

No. A148623

**COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO**

FACEBOOK, INC.

Defendant-Appellant,

vs.

JASON CROSS a/k/a MIKEL KNIGHT; 1230 ENTERTAINMENT, LLC;  
and MDRST MARKETING/PROMOTIONS, LLC,

Plaintiffs-Respondents.

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Appeal from an Order of the Superior Court of San Mateo County  
Case No. CIV537384  
Hon. Donald J. Ayooob, Judge

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**APPLICATION OF PUBLIC CITIZEN, INC.  
FOR LEAVE TO FILE AS AMICUS CURIAE AND  
BRIEF OF PUBLIC CITIZEN, INC.  
AS AMICUS CURIAE URGING REVERSAL**

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Paul Alan Levy (pro hac vice sought)  
Public Citizen Litigation Group  
1600 20<sup>th</sup> Street, NW  
Washington, D.C. 20009  
(202) 588-7725  
plevy@citizen.org

Marcia Hofmann  
California Bar No. 250087  
Zeitgeist Law PC  
25 Taylor Street  
San Francisco, California 94102  
(415) 830-6664  
marcia@zeitgeist.law

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Attorneys for Amicus Curiae

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## **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Pursuant to California Rule of Court 8.208, amicus makes the following disclosure:

Public Citizen, Inc., is a nonprofit corporation that takes no contributions from companies or governments. It has no shares, and nobody owns it.

/s/ Paul Alan Levy  
Paul Alan Levy

Counsel for Public Citizen

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## **APPLICATION FOR LEAVE TO FILE AS AMICUS CURIAE**

Pursuant to California Rule of Court 8.200(c), Public Citizen, Inc. requests leave to file the attached brief as amicus curiae urging reversal.

Public Citizen is a public-interest organization based in Washington, D.C. It has more than 400,000 members and supporters nationwide, roughly 60,000 in California. Since 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended many cases involving the First Amendment rights of citizens who participate in civic affairs. See <http://www.citizen.org/Page.aspx?pid=388>. Public Citizen attorneys have represented Doe defendants and Internet forum hosts, and have appeared as amicus curiae, in cases involving subpoenas seeking to identify hundreds of authors of anonymous Internet messages. Public Citizen attorneys agreed to represent one of the Doe defendants in this case, opposing plaintiffs' efforts to compel the release of identifying information. They have also participated in many cases in which consumers' right to post their views about businesses was at issue, or in which the right of Internet platforms to host such expression without being constricted by defamation claims whether brought as defamation claims, some of which were brought under intellectual property theories.

Having reviewed the main briefs of both parties, as well as drafts of briefs from other amici, this filing complements the arguments that others are presenting to the Court, and adds a different perspective. This brief discusses

the litigation between the parties in Tennessee, briefly noted in the appellate briefs of both parties. Public Citizen agreed to protect the First Amendment interests of the author of the main Facebook page that is at issue in this litigation in avoiding compelled disclosure of the Doe's identity. The brief explains the relationship between the two cases. In addition, this brief discussed authority from the Second Appellate District, mentioned in passing in respondent's brief, that could authorize the sort of claim brought here, and explains why it is inconsistent with authority from other districts and the California Supreme Court, and why, even if that authority were followed, the record does not support denial of Facebook's anti-SLAPP motion. The brief also addresses the issue of whether the plaintiff's right of publicity claim is not an "intellectual property" claim within the meaning of 47 U.S.C. § 230, but on narrower grounds than those offered by appellant or its other supporting amici. Finally, the brief offers a broader perspective describing the impact that affirmance would have on the ability of consumers to have their adverse opinions about celebrities and other commercial actors hosted on social media networks or other online environments.<sup>1</sup>

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<sup>1</sup> Pursuant to California Rule of Court 8.200(c)(3), counsel certify that this brief was authored solely by attorneys for amicus curiae; no party contributed either to the authorship or the financing of the time spent on the brief or the out-of-pocket expenses connected with the filing.

## BRIEF OF PUBLIC CITIZEN AS AMICUS CURIAE

### Introduction

Mikel Knight is a highly controversial figure in the Middle South and Midwest sections of the United States, not so much because of the violent imagery of his “country rap” music, but because of widespread reports about the savage treatment of the young men who sell his CD’s in streets and parking lots throughout Tennessee, Kentucky, Georgia, Texas, and surrounding states. Those reports have been featured on a number of blogs and media sites, but also on some Facebook pages that have been created and used by some of the victims of his reportedly abusive labor practices. Knight brought a defamation action in Tennessee state court against both Facebook and the anonymous creators of the hostile Facebook pages, demanding that Facebook identify its anonymous users to avoid being sued for defamation.

However, Facebook invoked its immunity under section 230 of the Communications Decency Act, and counsel for one of the Doe Facebook page creators warned Knight’s counsel that, if it became necessary to litigate the propriety of the subpoena seeking to strip the Does of their First Amendment right to speak anonymously, the Does would submit affidavits from Knight’s victims showing the truth of the abuse claims that Knight claimed were defamatory. In response, Knight dismissed his Tennessee lawsuit and filed this

case instead, asserting that by allowing Knight's victims to criticize Knight on the Facebook web site, while displaying advertising to members of the public who view those criticisms, Facebook was violating his right of publicity and committing an unfair trade practice under California law.

But the right of publicity does not provide a means for public figures to complain about unfavorable media coverage. Apart from caselaw in the Second Appellate District, California courts and courts throughout the country have rejected efforts to give a misappropriation gloss to lawsuits based on unwanted commentary in expressive works, and held that the First Amendment precludes the application of publicity rights in that way. Moreover, if this Court were to affirm the decision of the trial court below, it would be creating a road map for commercial actors to circumvent both the limits that section 230 places on claims against hosts of critical content, and the limits that the First Amendment places on defamation claims brought against the users of hosting sites, in that critics could be sued without any proof of falsity and without any evidence of actual malice or even negligence in publishing critical web pages.

## **STATEMENT OF THE CASE**

### **A. Facts**

The individual plaintiff in the case, Jason Cross, is a controversial impresario of "country rap," which he performs using the sobriquet "Mikel

Knight.” (The brief uses the sobriquet to identify him.) The controversy about Knight stems primarily from the way in which he markets his music. Because this lawsuit seeks to prevent Facebook from allowing its users to create pages giving their side of the issue, amicus briefly explains the nature of the controversy and the role played by the Facebook pages in discussing it.

