No. 23-4434

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PLANET GREEN CARTRIDGES, INC., a California corporation,

Plaintiff-Appellant,

v.

AMAZON.COM, INC., a Delaware corporation, et al.,

Defendant-Respondent,

On Appeal from The United States District Court
for the Central District of California
Case No. 2:23-cv-06647-JFW-(KSx)
Hon. John F Walter

APPELLANT'S OPENING BRIEF

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I. CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 7.1(a)(1) of the Federal Rules of Civil Procedure and Rule 26.1 of the Ninth Circuit Federal Rules of Appellate Procedure, Plaintiff Planet Green Cartridges, Inc. hereby states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Date: March 7, 2024

TROYGOULD PC

/s/ John C. Ulin

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I. Introduction

Plaintiff Planet Green Cartridges, Inc. ("Plaintiff" or Planet Green") brought this action to save its business and its industry. Planet Green is the leading domestic producer of remanufactured printer ink cartridges, responsible for the overwhelming majority of remanufactured cartridges at retail. In recent years, the remanufactured printer ink cartridge industry, and Planet Green's business, have been decimated by a flood of foreign-made clone cartridges, which are newly manufactured products that are misrepresented to consumers as remanufactured and recycled, when they are not. The primary platform for sales of these falsely labeled and misrepresented clone cartridges is Amazon.com, where sales have ranged into the billions of dollars. Accordingly, Planet Green contacted Defendants Amazon.com, Inc., Amazon.com Services, LLC and Amazon Advertising, LLC (collectivity, "Defendants" or "Amazon") in an effort to address the problem and, when that was not successful, filed suit against them in order to stop the sale of misrepresented clone cartridges once and for all.

Amazon contributes to the proliferation of falsely labeled clone cartridges in multiple ways. It imports them from overseas, stores them in its warehouses and distributes them to consumers throughout the United States. It takes title to them and itself sells them directly to consumers in packaging and bearing labels that falsely identifies the clone cartridges as remanufactured or recycled. It promotes

them through its own statements over the Amazon website, via email and on third-party internet platforms. And it participates extensively in the promotion and sale of the clone cartridges by third-party sellers on its website, and profits handsomely from those sales.

Despite extensive allegations in the First Amended Complaint ("FAC") that detail Amazon's direct involvement in the promotion, importation, distribution and sale of misrepresented clone printer ink cartridges, the District Court concluded that Amazon was shielded from any potential liability for its actions by Section 230 of the Communications Decency Act, 47 U.S.C. § 230, and granted Amazon's motion to dismiss the FAC in its entirety for the reasons set forth below, each of which constituted reversible error.

With respect to Section 230, the District Court found that Amazon was entitled to complete immunity from this action, even though its claims arise in significant part from statements, sales, and conduct by Amazon itself that do not constitute the publication of third-party statements over Amazon's website (*i.e.*, the only conduct for which Section 230 immunity is even arguably available). It also held that Amazon could not be held liable for false and misleading product listings for cartridge sales as to which the FAC alleges that Amazon contributed materially through its extensive involvement in the cartridge sales to which they related. Ultimately, the District Court gave Amazon a "get-out-of-jail-free card" that would

allow it to disregard any legal obligation to avoid deceiving consumers about printer ink cartridges, damaging Planet Green, or destroying the remanufactured ink cartridge industry, if the misrepresented cartridges that form the basis of the claim are also sold by third parties over Amazon's website. That result twists Section 230, which is a statute focused on limiting liability for the publication of third party statements on the internet, beyond recognition. It must be reversed.

Similarly, the District Court applied incorrect legal standards when it held that: (1) Planet Green's false advertising and unfair competition claims failed because it had not alleged any false statement created by Amazon; (2) Plaintiff's "passing off" claims had to be dismissed because the FAC does not allege either misuse of Planet Green's trade name or trademarks or that it is the exclusive domestic seller of remanufactured printer ink cartridges; and (3) Planet Green had not alleged a legally cognizable duty to support its negligence claim. The FAC's extensive allegations amply support all six of the claims asserted and the District Court's contrary conclusions based on misstated legal standards constitute reversible error.

