

1. The District Court did not err in failing to find that Facebook "developed" the content at issue.

For the first time on appeal, Mr. Fyk asserts that CDA § 230(c)(1) does not apply because Facebook somehow "developed" the content when, sometime after October 2016, a "competitor" who purchased Mr. Fyk's pages allegedly published those pages on the Facebook platform. App. Opening Br. at 16-27. An appellate court should not rule on an issue which was not sufficiently raised in the court below. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("an appellate court will not consider issues not properly raised before the district court"). For this reason alone, the District Court's dismissal should be affirmed without regard to Mr. Fyk's "development" theory. Even if Mr. Fyk had sufficiently raised that argument in the proceedings below, his claims would still be barred by the protections that the CDA affords to Facebook.

As an initial matter, it should be noted that Mr. Fyk's fundamental grievance is that Facebook disabled his pages, thereby allegedly lowering the value of those pages. But those actions all occurred ***before*** the sale of the pages at issue. And, all of those actions related to content that Mr. Fyk himself created and developed. Thus, there can be no contention that Facebook played any role in "developing" the pages before October 2016.

As for Mr. Fyk's speculative assertions regarding events after October 2016, they fare no better. Mr. Fyk asserts that "Facebook and the District Court

'ignore[d] the nature of Plaintiff's allegations, which accuse Defendant not of [(de-)creating] tortious content, but rather of . . . [tortiously] developing Fyk's businesses / pages (and, necessarily, the supposed violative content therein) for Fyk's competitor." App. Opening Br. at 26. In other words, Mr. Fyk contends that Facebook somehow became an "information content provider" and "developed" the pages at issue when the pages allegedly were published on the Facebook platform by a third party ***after*** it purchased the pages from Mr. Fyk.

But Mr. Fyk does not allege that Facebook did anything other than display the pre-existing content that this third party allegedly purchased from Mr. Fyk. He does not allege that Facebook itself created that content—which, according to Mr. Fyk, he had previously created himself. Put another way, the content at issue after October 2016 purportedly is the ***same*** content that Mr. Fyk ***already*** created.[3] Putting aside the vague and speculative nature of his assertions, Mr. Fyk offers no allegations whatsoever that Facebook did anything to this content other than display it. To the extent this tardy argument has not been waived, it should be rejected on the merits because it contradicts binding Ninth Circuit precedent.

"[A] website helps to develop unlawful content, and thus falls within the exception to section 230, if it ***contributes materially to the alleged illegality of the***

[3] *See, e.g.*, ER 23 at ¶ 45 (noting that the pages allegedly re-displayed after October 2016 had no "appreciable change (if any change) in the content" over what Mr. Fyk had previously created).

conduct." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (emphasis added). The Ninth Circuit's "material contribution" test "draw[s] the line at the crucial distinction between, on the one hand, taking actions . . . to . . . display . . . actionable content and, on the other hand, responsibility for what makes the displayed content [itself] illegal or actionable." *Kimzey v. Yelp! Inc*., 836 F.3d 1263, 1269 n.4 (9th Cir. 2016) (internal quotations omitted). For instance, in *Fair Housing*, upon which Mr. Fyk relies, a website operator was held liable for specifically requiring subscribers to provide certain types of information as a condition of accessing its service and for filtering search results in a discriminatory way. 521 F.3d at 1166-67.

Here, in contrast, Mr. Fyk does not allege that Facebook contributed in any way to the content at issue. As such, binding Ninth Circuit precedent forecloses Mr. Fyk's argument. In *Kimzey*, for instance, the Ninth Circuit rejected the contention that Yelp's republication of an allegedly defamatory review in the form of "proactively post[ing] advertisements or promotional links [to the negative review] on Google" transformed Yelp into an "information content provider" as to that review. 836 F.3d at 1270 n. 5. This Court noted that "[n]othing in the text of the CDA indicates that immunity turns on how many times an interactive computer service publishes 'information provided by another information content provider.'" *Id*. at 1270 (quoting 47 U.S.C. § 230(c)(1)). Accordingly, this Court held that

"[j]ust as Yelp is immune from liability under the CDA for posting user-generated content on its own website, Yelp is not liable for disseminating ***the same content in essentially the same format*** to a search engine, as this action does not change the origin of the third-party content." *Id.* (emphasis added); *see also id.* at 1271 ("Simply put, proliferation and dissemination of content does not equal creation or development of content.").[4]