As recounted in several online articles<sup>2</sup> as well as on the Facebook pages that Knight claims violate his right of publicity,<sup>3</sup> Knight sells his music through a sales force of young men who are recruited from small towns throughout the Middle South, and who lack good economic prospects. Identified as the Maverick Dirt Road Street Team (“MDRST”), the sellers fan out from Knight’s base in Nashville to sell CD’s out of a series of vans emblazoned with his logo. The sellers work strictly on commission, earning five dollars for every CD they sell for ten dollars. This can be lucrative work: some sellers, especially those eventually promoted to be in charge of the crew in a given van, report earning more than a thousand dollars a week— excellent money especially when paid in

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<sup>2</sup> Cush, *Driving and Dying in the Service of the Country Rap King*, <http://gawker.com/driving-and-dying-in-the-service-of-the-country-rap-kin-1751698239>, *The Sound of Deception: Country Rap’s Mikel Knight & His Notorious Street Teams*, <http://www.savingcountrymusic.com/the-sound-of-deception-country-raps-mikel-knight-his-notorious-street-teams/>

<sup>3</sup>*E.g.*, *Public Awareness of Mikel Knight and the Maverick Dirt Road Street Team*, <https://www.facebook.com/Public-Awareness-of-Mikel-Knight-and -The-Maverick-Dirt-Road-Street-Team-1533971343525187/>

cash. It is lucrative for Knight, as well: he claimed in 2015 to have sold 1.4 million CD's using these techniques.

The online articles and the Facebook pages at issue further recount that the MDRST sales force work eighteen hour days for nearly a month at a time; no overtime is paid because Knight calls them "independent contractors" and in light of the "outside sales" exception to the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1). The sellers sleep in their sales vans, parked at Wal-Mart stores where employees use the bathrooms after midnight or in the pre-dawn hours before the work day begins again. The employees go without showers for a week at a time, and often rely on candy for nutrition. Employees have to turn in the proceeds from each day's sales, on the promise that they will receive their sales commissions at the end of each 25-day tour; but many employees have complained that salesmen who failed to meet sales quotas, or who spoke up against their mistreatment, were physically assaulted by Knight's supervisory staff or left by the side of the road in remote areas, without any of the commissions they had earned through their sales to date, and having to find their own way home. Eventually, the physical and mental exhaustion caused by such grueling work schedules led to crashes of some of the sales vans, with several sellers being killed or gravely injured. *See nn. 1-2.* Knight has denied the accuracy of the former employees' accounts of these working conditions.



Knight has created a Facebook page to promote his business; several of his detractors have created Facebook pages to criticize him. Those pages include *Families Against Mikel Knight and the MDRST*, later named *Public Awareness of Mikel Knight and the Maverick Dirt Road Street Team*, <https://www.facebook.com/Public-Awareness-of-Mikel-Knight-and-The-Maverick-Dirt-Road-Street-Team-1533971343525187/>, *Prove yourself Jason Cross aka Mikel Knight*, <https://www.facebook.com/Prove-yourself-Jason-Cross-aka-Mikel-Knight-1510278499186306/>, and *Jason cross aka mikel knight*, <https://www.facebook.com/Jason-cross-aka-mikel-knight-806397209385065/>. Many of the young men who see themselves as victims of Knight's employment practices, or their family members, have used the pages to provide gripping accounts of their experiences. The very names of some of these pages reflect that they exist to comment on Knight, rather than being sponsored by him, and a simple glance at each of the Facebook pages that remain online would plainly reveal to even the least sophisticated of Internet users that these are web pages where members of the public criticize Knight. None of these pages promote Knight or suggest that Knight is a fan or supporter of the Facebook pages. Indeed, the hostile and even vitriolic comments taken from the pages and recited in plaintiffs' own complaint filed in Tennessee state court, and in the attachments to the complaint in this case, reveal that these are "gripe pages"

about Knight, not pages that he has endorsed or for which he has given permission. Put another way, no Mikel Knight fans is likely to look at the pages because the fans entertain the idea that Knight has any positive association with the pages. The pages' operators do not "appropriate" Knight's image for their own commercial advantage; they use it to identify the subject of their criticism.

It appears that, in response to these critical Facebook pages as well as the other publications about Knight's abuses, his sales teams encountered a hostile reception in some of the small towns they visited. Some local police refused to allow them to vend their merchandise, citing a failure to obtain proper permits, and there were apparently some hostile crowds. Some of the comments posted to the Facebook pages themselves were quite vituperative.

Knight complained (through his Tennessee counsel) to Facebook that it was hosting defamatory and threatening content, and demanded that Facebook both remove the content of which Knight disapproved and provide information from which the authors of this allegedly defamatory content could be identified. *See Respondents' Appendix, 164-175.* Facebook declined either to remove or to identify, in the latter case pointing Knight to its announced policy: "Facebook may provide basic subscriber information (not content) where the requested information is indispensable to the case, and not within a party's possession upon personal service of a valid federal, California or California domesticated

subpoena and after notice to people affected.” *Id.*, citing *Information on Civil Subpoenas*, <https://www.facebook.com/help/473784375984502>. When Facebook refused to accede to Knight’s demands, Knight’s counsel warned, “If you will not . . . voluntarily disclose the identities of the individuals in question . . . we will . . . hold you responsible for any damage . . . in the interim.” *Id.*

## **B. Proceedings to Date**

### **1. The Tennessee Litigation**

On June 22, 2015, Mikel Knight and his company, 1203 Entertainment, LLC, filed a petition for pre-litigation discovery in the Second Circuit Court for Davidson County, Tennessee, naming as defendants both Facebook and “John and/or Jane Does 1-10,” who were described as the individual(s) responsible for maintaining the “Families Against Mikel Knight and the MDRST,” later renamed “Public Awareness of Mikel Knight and The Maverick Dirt Road Street Team.” The petition asserted that the page contained false and defamatory statements and said that plaintiffs needed discovery to identify these individuals so that they could be named as defendants in the litigation. Knight also sought a temporary restraining order compelling Facebook to remove the critical web page from its servers. *Knight v. Facebook*, No. 15C2403 (June 22, 2015).

Facebook opposed both the TRO and the requested discovery. In opposition to the TRO, Facebook pointed out that it is the provider of an

interactive computer service—namely, the Facebook social networking service that allows anyone who registers for a Facebook account to create a Facebook page or Facebook group to advocate whatever point of view they might wish, and indeed to post comments on such pages. Facebook argued that it was immune pursuant to Section 230 of the Communications Decency Act, 47 U.S.C. § 230, from being sued over content provided by some of its users. Although a TRO had initially been granted ex parte, the Tennessee court dissolved that TRO, and refused to extend it, based on Section 230. Respondents' Appendix 61-63.

Facebook opposed the requested discovery on the ground that plaintiffs had not satisfied the requirements of *Dendrite Int'l v. Doe* (N.J. Super. Ct. App. Div. 2001) 342 N.J. Super. 134 [775 A.2d 756]. Considering both the thuggish reputation of Knight himself as well as his sales supervisors, and considering the fact that Knight himself has a long criminal record including arrests for crimes of violence,<sup>4</sup> the anonymous authors of the Facebook pages had every reason to want to keep their names secret (a factor in the *Dendrite* balancing test but not in the Sixth District's version of that First Amendment test. (*Krinsky v. Doe 6*

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<sup>4</sup> See *Sound of Deception*, supra n. 1: <http://www.savingcountrymusic.com/the-sound-of-deception-country-raps-mikel-knight-his-notorious-street-teams/> (providing detail of long rap sheets from both Nashville and Texas, Knight's former place of residence). As noted below in footnote 6, Knight glories in his own criminal record when warning his online critics about the physical punishment that they face when he finds them.