The decision below sends a dangerous message that website operators can hide behind Section 230 and sell, and facilitate unlawful sales of, enormous quantities of misrepresented products that deceive millions of consumers and cause severe damage to an entire industry, and even do it knowingly, without legal

consequence. It flouts this Court's admonition that "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC,* 521 F.3d 1157, 1164 (9th Cir. 2008) (*en banc*). Because the decision was based on a misreading of Section 230 and erroneous statements of the legal standards governing the FAC's substantive claims, it must be reversed, so that Planet Green can pursue this action and protect itself, its industry and the public from Amazon's deception and unlawful conduct.

II. Statement of Jurisdiction

The District Court for the Central District of California had original jurisdiction over the subject matter of this matter under 15 U.S.C. section 1121 and 28 U.S.C. sections 1331 and 1338, because it is a civil action involving claims arising under the laws of the United States, including the Lanham Act, 15 U.S.C. section 1051 et seq., and supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. sections 1338(b) and 1367(a), in that they form part of the same case or controversy that gives rise to Plaintiff's claims under the laws of the United States. The district court also had original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. section 1332 because the amount in controversy exceeds $75,000.00 and the parties are diverse in citizenship.

On December 5, 2023, the District Court issued an Order Granting Defendants' Motion to Dismiss Plaintiff's First Amended Complaint. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 because the order granting the motion to dismiss without leave to amend was a final determination of all claims pending before the district court. On December 22, 2023, pursuant to Federal Rules of Appellate Procedure 4(a), Planet Green filed a timely Notice of Appeal.

III. Statement of Issues Appealed

1. Whether the District Court erred when it concluded that Section 230 of the Communications Decency Act, 47 U.S.C. § 230, ("Section 230") provides Amazon with immunity from each of Plaintiff's claims in the FAC, including its claims for (1) Violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) – False Advertising; (2) Violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A) – False Association & False Designation of Origin or Approval; (3) Common Law Unfair Competition; (4) Unfair Competition in Violation of California Unfair Competition Law – Unlawful and Unfair Prongs (Cal. Bus. & Prof. Code § 17200, et seq.); (5) Violation of California False Advertising Law (Cal. Bus. & Prof. Code § 17500, et seq.); and (6) Negligence.

2. Whether the District Court erred by affording Amazon Section 230 immunity from claims or aspects of claims that arise from conduct other than the publication of third party content over Amazon's website.

3. Whether the District Court erred when it held that Amazon is an information service provider and thus are entitled to immunity from each of Plaintiff's claims under Section 230.

4. Whether the District Court erred when it held that Plaintiff's claims treated Defendants as the publishers or speakers of third party content under Section 230.

5. Whether the District Court erred when it held that the misrepresentations underlying Plaintiff's claims in this action constituted "information provided by another information service provider" as to which Amazon was entitled to immunity under Section 230.

6. Whether the District Court erred by dismissing Planet Green's claims under the Lanham Act, California's Unfair Competition Law and False Advertising Law and for common law unfair competition, based on its conclusion that the FAC does not allege Amazon created or otherwise contributed to any of the false statements or product descriptions at issue.

7. Whether the District Court erred when it concluded that Planet Green failed to plead "passing off" because it did not allege misuse of its trade names or

trademarks or that Planet Green is the exclusive source of remanufactured printer ink cartridges in the United States and therefore dismissed Plaintiff's claims for false association and false designation of origin, under 15 U.S.C. § 1125(a)(1)(A), and California common law unfair competition.

8. Whether the District Court erred when it determined that Planet Green failed to allege a legally cognizable duty to support its negligence claim.

9. Whether the District Court erred when it determined leave to amend the FAC would be futile.

IV. Statement of the Case and Statement of Facts

A. Statement of the Case

On August 14, 2023, Planet Green filed its Complaint for Damages against Defendants Amazon.com, Inc., Amazon.com Services LLC, and Amazon Advertising LLC (collectively, "Defendants"), alleging: (1) Violation of the Lanham Act, 15 U.S.C. § 1125; (2) Common Law Unfair Competition; (3) Unfair Competition in Violation of California Unfair Competition Law – Unlawful and Unfair Prongs (Cal. Bus. & Prof. Code § 17200, et seq.); and (4) Violation of California False Advertising Law (Cal. Bus. & Prof. Code § 17500, et seq.). ER-179.