The district court cases that Mr. Fyk cites are not to the contrary. In *Fraley v. Facebook*, for instance, the district court found that the defendant qualified as an "information content provider" under 47 U.S.C. § 230(f)(2) because it was alleged to have used users' names, photographs and likenesses "***to create new content*** that it publishes as endorsements of third-party products or services." 830 F. Supp. 2d

[4] *See also Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1099 (9th Cir. 2019) ("Plaintiff cannot and does not plead that [Defendant] required users to post specific content, made suggestions regarding the content of potential user posts, or contributed to making unlawful or objectionable user posts. [Defendant] is entitled to immunity under the plain terms of Section 230 and our case law as a publisher of third-party content."); *Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156, 1173 (N.D. Cal. 2018) ("As with the Yelp review at issue in *Kimzey* that was linked to a different website, Google's content recommendation tool 'does not change the origin of the third-party content' that it recommends."); *Force v. Facebook, Inc.*, 934 F.3d 53, 70 (2d Cir. 2019) (rejecting argument that Facebook "developed" content by allegedly making that content "more 'visible,' 'available,' and 'usable'"; "making information more available is . . . an essential part of traditional *publishing*; it does not amount to 'developing' that information within the meaning of Section 230." (emphasis in original)); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) ("a website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online").

785, 801 (N.D. Cal. 2011) (emphasis added). Similarly, in *Perkins v. Linkedin Corp.*, the defendant was found to be a "developer" of content based on allegations that it had "generated the text, layout, and design" of certain reminder emails that made use of Plaintiffs' names and likenesses as personalized endorsements for LinkedIn without Plaintiffs' knowledge or consent. 53 F. Supp. 3d 1222, 1247 (N.D. Cal. 2014) (noting that "the text and layout of these emails were created by LinkedIn without any input from the user"). No comparable circumstances are present in this case. As noted, Facebook is alleged to have simply displayed the same content that Mr. Fyk had already created. Unlike in *Fraley* and *Perkins*, Facebook did not create ***any*** new content—it merely re-displayed third party content.

In short, Mr. Fyk has not alleged that Facebook took any action as a "developer" of content that deprive Facebook of the protections Congress afforded it under Section 230.

2. The District Court correctly held that CDA § 230(c)(1) can protect interactive computer service providers like Facebook when they elect to remove content from their platforms.

Mr. Fyk argues that the District Court erroneously applied CDA § 230(c)(1) to the facts of this case. He asserts that CDA § 230(c)(1) does not apply to what he dubs "first-party" cases—cases where a plaintiff is contesting the removal of his or her own content by an internet platform. Such cases, Mr. Fyk asserts, are, instead,

governed by CDA § 230(c)(2)(A). Neither the caselaw nor the statute support Mr. Fyk.[5]

a. The Ninth Circuit has held that CDA § 230(c)(1) applies to decisions to withdraw or remove content from publication.

CDA § 230(c)(1) provides: "No 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." In *Barnes v. Yahoo*!, this Court examined the statutory text and legislative history of CDA § 230(c)(1) and held that it applies whenever "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability." 570 F.3d at 1102. This Court then held that "publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content" and that "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Id*. (internal citations omitted). This Court made clear that "Subsection (c)(1), by itself, shields from liability *all* publication decisions, whether to edit, to remove, or to post, with respect to content

[5] 47 U.S.C. § 230(c)(2)(A) provides: "No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

generated entirely by third parties."[6] *Id*. at 1105 (emphasis added). Given these repeated statements in *Barnes*, it is clear that CDA § 230(c)(1) applies to decisions to remove content.

b. The Ninth Circuit and District Courts within the Ninth Circuit have applied CDA § 230(c)(1) to lawsuits challenging a defendant's removal of plaintiff's content.

Given the Ninth Circuit's clear interpretation of CDA § 230(c)(1) in *Barnes v. Yahoo*!, it should come as no surprise that courts routinely dismiss lawsuits seeking to hold defendants liable for their decision to remove plaintiffs' content.

In *Sikhs for Justice, Inc. v. Facebook, Inc.*, for example, the Ninth Circuit affirmed the District Court's decision to dismiss a suit against Facebook under CDA § 230(c)(1) filed by a plaintiff whose own Facebook page was disabled from appearing on the Facebook platform. 144 F. Supp. 3d 1088, 1093-1095 (N.D. Cal. 2015*), aff'd*, 697 F. App'x 526, 526 (9th Cir. 2017). In *Riggs v. MySpace*, 444 Fed. Appx. 986 (9th Cir. 2011), *aff'g in part* 2009 WL 10671689, at *3 (C.D. Cal. Sept. 17, 2009), the Ninth Circuit held that the District Court "properly dismissed" a series of tort claims filed against an internet platform that removed plaintiff's online profiles from its platform. The Ninth Circuit specifically held that such

[6] *See also Klayman*, 753 F.3d at 1359 ("the very essence of publishing is making the decision whether to print or retract a given piece of content"); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert denied*, 524 U.S. 937 (1998) (listing "deciding whether to publish, withdraw, postpone or alter content" as examples of "a publisher's traditional editorial functions").