(Cal. App. 2008) 159 Cal. App.4th 1154, 1172 [2 Cal.Rptr.3d 23].) Facebook also pointed to the requirements of Rule 27.01(2) of the Tennessee Rules of Civil Procedure, under which a court that is considering a motion for leave to take discovery needed to enable litigation against an absent defendant must appoint a lawyer to represent the interests of the absent intended adverse party. Facebook advised the Court that it had received correspondence from undersigned counsel, Paul Alan Levy, advising that he and his firm, which appeared as amicus curiae in *Dendrite* and in many similar cases elsewhere (including in California), were ready to accept a pro bono appointment as counsel for the Doe in responding to the request for discovery.

Plaintiffs then sought leave to amend their complaint to seek damages as well as injunctive relief against both Facebook and the Doe defendant because the content on the anti-Knight Facebook page was alleged to be both defamatory and tortiously threatening. The proposed amended complaint cited several statements on the anti-Knight page calling for a violent response to Knight's anticipated appearance in certain small towns, and accusations against Knight that the complaint alleged were false and defamatory. Proposed Amended Complaint in 15C2403, ¶¶ 12, 13 (Aug. 13, 2015). Facebook opposed the motion to amend, asserting its section 230 immunity from being sued for tortious speech that others had placed on its social network. Public Citizen, anticipating

possible appointment as counsel for the Doe, contacted many of plaintiffs' former salesmen and obtained affidavits confirming the veracity of the reports of the brutal and hellacious working conditions detailed on the web page. Public Citizen's counsel warned Knight's counsel that, if he were to move to take discovery to identify the Doe, the Doe would be filing these affidavits to show the Court that the statements on the Facebook page were true, and thus not the proper subject for a defamation action or for enforcement of a subpoena sought for the supposed purpose of pursuing a defamation claim against the Doe.

The Tennessee trial court denied the motion for leave to amend, reasoning that section 230 would protect Facebook against the various tort claims, and set a hearing at which plaintiffs were to explain whether they wished to proceed against the Does alone (and at which counsel could be appointed to address the requested discovery). At this juncture, instead of proceeding against the Does, plaintiffs nonsuited their Tennessee action. Respondents' Appendix 293.<sup>5</sup>

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<sup>5</sup> Both California and Tennessee apply a one year statute of limitations to libel claims. California Code of Civil Procedure 340(c); Tennessee Code § 28-3-104(a)(1). Both states also enforce the single publication rule. California Civil Code 3425.1-3425.5; Tennessee (*Agba v. Commercial Appeal*. (W.D. Tenn. Aug. 18, 2015) 2015 WL 4935503, at \*2). Plaintiffs cannot delay suing for defamation just because the challenged publication remains accessible to the public on the Internet. (*Clark v. Viacom Int'l* (6th Cir. 2015) 617 Fed. Appx. 495, 501). Because the statements on which plaintiffs' Tennessee libel claims were based were all placed on the anti-Knight Facebook page in May and June, 2015, plaintiffs' ability to sue for defamation has lapsed.

## 2. Proceedings Below

Instead of pursuing their defamation claims in Tennessee, the two plaintiffs who had sued there, joined by “MDRST Marketing/Promotions,” a subsidiary of “1203 Entertainment, LLC,” filed this action on February 16, 2016, against Facebook and Does 1 through 5, the Does responsible for creating and maintaining the anonymous Facebook page at issue in Tennessee, as well as others. The complaint alleged six separate claims, but all were focused on the harm that was being done to plaintiffs’ business by the publication of comments on the challenged Facebook pages cited in the complaint that criticized plaintiffs and, in some cases, advocated a violent response to their reported abuses. Plaintiffs alleged that they had lost business opportunities with potential partners who were dissuaded by the adverse content on the challenged pages. Respondents’ Appendix 5-6. Plaintiffs served discovery requests seeking, among other things, documents and answers that would identify the authors of the critical pages. *Id.* 202-203, 245.

Facebook filed a special motion to strike under the California anti-SLAPP statute, pointing out that each of the criticism pages was addressed to matters of public concern and arguing that none of plaintiffs’ claims could withstand serious scrutiny as against section 230. Plaintiffs argued, however, that the unauthorized use of plaintiff Knight’s name and likeness on the Facebook pages

attacking him both served to benefit Facebook by bringing in viewers to see the advertisements shown on the pages, and was causing significant harm to Knight by dissuading major sports and entertainment companies from forming commercial relationships with Knight “because of the allegations posted [on] the unauthorized Facebook pages” or because “we don’t want to do business with people like you.” Hairston Aff. ¶¶ 12-13; Knight Aff. ¶¶ 6-7; Respondents’ Appendix 127-128, 158-159.

The trial court agreed that the complaint was addressed to Facebook’s maintenance of a public forum for issues relating to the public interest, for example plaintiffs’ subjecting their employees to onerous working conditions that led to fatal vehicle collisions, and hence was within the scope of the anti-SLAPP statute. Respondents’ Appendix 358-360. The court further agreed with Facebook that it was immune under section 230 from suit on plaintiffs’ breach of contract and tort claims. *Id.* 360. However, because plaintiffs had characterized their remaining claims using the rubric of the right of publicity, and because California treats such claims as state-law intellectual property claims, the court concluded that section 230 does not protect Facebook against those claims. *Id.* 361. Moreover, the court noted that Facebook derives revenue from all advertising on its pages, including pages created to criticize public entertainers like Knight, and Knight had shown that his business suffered from



the criticism posted on those pages. *Id.* Consequently, Facebook’s special motion to dismiss the right of publicity claims, and the unfair business practices claim that turns on those claims, had to be denied. *Id.*

### SUMMARY OF ARGUMENT

Had plaintiffs brought this action as a claim for defamation or for “threats,” Facebook would be immune from liability pursuant to section 230 of the Communications Decency Act. The question presented by this appeal is whether a claim that seeks to impose liability for hosting material that is alleged to include unprotected threats or false accusations, that are hosted on a social networking service that is supported by advertising, evades immunity under federal law because the plaintiffs changed the label on their claim from defamation to the right of publicity.