On September 18, 2023, Amazon filed a Motion to Dismiss Plaintiff's Complaint, or in the Alternative, To Strike. In response, pursuant to Federal Rule

of Civil Procedure 15(a), Planet Green filed a First Amended Complaint on October 10, 2023, alleging claims for: (1) Violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) – False Advertising; (2) Violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A) – False Association & False Designation of Origin or Approval; (3) Common Law Unfair Competition; (4) Unfair Competition in Violation of California Unfair Competition Law – Unlawful and Unfair Prongs (Cal. Bus. & Prof. Code § 17200, et seq.); (5) Violation of California False Advertising Law (Cal. Bus. & Prof. Code § 17500, et seq.); and (6) Negligence. ER-182.

On October 24, 2023, Amazon filed a Motion to Dismiss Plaintiff's First Amended Complaint. Planet Green filed its Opposition on November 6, 2023, and Amazon filed its Reply in Support of the Motion to Dismiss on November 13, 2023. On November 21, 2023, the District Court issued an Order Taking Under Submission Defendants' Motion To Dismiss Plaintiff's First Amended Complaint. On December 5, 2023, the District Court issued an Order Granting Defendants' Motion To Dismiss Plaintiff's First Amended Complaint. On December 22, 2023, Planet Green filed a Notice of Appeal. This appeal is timely pursuant to Federal Rules of Appellate Procedure 4(a). ER-184.

B. Statement of Facts

For the last 23 years, Planet Green has been an industry leader of wholesale, high-quality, United States remanufactured ink cartridge products. ER-19, ¶ 5.

Planet Green remanufactures ink cartridges in a state-of-the-art facility utilizing a painstaking process consisting of obtaining used original equipment manufacturer ("OEM") cartridge cores, thoroughly inspecting, cleaning, refilling the cartridges with new ink, testing for quality control, and packaging for resale. ER-18, ER-19, ER-22, ¶¶ 1, 5, 15. The remanufactured ink cartridges sold by Planet Green are authentic recycled products. ER-19, ¶ 5. A leader in the industry, Planet Green is one of the last remaining printer cartridge remanufacturers in the United States. ER-22, ¶ 16.

The United States once was the epicenter of the printer ink cartridge remanufacturing industry, with thousands of remanufacturers, suppliers, and resellers located here. In recent years, the industry has been decimated by a flood of falsely labeled and misrepresented clone ink cartridges imported mostly from China. ER-18, ER-22, ¶¶ 1, 15. Sellers, including Amazon, represent these cartridges to consumers as remanufactured and recycled products on product packaging and labels, in product listings and in promotional communications. ER-19, ER-55, ¶¶ 4, 50. But those representations are false. The clone cartridges are not actually remanufactured but are instead newly manufactured products that add to the exact e-waste and other environmental concerns that consumers have sought to avoid by purchasing remanufactured cartridges. ER-21, ¶ 12. The mass importation and sale of misrepresented clone ink cartridges has thus deceived

consumers, crippled the legitimate remanufactured ink cartridge industry, and done untold damage to Planet Green's business. ER-24, ¶ 20.

By this point, Planet Green is one of the only remaining printer ink cartridge remanufacturers remaining in the United States. It produces the overwhelming majority of remanufactured printer ink cartridges remanufactured and sold at retail, including over Amazon's website. ER-19, ER-22, ¶¶ 5, 16. Consumers who purchase printer ink cartridges over Amazon's website that are represented as remanufactured or recycled rightly understand that they come from the lawful source of remanufactured cartridges, whether they know the name of the company or not, that nearly always means Planet Green. ER-22, ¶¶ 15-16. To the extent that others, including Amazon, sell clone cartridges over Amazon's website that are misrepresented as recycled or remanufactured, they are falsely representing to consumers that they sell a product that consumers associate with the lawful source of remanufactured printer ink cartridges, *i.e.*, Planet Green. ER-19, ER-22, ¶¶ 4, 16.