"claims were precluded by section 230(c)(1) of the Communications Decency Act." 444 Fed. Appx. at 987.

Numerous District Courts within the Ninth Circuit have likewise applied CDA § 230(c)(1) when a plaintiff challenges removal of its own content by Internet platforms such as Twitter,[7] Google,[8] and Facebook.[9] Courts outside the Ninth Circuit have done the same.[10]

Plaintiff cites only one case holding otherwise—*e-Ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017)—but this is an unpublished, out-of-circuit district court decision whose ruling on the CDA has never been reviewed on appeal and has not been followed by a single court anywhere in the country.

c. Applying CDA § 230(c)(1) when a plaintiff's own content has been removed does not render CDA § 230(c)(2) moot.

Plaintiff suggests that the application of CDA § 230(c)(1) to cases where

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[7] *Brittain v. Twitter, Inc.*, 2019 WL 2423375, at *4 (N.D. Cal. June 10, 2019).

[8] *Darnaa, LLC v. Google, Inc.*, 2016 WL 6540452, at *7-8 (N.D. Cal. Nov. 2, 2016); *Lancaster v. Alphabet Inc.*, 2016 WL 3648608, at *2-3 (N.D. Cal. July 8, 2016).

[9] *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1305 (N.D. Cal. 2019); *King v. Facebook, Inc.*, 2019 WL 4221768, at *4-5 (N.D. Cal. Sept. 5, 2019); *Ebeid v. Facebook, Inc.*, 2019 WL 2059662, at *4-5 (N.D. Cal. May 9, 2019).

[10] *Cox v. Twitter, Inc.*, 2019 WL 2513963 (D.S.C. Feb. 8, 2019), *report and recommendation approved*, 2019 WL 2514732 (D.S.C. Mar. 8, 2019); *Mezey v. Twitter, Inc.*, 2018 WL 5306769, at *1 (S.D. Fla. July 19, 2018).

plaintiff's own content has been removed renders CDA § 230(c)(2) mere "surplusage." Not so. As the Ninth Circuit already has held, Subsections (c)(1) and (c)(2) provide separate and independent grants of immunity. "Subsection (c)(1), *by itself*, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties." *Barnes*, 570 F.3d at 1105 (emphasis added). By contrast, for Subsection (c)(2), "the persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service." *Id*. (emphasis in original). "Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue," may be able to take advantage of Subsection (c)(2). *Id*

d. Mr. Fyk constitutes an "information content provider" for purposes of CDA § 230(c)(1).

Both at the District Court and before the Ninth Circuit, Mr. Fyk has suggested that his own content cannot qualify as "information provided by another information content provider." App. Opening Br. at 27; ER 3. Mr. Fyk never explains how this argument is distinct from his assertion that CDA § 230(c)(1) cannot apply to removal of a plaintiff's own content. In any event, Facebook's arguments are the same. Numerous courts have held that a plaintiff's content

qualifies as "information provided by another" and this Court should as well.[11]

B. The District Court correctly declined to hold that Facebook is estopped from asserting a CDA § 230(c)(1) defense because it did not identify that provision in pre-suit communications with Mr. Fyk.

Mr. Fyk identifies no authority for the unprecedented proposition that a party is estopped from asserting arguments in litigation that it did not specifically identify in pre-suit communications with the plaintiff.

The so-called "mend the hold" doctrine, upon which Mr. Fyk relies, "provides that a contract party is not permitted to change is position on the meaning of a contract in the middle of litigation over it." *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 864 F. Supp. 2d 1157, 1170 n. 9 (D.N.M. 2012) (citing *First Bank & Trust Co. of Illinois v. Cimerring*, 365 Fed. Appx. 5, 8 (7th Cir. 2010)).[12] That doctrine has no application here, among other reasons, because this is not a

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[11] *Sikhs for Justice, Inc.*, 144 F. Supp. 3d at 1095, *aff'd*, 697 Fed. Appx. 526 (9th Cir. 2017); *Ebeid*, 2019 WL 2059662, at *3 (holding that Facebook was "immune from [Plaintiff's] claims because they essentially seek to hold Facebook liable for restricting what plaintiff can post on the Facebook platform") (emphasis added); *Fed. Agency of News LLC*, 395 F. Supp. 3d at 1305 (holding that Facebook was immune from suit under § 230 where "Plaintiffs do not challenge that the information for which Plaintiffs seek to hold Facebook liable for removing—FAN's Facebook account, posts, and content—was not provided by Facebook, but rather, by FAN"); *Lancaster*, 2016 WL 3648608, at *3 (holding that "§ 230(c)(1) of the CDA precludes as a matter of law any claims arising from Defendants' removal of Plaintiff's [YouTube] videos") (emphasis added).