Plaintiffs’ theory of the case should not allow evasion of section 230 immunity, for several reasons. First, although a case decided by the Second Appellate District allows defamation claims to be pursued on a right of publicity theory, this Court has never embraced that precedent and should refuse to do so now: it is contrary to precedent in other districts, to binding California Supreme Court authority, and to the way courts throughout the country have addressed right of publicity claims. Second, even assuming that the Court were to follow the Second District, plaintiffs’ allegations and showings below do not meet the

terms of that authority. Third, the fact that California courts have treated right of publicity claims as implicating intellectual property does not mean that the claims in **this** case raise intellectual property concerns and hence are outside section 230's immunity pursuant to the intellectual property exception. Finally, if accepted by this Court, plaintiffs' claims would provide a road map for any celebrity to evade section 230's ban on holding web hosts liable for defamation claims based on material supplied by the host's users, contrary to the intent and to the valid social interests served by that federal statute, and effectively destroy a major California industry.

## ARGUMENT

### A. **Plaintiffs' Claims About Alleged Threats and False Accusations Are Outside the Proper Scope of the Right of Publicity.**

The fundamental flaw in the superior court's ruling, as in the plaintiffs' defense of their right of publicity claims, is that neither the court nor the plaintiffs took proper account of the First Amendment limits on the right of publicity. "[T]he right of publicity is essentially an economic right." (*Comedy III Productions v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 403 [106 Cal.Rptr.2d 126, 139, 21 P.3d 797, 809]). It "prevent[s] others from **misappropriating** the economic value generated by [a] celebrity's fame through the **merchandising**" of the celebrity's name, image or likeness, *id.* (emphasis added) (25 Cal.4th at 403), such as by exploiting the market for celebrity memorabilia (*id.* at 405), or

the market for paid endorsements. (*Abdul-Jabbar v. Gen. Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 415). Thus, the right of publicity “is often invoked in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product.” (*Comedy III*, 25 Cal.4th at 396 [21 P.3d at 802].)

However, as the California Supreme Court also said in *Comedy III*,

the right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity’s image by censoring disagreeable portrayals. Once the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope. The necessary implication of this observation is that the right of publicity is essentially an economic right. What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame.

(25 Cal.4th at 403, [21 P.3d at 807, 106 Cal. Rptr.2d at 139].)

Thus, the right of publicity yields to the defense that the First Amendment and the public interest in the right to engage in discussions about celebrities, such as in the case of news reporting. (*Browne v. McCain* (C.D. Cal. 2009) 611 F. Supp. 2d 1062, 1071, *citing New Kids on the Block v. News Am. Pub.* (9th Cir. 1992) 971 F.2d 302, 309-310.; *Hoffman v. Capital Cities/ABC* (9th Cir. 2001) 255 F.3d 1180, 1189.) “Generally, courts apply this defense when the defendant’s use of the plaintiff’s identity actually targets the plaintiff or matters related to the

plaintiff.” (*Browne*, 611 F. Supp. 2d at 1071. *See also Montana v. San Jose Mercury News* (Cal. App. 6 Dist. 1995) 34 Cal. App.4th 790 [40 Cal. Rptr. 2d 639, 641–42], as modified): “public figures do not retain the right of publicity against the use of name and likeness in the news media.” Indeed, “[a]ny other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person’s identity.” (*Montana*, 34 Cal. App. 4th at 796, 40 Cal. Rptr.2d at 642).

The use of plaintiff Knight’s name and likeness in this case was exclusively devoted to identifying the subject of the Facebook group owners’ harsh criticisms. Such uses “are not, from the celebrity fan’s viewpoint, good substitutes for conventional depictions of the celebrity and therefore do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect.” (*Winter v. DC Comics* (2003), 30 Cal. 4th 881, 888 [69 P.3d 473, 477, 134 Cal. Rptr. 634, 639].)

Moreover, the mere fact that an expressive use that does not otherwise violate the right of publicity is accompanied by advertising, or the fact that it is promoted for purpose of commercial gain, does not make it a violation of the right of publicity. Thus, the Court of Appeals held in *Montana v. San Jose Mercury News* that a newspaper, having engaged in the protected activity of

reporting on the exploits of Forty-Niners quarterback Joe Montana, could sell commemorative posters displaying its previous reports. The court further held that this advertising to promote the newspaper's own reporting was constitutionally protected by the First Amendment so long as it did not misleadingly imply that Montana endorsed the newspaper. (34 Cal. App. 4th at 796 [40 Cal. Rptr.2d at 642].) The California Supreme Court embraced this analysis in *Winter v. DC Comics*, when, having held that a comic book featuring the celebrity plaintiffs' persona was transformative and hence outside the protections of the plaintiffs' right of publicity, it rejected the contention that defendants had nevertheless violated the right of publicity by using their likenesses and reputations to increase sales.

This is irrelevant to whether the comic books are constitutionally protected. The question is whether the work is transformative, not how it is marketed. If the work is sufficiently transformative to receive legal protection, "it is of no moment that the advertisements may have increased the profitability of the [work]." (*Guglielmi v. Spelling-Goldberg Productions, supra*, [1979] 25 Cal.3d [860,] at p. 873, 160 Cal.Rptr. 352, 603 P.2d 454 (conc. opn. of Bird, C.J.)) If the challenged work is transformative, the way it is advertised cannot somehow make it nontransformative.

(*Winter*, 30 Cal.4th at 891 [69 P.3d at 479, 134 Cal. Rptr.2d at 642].)

Similarly here, the Facebook pages at issue are exclusively devoted to discussing perceived **problems** with the way plaintiff Knight and his companies make their money, by exploiting the dreams of young men, treating them

harshly and leaving some of them alone by the side of the road or even dead from vehicular crashes caused by overlong working hours. The pictures and name are used because they identify Knight as the subject of the criticism. Such criticism does not violate the right of publicity, and the fact that Facebook serves advertisements on the pages where these criticisms are displayed does not, under the holdings in *Montana v. San Jose Mercury News* and *Winter v. DC Comics*, make out a claim under the California right of publicity.

Plaintiffs make much of the allegation that some comments posted to the Facebook page express the wish that someone might use violence to put an end to Knight's employment abuses. The sufficiency of the claims over these comments to overcome First Amendment protection is addressed in the next section of this brief; but even if they are unprotected, no California case, nor indeed any case around the country, has held that making threats to a celebrity is a violation of the celebrity's right of publicity. To be sure, there is a tort cause of action for making threats, but the common law, along with California's statutory harassment remedy under section 527.6 of the California Code of Civil Procedure, adequately protects celebrities, just as it protects ordinary people, through the issuance of protection orders and similar remedies. There is no need

to distort the right of publicity to craft a special remedy for Mikel Knight.<sup>6</sup>

The complaint also alleges that some of the statements made on the Facebook pages about Knight are false, but this also does not make out a claim that his right of publicity has been violated. To be sure the Court of Appeal for the Second District recognized such a cause of action under the rubric of the right of publicity in a case in which Clint Eastwood sued over an article, headlined on the front page of the *National Enquirer* for the apparent purpose of boosting newsstand and supermarket checkout-line sales, that described his supposed involvement in a love triangle. (*Eastwood v. Superior Court* (Cal. App. 2 Dist. 1983) 149 Cal. App. 3d 409 [198 Cal. Rptr. 342].) The Court of Appeal, reasoning that the right of publicity is not necessarily limited to cases of apparent endorsement by the celebrity, decided that the right of publicity could apply in this context, but only if the plaintiff could plead and prove **both** that the article made false statements of fact about him, **and** that the statements were made with actual malice. (*Id.* at 426 [198 Cal. Rptr. at 352].) The trial