Amazon is involved in the sale, distribution and promotion of misrepresented clone ink cartridges in at least three significant ways: (1) it partners closely with third-party sellers to promote and sell the clone cartridges over Amazon's website; (2) it sells the clone cartridges itself, including through its Amazon Warehouse program; and (3) it imports and distributes the clone

cartridges, taking possession of them, storing them at its warehouses and delivering them to consumers. ER-18 - ER-19, ER-43, ER-77, ¶¶ 2-4, 36, 75.

The clone ink cartridges are misrepresented to consumers as remanufactured or recycled products, when they are actually newly manufactured "compatible" products. ER-23, ¶ 17. The misrepresentations appear in product listings and promotional statements on Amazon's website, on product labels and packaging, and in promotional communications by Amazon on other internet platforms and via email. ER-43, ER-55 - ER-57, ¶¶ 36, 49, 50. Amazon provides extensive support to sellers of clone cartridges, including by its collection and analysis of user data in a manner that enables sellers to target their advertising more effectively and increases the deceptive effect of misleading communications about whether the clone cartridges are actually remanufactured. ER-55 - ER-63, ¶¶ 49-51. Amazon also communicates directly with consumers over its website, via email and through programs like "Amazon's Choice," all of which recommend misrepresented clone cartridges to consumers. ER-55 – ER-57, ¶¶ 49, 50.

Plaintiff has twice provided Amazon with extensive presentations about the category-wide problem with misrepresented clone printer ink cartridges, replete with photographic evidence. ER-19, ER-91 - ER-128, ¶ 3; Ex. 1. And yet the problem persists. In addition to Plaintiff's presentations, the International Imaging Technology Council ("IITC"), and independent trade association, made a third

presentation to Amazon on the subject and proposed a simple verification process that would help to address the problem by confirming whether cartridges sold on the website are actually remanufactured. ER-76 - ER-77, ¶¶ 74-75. Over a year after receiving the presentation, Amazon still has done nothing about adopting the verification process. ER-73, ER-76, ¶¶ 66, 72.

As a direct and proximate result of Defendants' support for the unlawful importation, distribution, promotion and sale of misrepresented clone printer ink cartridges, Defendants have caused Plaintiff substantial damages, including lost profits, damage to reputation, and the need to invest substantial time, energy and money to combat a problem that Amazon is uniquely situated to address by simply verifying the assertions of clone cartridge sellers and barring those who are falsely representing their products as remanufactured from selling over Amazon's website. ER-18, ER-73, ER-76, ER-82, ¶¶ 2, 66, 71, 101.

And with all that said, it bears emphasis that this action does not arise exclusively from Amazon's extensive involvement in third-party sales of misrepresented clone printer ink cartridges over its website. It also arises from Amazon's own direct sales of falsely labeled and packaged clone cartridges, Amazon's massive importation and distribution of such cartridges, and Amazon's direct communications with consumers over its own website and on other platforms, in which Amazon itself misrepresents the clone cartridges as

remanufactured in transactions where Amazon profits handsomely from selling, distributing and importing them, all the while undermining the legitimate remanufacturing industry and Planet Green's business. ER-19, ER-20, ER-22, ¶¶ 4, 7-8, 15.

V. Standard of Review

A district court's decision about whether to grant a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is a question of law, and as such, is reviewed *de novo*. *Emrich v. Touche Ross & Co.,* 846 F.2d 1190, 1198 (9th Cir. 1988) (*de novo* review revealed that district court erred in dismissing complaint); *Edwards v. Marin Park, Inc*., 356 F.3d 1058, 1061 (9th Cir. 2004) ("We review *de novo* the district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim.")

De novo review means that this Court views the case from the same position as the District Court. *See Envtl. Prot. Info. Ctr. v. Simpson Timber Co*., 255 F.3d 1073, 1078 (9th Cir. 2001). The appellate court must consider the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered. *Ness v. Commissioner*, 954 F.2d 1495, 1497 (9th Cir. 1992). Thus, no deference is owed to the District Court. *See Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir.), *cert. denied*, 121 S. Ct. 628 (2000).