[12] In *Harbor Ins. Co. v. Cont'l Bank Corp.*, upon which Mr. Fyk relies, the Seventh Circuit explained that the "mend the hold" doctrine "is the name of a common law doctrine that limits the right of a party to a ***contract suit*** to change his litigating position." 922 F.2d 357, 362 (7th Cir. 1990) (emphasis added).

contract action. In any event, Facebook has not changed its position in this litigation; it asserted CDA § 230(c)(1) immunity in its first response to Mr. Fyk's Complaint, and the District Court properly applied CDA § 230(c)(1) to dismiss this case.[13]

C. The District Court did not err in failing to convert Facebook's motion to dismiss to a Rule 56 motion for summary judgment.

In the first paragraph of its dismissal order, the District Court noted by way of background that "Plaintiff had used Facebook's free online platform to create a series of, among other amusing things, pages dedicated to videos and pictures of people urinating." ER 1. Mr. Fyk asserts that the District Court's purported reliance on this "factually inaccurate and out-of-context red-herring"[14] effectively "converted Facebook's Rule 12(b)(6) or 12(c) Motion to Dismiss into a Rule 56 motion for summary judgment." App. Opening Br. at 14, 16. According to Mr. Fyk, dismissal was inappropriate under the Rule 56 standard because "there is a genuine dispute as to the public urination 'fact'…" *Id*. at 16. Nonsense.

The District Court held that CDA § 230(c)(1) barred Mr. Fyk's claims

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[13] Facebook reserves the right to assert CDA § 230(c)(2) in future proceedings should they be necessary.

[14] Mr. Fyk asserts for the first time on appeal that he "does not know much about the www.facebook.com/takeapissfunny business / page" (App. Opening Br. at 15, n. 11), but he alleged in paragraph 22 of his Complaint that Facebook "destroyed and/or severely devalued" that page, among others. ER 14. As set forth in Mr. Fyk's Complaint, that page concerned "take the piss funny pics and videos" and had approximately 4,300,000 followers. ER 14.

because they "seek to hold an interactive computer service [provider] liable as a publisher of third party content." ER 4. In reaching that conclusion, the District Court did not rely upon, or even mention, the so-called "public urination fact."

In any event, application of Rule 56 would not have changed the outcome because there is no genuine issue as to any ***material*** fact. *See* Fed. R. Civ. Proc. 56(c); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The so-called "public urination fact" has no bearing on whether CDA immunity applies in this case, which is why neither Facebook nor the District Court mentioned that "fact" in the analysis of CDA § 230(c)(1).

D. Even if Facebook Did Not Enjoy CDA Immunity, Mr. Fyk's Complaint Fails to State a Claim.

Although the District Court did not reach Facebook's second basis for dismissal—namely, that Mr. Fyk has failed to state a cause of action for any of his individual claims—this Court "may affirm the district court on any basis supported by the record." *Kohler v. Bed Bath & Beyond of California, LLC*, 778 F.3d 827, 829 (9th Cir. 2015). Because Facebook's second independent basis for dismissal is fully supported by the record,[15] this Court may affirm on this basis as well.

[15] *See* ER 97-103 (Mot. to Dismiss); 116-121 (Reply i/s/o Mot. Dismiss).

CONCLUSION

The District Court correctly held that all of Mr. Fyk's claims are barred by CDA § 230(c)(1) because each treats Facebook as the publisher or speaker of Mr. Fyk's own content. Facebook's role in allegedly displaying the exact same content after Mr. Fyk sold his pages does not transform Facebook into a "developer" of content. And the District Court's decision to apply CDA §230(c)(1) rather than CDA §230(c)(2) comports with a long line of Ninth Circuit cases, as well as the text of the statute itself.

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

Respectfully submitted,

Dated: November 18, 2019

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STATEMENT OF RELATED CASES

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

Dated: November 18, 2019 KEKER, VAN NEST & PETERS LLP

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CERTIFICATE OF COMPLIANCE

I certify that:

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

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

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