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<sup>6</sup>Appended at the end of this brief is a post that plaintiff-respondent Mikel Knight placed on his own Facebook page on December 13, 2016, while this brief was being drafted, bragging about the large number of public brawls in which he has engaged and about the fact that he has been arrested for such brawling, thus reinforcing the threat to assault his online detractors: “in 2017 which is 4 weeks away WE ARE COMING to your town [where] WE ARE TAKING YOUR FUCKIN TEETH OUT!! Thats it.” <https://www.facebook.com/countryrapking/posts/1196703033710223>. The Court should take judicial notice of this threat.

judge here upheld the right-of-publicity-based claims partly because of plaintiffs' showing that plaintiffs had lost business as a result of prospective business partners taking the allegations seriously, Respondents' Appendix 361, which according to Knight's affiant led them to "[not] want to do business with people like you," *id.* 159 ¶ 13, or in another instance to "not complete this deal because of the allegations posted [on] the unauthorized Facebook pages." *Id.* 158 ¶ 12.<sup>7</sup>

*Eastwood* does not support a right of publicity claim here, for several reasons. First, this Court has never followed *Eastwood's* holding that the right of publicity affords a basis for suing over a defendant's publication of criticism in an expressive work that is sold to subscribers or accompanied by advertising.<sup>8</sup>

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<sup>7</sup>The trial court cited "Decl. Knight ¶¶ 12-13" as the relevant evidentiary support, but the only affidavit of Mikel Knight that appears in the record below ends at paragraph 9. Respondents' Appendix 127-128. It is the affidavit of Thomas Hairston that extends to paragraph 21, and whose paragraphs 12 and 13 refer to claims of harm based on unspecified allegations. Knight's affidavit refers more vaguely to the same claimed loss of business at ¶¶ 6-7. The lack of specificity about **which** allegations caused the lack of business is significant because, even if the Court were to follow *Eastwood*, this claim of harm would matter only if the allegations that caused the harm were both false, and published with actual malice.

<sup>8</sup> This Court has cited *Eastwood* in only three cases since it was decided. *Stewart v. Rolling Stone LLC* (Cal. App. 1 Dist. 2010) 181 Cal. App.4th 664, 678-680 [105 Cal. Rptr. 3d 98, 110], as modified on denial of reh'g (Feb. 24, 2010), and *Gionfriddo v. Major League Baseball* (Cal. App. 1 Dist. 2001) 94 Cal. App.4th 400 [114 Cal. Rptr. 2d 307], both involved right of publicity claims, but ruled that the defendants' First Amendment right to engage in noncommercial speech outweighed the plaintiffs' objections, respectively, to being discussed in an article displayed adjacent to an ad of tobacco products, and to having their names and likenesses shown on baseball cards. *U.S. Golf Assn. v. Arroyo*



Indeed, amicus has not been able to find a single appellate decision outside the Second Appellate District that cited *Eastwood* in such a case. Cases in the Sixth Appellate District, however, point **away** from *Eastwood*'s holding.

*Eastwood* has been cited by the Sixth Appellate District in three cases, two of them precedential; neither of them involved publicity claims predicated on the theory that the defendants had criticized the plaintiffs, and both cast doubt on the validity of such a cause of action: *Montana v. San Jose Mercury News* discussed above, and *Slivinsky v. Watkins-Johnson Co.* (Cal. App. 6thist. 1990) 221 Cal.App.3d 799, 807 [270 Cal. Rptr. 585, 589].) *Montana*, as noted above, held that the plaintiff there had **not** brought a proper right of publicity claim, and furthermore inveighed against the **misuse** of the right of publicity cause of action to “subject . . . reports and commentaries on the thoughts and conduct of public and prominent persons . . . to censorship.” (34 Cal. App. 4th at 796 [40 Cal. Rptr.2d at 642].) And *Slivinsky*, rejecting an effort to transform a run-of-the-mill libel claim based on an adverse employment reference into a claim for misappropriation of name or likeness, held that such claims must include “an allegation of a knowing use of the plaintiff’s name . . . for purposes of advertising or solicitation of purchases” and “[a] ‘direct’ connection must be alleged between

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*Software Corp.* (Cal. App. 1 Dist. 1999) 69 Cal. App.4th 607 [81 Cal. Rptr. 2d 708, 714 was a decision about collateral estoppel.

the use and the commercial purpose.” (*Id.*)<sup>9</sup>

Moreover, the California Supreme Court’s ruling in *Comedy III* also rejects *Eastwood*’s premise: the Supreme Court said that “the right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity’s image by censoring disagreeable portrayals[;] . . . the right to comment on . . . the celebrity . . . must be given a broad scope[; and] . . . the right of publicity holder is not a right of censorship.” (25 Cal.4th at 403 [21 P.3d at 807, 106 Cal. Rptr.2d at 139].) This holding is at odds with *Eastwood*, where the mere fact that a statement is negative, false and published with actual malice is enough to trigger application of the right of publicity.<sup>10</sup>

Finally, consistent with the approach delineated in *Comedy III* and *Winters*, federal and state courts across the country have refused to allow state-

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<sup>9</sup> A fact that the Second District considered significant in *Eastwood* was that the National Enquirer had placed a headline about the story on its front page, apparently trying to boost sales. Here, by contrast, Facebook did nothing to call the gripe pages to the attention of casual Internet users. But that distinction should make no difference. The *San Francisco Chronicle* may lavish front page and vending machine attention on stars of the Forty-Niners and the Giants, promoting stories inside the paper but also no doubt hoping to attract casual readers, but that is not a “commercial appropriation” of their names or likenesses that is actionable under the California right of publicity.

<sup>10</sup> Because plaintiffs’ claims fall outside the proper scope of the right of publicity, the Court need not reach Facebook’s additional argument that it was not Facebook, but rather the Doe defendants, that made use of Knight’s name or likeness. The Doe defendants, of course, are not charged with making a **commercial** use of Knight’s name.

law commercial appropriation theories to proceed against expressive works, even works that are sold and advertised, sometimes under state law alone, sometimes under state law as construed in light of the First Amendment, and sometimes because the First Amendment would bar such a claim.<sup>11</sup> This Court should decline to follow *Eastwood* in allowing the misuse of California's right of

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<sup>11</sup> *Cardtoons, L.C. v. Major League Baseball Players Assoc.* (10th Cir. 1996) 95 F.3d 959 (potential claim regarding parody player trading cards under Oklahoma's right of publicity law, dismissed on the First Amendment); *Matthews v. Wozencraft* (5th Cir. 1994) 15 F.3d 432, 437-440 (no misappropriation theory under Texas law protecting name or likeness for writing a book about someone's life or incorporating facts about a life into a work of fiction; even if cause existed under state law, barred by First Amendment); *Valentine v. C.B.S., Inc.* (11th Cir. 1983) 698 F.2d 430, 433 (after defamation claim rejected, court bars claim based on use of plaintiff's name in a Dylan song about the conviction of Hurricane Carter, under Florida law but also to avoid First Amendment question); *Meeropol v. Nizer* (2d Cir. 1977) 560 F.2d 1061, 1067 (claim barred under New York's appropriation of name or likeness statute, no mention of First Amendment); *Seale v. Gramercy Pictures* (E.D. Pa. 1996) 949 F. Supp. 331, 337 (claim under Pennsylvania's misappropriation statute barred under state law; construction influenced by First Amendment); *Tyne v. Time Warner Ent. Co.* (Fla. 2005) 901 So. 2d 802, 809 (refused to allow claim under Florida law for misappropriation of name or likeness in an expressive work, a dramatization of events in which plaintiffs' decedents were prominent, as a matter of state law construed to avoid First Amendment problems); *Rosemont Enterprises v. Random House* (1968) 58 Misc.2d 1, 6-7, 294 N.Y.S.2d 122, 129, *aff'd* (1969) 32 App. Div.2d 892, 301 N.Y.S.2d 948 (Howard Hughes could not use commercial misappropriation theory to stop a publisher from selling a biography of his life, even though he purported to give exclusive rights to that story to a different company). *Cardtoons'* holding and much of its analysis was squarely endorsed by the California Supreme Court in *Comedy III*. (25 Cal.4th at 406 [21 P.3d at 809].)

publicity statute to provide an additional theory for filing lawsuits against criticism of celebrities in expressive works.

**B. If Claims Based on Threats and False Accusations Could Ever Form a Proper Basis for Right of Publicity Violations, Plaintiffs Did Not Make the Required Showing of a Probability That They Will Prevail on Any Such Claims.**

Even if the Court were to decide to adopt *Eastwood*'s holding as stating the law of this appellate district, plaintiffs could not sustain the ruling in their favor on the present record for two reasons.

**1. Plaintiffs Have Not Made the Requisite Evidentiary Showings.**

Plaintiffs have not shown that any of the content hosted by Facebook is outside the protection of the First Amendment.

With respect to the “threats” set forth in Exhibit A to the complaint, Respondents’ Appendix 16-19, amicus acknowledges that some of them are articulated in a rough and even deplorable manner. However, it is doubtful that they amount to the sort of “true threats” that are outside the protection of the First Amendment. California cases demand proof that the “statements [were ones] that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat, namely, ‘a serious expression of an intent to commit an act of unlawful violence.’” (*People v. Lowery* (2011) 52 Cal.4th 419, 427 [257 P.3d 72, 78, 128 Cal. Rptr.3d 648, 654].) California courts also distinguish threats—statements made to the target of the

threats in a way that puts the target in fear of harm from the speaker—from statements advocating the use of force, which must meet the First Amendment’s “imminent and likely lawless action” standard. (*Huntingdon Life Scis. v. Stop Huntingdon Animal Cruelty USA* (Cal. App. 4 Dist. 2005) 129 Cal. App.4th 1228, 1251-1252 [29 Cal. Rptr. 3d 521, 539–40], citing *Brandenburg v. Ohio* (1969) 395 U.S. 444, 447. See also *Elonis v. United States* (2015) 135 S. Ct. 2001 (holding that federal statute criminalizing threats could not apply to a Facebook user’s rants about his former spouse).)

As for allegedly false statements, plaintiffs did not submit probative evidence of falsity and did not even allege actual malice on Facebook’s part. These elements are required not only by *Eastwood* but also by the California Supreme Court’s decision in *Blatty v. New York Times* (1986) 42 Cal.3d 1033 [728 P.2d 1177, 232 Cal.Rptr. 542], which holds that any state-law cause of action whose gravamen is injurious falsehood must meet all of the requirements that the First Amendment imposes on claims for defamation. (42 Cal.3d at 1045 [728 P.2d at 1184, 232 Cal Rptr. at 549].) And *Blatty*, which rejected the reasoning of the United States Court of Appeals for the Fourth Circuit in *Falwell v. Flynt* (4th Cir. 1986) 797 F.2d 1270, anticipated the Supreme Court’s reversal of that decision in *Hustler Magazine v. Falwell* (1988) 485 U.S. 46, which

required that tort claims based on falsehoods that injure reputation meet constitutional libel standards.<sup>12</sup>

Plaintiffs have not come close to meeting those standards. The affidavit of Mikel Knight, Respondents' Appendix page 128, refers in passing to unspecified "inflammatory statements posted on [the] unauthorized pages" and avers that they "are completely untrue." This affidavit does not specify which statements are false, however. Without specific statements, the Court cannot evaluate whether plaintiffs are complaining about factual statements capable of a defamatory meaning, rather than constitutionally protected opinions. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720 [151 P.3d 1185, 1209, 54 Cal. Rptr.3d 775, 805].) Similarly, plaintiffs' failure to allege the specific statements that they claim are false prevents the Court from satisfying itself that any demonstrably false statements are of and concerning Knight or his companies, as also required by the First Amendment as well as California law. (*Blatty*, 42 Cal.3d at 1042 [728 P.2d at 1182]). Nor does his affidavit show that Knight has personal knowledge of the alleged falsity – that he was present at the time that the claimed incidents occurred and can testify that the statements about the

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<sup>12</sup>In *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th at 683-690 [105 Cal. Rptr. 3d at 114-119], this Court agreed with *Eastwood* that when a plaintiff brings a right of publicity claim based on a defendant's noncommercial speech, actual malice must be shown even if the non-commercial speech is accompanied by advertising.

incidents are false. And he verified the complaint only on information and belief. Respondents' Appendix 22.

The affidavit of Thomas Hairston, in turn, asserts that “the unauthorized Facebook pages falsely claim that [Knight’s sales team] are involved in alleged kidnapping attempts,” based on a single image from an unspecified source on Facebook referring to a specific van that was allegedly “snatching people up.” Respondents' Appendix 159 ¶ 14, 177 Exhibit D. Apart from the fact that this reference might well not refer to a kidnapping charge, Hairston provided no basis in his affidavit from which a court could conclude that he had personal knowledge of what the occupants of this van were or were not doing; as a “senior vice president,” he presumably sits in a Nashville office rather than riding around in vans selling CD’s. None of this is evidence of falsity sufficient to support a probability of success under California’s anti-SLAPP statute.<sup>13</sup>

Moreover, mere falsity does not take a statement outside the protection of the First Amendment. (*United States v. Alvarez* (2012) 132 S. Ct. 2537, 2544.) The complaint does not allege actual malice, and the plaintiffs submitted no evidence of actual malice: no evidence that either the unknown individuals

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<sup>13</sup> Hairston also avers that he saw a Facebook post from a Georgia police department describing a Facebook warning about a van as false. Respondent’s Appendix 159 ¶ 17. The averment reports hearsay, and there is no evidence tying the police report cited in paragraph 17 of his affidavit to the van referenced in paragraph 14 of his affidavit and pictured in Exhibit D.

placing comments on the Facebook pages, nor the operators of that page, nor indeed Facebook either believed that the statements that they made or that they hosted were false, or that they entertained serious doubts about the truth of the statements but published them anyway. The mere fact that some business wrote to Facebook to dispute one of the many millions of things that have been said using its social networking service, and thus put Facebook on notice of a **claim** of falsity, is not evidence that Facebook published the material with actual malice.

## **2. Defendants Are Immune from Suit Under Section 230.**

Regardless of whether a claim of injurious falsehood is actionable as a violation of the right of publicity, or whether plaintiffs have made out a case of actionable injurious falsehood, both Facebook, and the Doe defendants who created the Facebook pages in question, are immune under section 230 of the Communications Decency Act from a suit based on statements made by various individuals who have posted comments on those pages. Facebook has urged the Court to hold, as the Ninth Circuit has done, that as a matter of federal law, the phrase “intellectual property” in 47 U.S.C. § 230(e)(2) does not include state-law intellectual property theories.<sup>14</sup> But the Court need not address the broader

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<sup>14</sup> **“(2) No effect on intellectual property law** Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”



question presented by Facebook and some amici, about whether right of publicity claims can ever be within the intellectual property exclusion; it is sufficient to conclude that the right of publicity claims alleged in **this** case are not intellectual property claims.

In that regard, the California Supreme Court ruled in *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 45 [146 P.3d 510, 517, 51 Cal. Rptr.3d 55, 63], that a provider of an interactive computer service is immune for suit based on allegedly defamatory communications placed on a provider's forum by third parties. The principles of *Hustler Magazine v. Falwell* and *Blatty v. New York Times*, holding that a plaintiff cannot, by changing the label on a defamation claim, avoid the strictures of the First Amendment, apply equally to section 230: the fact that plaintiffs' claims for injurious falsehood (or for allegedly actionable threats) are here paraded in right of publicity raiment should not be sufficient to evade section 230.

In addition, although California cases describe the right of publicity as a form of intellectual property under state law, it is **federal** law that determines the meaning of a term as it appears in a federal statute. (*Johnson v. United States* (2010) 559 U.S. 133, 138; *Western Air Lines v. South Dakota Bd. of Equalization* (1987) 480 U.S. 123, 129.) Thus, state-court decisions cannot control the meaning of "intellectual property" in section 230(e)(2). And several

courts addressing the application of federal statutes have distinguished reputational harm from intellectual property harm, holding that the former harms cannot be redressed under the intellectual property laws. Under the trademark laws — which provide a kind of right that is analogous to state-law right of publicity principles — claims based on injury to reputation are not cognizable. A leading example is *Universal Communication Sys. v. Lycos* (1st Cir. 2007) 478 F.3d 413, where the Court of Appeals held that a state law trademark claim based on the impact of criticism posted on the Raging Bull web forum for investors on the reputation of the plaintiff’s business “is not a form of trademark injury. . . . If the injury alleged is one of critical commentary, it falls outside trademark law, whether the criticism is warranted or unwarranted.” (*Id.* at 423-424. *Accord, Jenzabar, Inc. v. Long Bow Group* (Mass. App. Ct. 2012) 82 Mass. App.Ct. 648, 666 [977 N.E.2d 75, 90].)

Similarly under copyright law, several federal decisions hold that injury to reputation cannot be redressed as a form of copyright injury. The leading recent decision is *Garcia v. Google, Inc.* (9th Cir. 2015) 786 F.3d 733, 745 (en banc), where an actress claimed that she had been bamboozled into appearing in a film where her role was so hateful in the Muslim world that she was subjected to death threats; she sued for infringement of the copyright in her performance in the film. The Ninth Circuit held that the harms to her

reputation were not a form of copyright injury — although serious and perhaps redressable on a privacy or fraud theory, “her harms are untethered from—and incompatible with—copyright and copyright’s function as the engine of expression. (*Id.* at 745.) Similarly, when a company representing the interests of Howard Hughes (who opposed any efforts to write his biography) bought the copyright in a few news article on which a new biography of Hughes was based, then sued the book’s publisher for copyright infringement, the Court of Appeals for the Second Circuit held that the interests being protected were outside the proper scope of copyright, and hence refused to find an actionable infringement: “courts should not tolerate any attempted interference with the public’s right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.” (*Rosemont Enterprises v. Random House* (2d Cir. 1966) 366 F.2d 303, 311) (Lumbard, J. concurring in opinion joined by second judge on three-judge panel).

In this case as well, the injury that plaintiffs seek to redress is not intellectual property injury, but rather is defamation injury. The history of the litigation shows its real character: it was first filed in Tennessee on a defamation theory, which was dropped after Facebook successfully invoked section 230 and the need to surmount opposition to discovery by showing that the criticisms on

the Facebook page were false, and then refile below on a right of publicity theory. Plaintiffs should not be able to escape the limitations that section 230 places on claims against parties such as Facebook by giving the tort a name that might otherwise be properly treated as an intellectual property claim.

Indeed, if plaintiffs seek to sue the Does who operate the Facebook pages, in addition to Facebook itself, they must specify that the statements that they allege to be false were made by the authors of the pages and not by other Facebook users who merely take advantage of the “comment feature” to place their own observations on the page. The Does who operate “unauthorized pages” are information content providers to the extent that they have authored content on those pages – for example, they chose to name the pages as being about plaintiff Knight, and it is they who posted images of his smashed vans; they have also authored a number of entries. But the Does are also the host of interactive computer systems to the extent that they allow comments to be made to their articles by other Facebook users. The examples in Exhibit A to the complaint, for example, are all culled from the comment portions of the “unauthorized pages,” and **those** comments are thus within the page creators’ section 230 immunity. Indeed, as result of the limitations recognized by *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1034-1035, and *Barrett v. Rosenthal*, section 230 protects the operators of the pages from being sued in California state courts for

placing on their Facebook pages accusations against Knight that were forwarded to the Does for such posting, or that the Does copied from other online sources.

**3. Affirming the Decision Below Would Have a Devastating Effect on Consumers By Making Balanced Online Commentary Impossible.**

From the consumer perspective, section 230 plays a key role in the system of online free speech that enables individual members of the public to express their views about the merits and flaws of businesses they have used, and at the same time serves the marketplace of ideas that enables consumers to get the benefit of what other consumers have to say in making decisions about where they should do business in the future.

Web sites that display third-party content may have many millions of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content would have an obvious chilling effect in light of the difficulty of screening posts for potential issues. (*Jane Doe No. 1 v. Backpage.com* (1st Cir. 2016) 817 F.3d 12, 18-19.) Most operators of interactive computer systems (“ICS”) receive very small sums for hosting services, or offset the costs of hosting by selling advertising on the site for a fraction of a penny per page-view or per click, or by commercializing access to data about visitors to the site. Not only can hosts not police content in advance, but even when particular comments are challenged, it is unrealistic to expect

operators to devote sufficient lawyer time to evaluate challenged statements and decide whether to remove them or leave them posted. The cost of making intelligent assessments of the risks of litigation, not to speak of the cost of participating in the litigation, far outstrips the money that can be earned from hosting challenged comments. *Chicago Lawyers' Committee v. Craigslist* (7th Cir. 2008) 519 F.3d 666, 668-669.)

Given those circumstances, the California Supreme Court explained in *Barrett v. Rosenthal* what the consequences would be if online service providers could be held liable for false criticisms based simply on having received a complaint about those criticisms:

A provider would be at risk for liability each time it received notice of a potentially defamatory statement in any Internet message, requiring an investigation of the circumstances, a legal judgment about the defamatory character of the information, and an editorial decision on whether to continue the publication. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. . . .

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply 'notify' the relevant service provider, claiming the information to be legally defamatory....

[Moreover,] service providers who received notification of a defamatory message would be subject to liability only for maintaining the message, not for removing it. This fact, together

with the burdens involved in evaluating the defamatory character of a great number of protested messages, would provide a natural incentive to simply remove messages upon notification, chilling the freedom of Internet speech. . . . Finally, notice-based liability would give third parties a cost-free means of manufacturing claims, imposing on providers ceaseless choices of suppressing controversial speech or sustaining prohibitive liability.

(40 Cal.4th at 45-46, 54-55 [146 P.3d 510 at 523-524]) (citations and internal quotation marks omitted).

And only critical speech is targeted for such removal. Nobody threatens to sue over overstated online praise or undeserved online compliments. Thus, consumers would, as a practical matter, lose the ability to express any criticisms of businesses, and to have those criticisms hosted; the marketplace of ideas about the qualities of business services would be unfairly skewed in favor of the most unqualified praise. As a result, plaintiffs' theory undermines the powerful immunity provided to ICS operators that has become a vital aspect of our system of free speech online—so central that when Congress banned libel tourism, preventing the enforcement of foreign defamation judgments in the United States that would run afoul of our constitutional protections, it included specific protection for ICS operators. (28 U.S.C. § 4102(c).)

Instead of subjecting ICS operators to suit over the removal of objectionable material, section 230 tells plaintiffs: sue the speaker, not the host. In that way, the litigation is filed against the party who is best situated to evaluate the circumstances about which she was speaking, and who has the

greatest interest in defending her right to make the statements. If the speaker is found liable, then the court can impose damages and (in California) permanent injunctive relief against the wrongdoer.

If this Court were to uphold the decision below, and say that any web site that supports itself by carrying advertising can be held liable for including critical content under the rubric of the right of publicity, even though it would be immune if sued under the rubric of defamation, then unscrupulous businesses would be given a road map to destroy the system of online free speech that Congress fostered by adopting section 230, and that the California Supreme Court warmly embraced and construed expansively in *Barrett v. Rosenthal*.

Moreover, adopting the right of publicity theory advocated by plaintiffs and accepted by the court below would destroy the utility of many California online businesses, which depend on section 230 for their vitality. Not only would social media sites like Facebook, Twitter, LinkedIn, and Tumblr, be devastated, but so too would be review sites such as Yelp, Glassdoor, Google Reviews, and Yahoo! reviews, and blogging platforms such as WordPress, Typepad, and Medium that support their offer of free services by displaying advertising.



## CONCLUSION

The order denying Facebook's motion to strike plaintiffs' right of publicity claims, and the unfair business practices claim that turns on the right of publicity, should be reversed.

Respectfully submitted,

/s/ Paul Alan Levy

Paul Alan Levy (pro hac vice sought)

Public Citizen Litigation Group  
1600 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20009  
(202) 588-7725  
plevy@citizen.org

/s/ Marcia Hofmann

Marcia Hofmann  
California Bar No. 250087

Zeitgeist Law PC  
25 Taylor Street  
San Francisco, California 94102  
(415) 830-6664  
marcia@zeitgeist.law

Attorneys for Amicus Curiae

December 20, 2016

# ADDENDUM

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Mikel Knight

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**Mikel Knight** 4 hrs · 🌐

Public Service Announcement: HATERS LEFT SNORING. This announcement is for you big mouth cowards out on social media. NOT you amazing, awesome, respectful, God fearing folks. This is my quarterly message sent as a reminder to these SOFT COWARD ASS whiteboys who actually take the time to go to another mans page and talk disrespectful shit about someones livelihood when you dont know that man or his life... Listen up cowards and listen good. In 2017 which is 4 weeks away WE ARE COMING to your town and aint playing NO games. Stop talking fake tough shit.. and this goes for for FANS and ARTISTS too.. I have a healthy respect for the authority of our government and a real fear of God, but thats where the line is drawn. Ive been in over 2000 real street fights in my life and I'VE NEVER LOST ONE!! (Ripleys Motherfucker!!) and ive been arrested for 2 of them when i was younger, but I STAND firm by GODs law. For my right to defend myself, my way of life, and my family by ANY MEANS necessary and If you bring your fuckshit, your hate, your disrespect, your slander, or your verbal extortion to me or my company this year WE ARE TAKING YOUR FUCKIN TEETH OUT!! Thats it. I am surrounded by men who I've known since I was 7-15 (aint no one here under 30 either) and NOT one of you HAS EVER said ANYTHING this to our faces ever, in all these years, and not been put to SLEEP! FACT!! #allhaterleftsnoring

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## CERTIFICATE OF COMPLIANCE

I certify that this brief, exclusive of the certificates, the cover, the signature block, and the tables of contents and authorities, contains 9,109 words according to the word count feature of Word Perfect, in which the brief was prepared using 13-point Century Schoolbook font. Consequently, the length of the brief complies with Rule 204(c)(4) of the California Rules of Court.

December 19, 2016

/s/ Paul Alan Levy  
Paul Alan Levy

## CERTIFICATE OF SERVICE

I certify that on this 19th day of December 2016, I am causing the foregoing brief to be filed using the Court's e-filing system, which will effect service on the following counsel for the parties:

Mark Punzalan, Esquire  
Punzalan Law, P.C.  
600 Allerton Street, Suite 201  
Redwood City, California 940063

Julie Schwartz, Esquire  
Perkins Coie LLP  
3150 Porter Drive  
Palo Alto, California 94304

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on December 19, 2016, at Washington, DC.

/s/ Paul Alan Levy  
Paul Alan Levy