When reviewing a decision to grant a Rule 12(b)(6) motion to dismiss *de novo*, the Court of Appeal "accept[s] all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Public Lands for the People, Inc. v. U.S. Dep't of Agric.*, 697 F.3d 1192, 1196 (9th Cir. 2012) (internal quotation marks and citation omitted). A complaint should not be dismissed unless it appears "beyond doubt" that the plaintiff could prove no set of facts in support of its claim which would entitle it to relief. *Emrich v. Touche Ross & Co.*, 846 F.2d at 1198, *citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

VI. Summary of the Argument

The District Court committed reversible error by granting Amazon's motion to dismiss in its entirety with prejudice.

The District Court's conclusion that Section 230 of the Communications Decency Act, 47 U.S.C. § 230, bars all of Plaintiff's claims was wrong for several reasons. *First,* the District Court erred by extending Section 230 immunity to claims and aspects of claims arising from conduct to which the statute does not apply. Section 230 was intended to protect internet service providers from being held liable as the publishers of statements made on their platforms by third parties. But Planet Green's claims against Amazon in this case do not arise exclusively from the publication of statements by third party sellers on Amazon's website. On the contrary, Planet Green's claims arise, in whole or in part, from:

- Amazon's own statements about clone ink cartridges sold on its website, including statements made in email and on internet platforms other than Amazon's website;
- Amazon's importation and distribution of clone cartridges in a manner that is likely to deceive or harm consumers;
- Amazon's importation, distribution and sale of clone printer ink cartridges in packing and bearing labels that misrepresent them as remanufactured and recycled, which involves the dissemination of misinformation and actionable misstatements through packaging and labeling and not over the internet; and
- Amazon's promotion of clone ink cartridges that Amazon itself sells (and as to which it holds itself out to the public as seller) over its website through its Amazon Warehouse program, which constitutes Amazon's own statements about products it sells.

The FAC thus includes claims that do not derive from the publication of third-party content over Amazon's website, which therefore are not subject to Section 230 immunity.

Planet Green's claim under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq*., in particular falls outside the scope of Section 230 because it is premised, in part, on statutory violations that do not involve the

publication of third party statements over Amazon's website. Plaintiff's UCL claims arising from violations of Cal. Pub. Res. Code § 42355.51, Cal Bus. & Prof. Code 17200, Cal Bus. & Prof. Code §§ 17500 and 17580.5 and the FTC Act are premised, at least in part, on misrepresentations on product packaging and labeling. Section 230 does not shield Amazon from such claims.

The same is true of Planet Green's negligence claim, which is premised on Amazon's failure to verify that the printer ink cartridges it imports and distributes are actually remanufactured or recycled, as their packaging and labeling represents, when it has become aware of a category-wide problem with misrepresented product and was offered a simple and cost-effective verification process by a concerned trade association. The claim does not involve monitoring, publishing or removing third party statements on Amazon's website and thus falls beyond the scope of Section 230.

The District Court also erred in its application of this Court's three element test for Section 230 immunity. As to the first element, it held that Amazon is an "interactive computer service" for all purposes relating to Section 230 analysis, but that is obviously wrong. The allegations of the FAC implicate conduct by Amazon that extends far beyond hosting a website on which third-parties post information. To the extent that Planet Green's claims arise from Amazon's activities as

importer, distributor and direct seller of clone ink cartridges, they do not relate to Amazon's status as an "interactive computer service."

Moreover, even as to claims that arise from product descriptions and promotions by sellers on Amazon's website, the FAC contains extensive allegations that Amazon is so deeply involved in the sale of clone cartridges and exerts so much control over what the sellers can and do say about their products on its website that it is responsible, in whole or in part, for the creation or development of the misrepresentations that form part of the basis of Planet Green's claims. With respect to such misrepresentations, Amazon is thus, at best, both an interactive computer service and an information content provider (or co-provider) and therefore its claim of Section 230 immunity fails on the first element.

As to the second element, Planet Green's claims seek to hold Amazon accountable for its actions as importer, distributor and direct seller of misrepresented clone printer ink cartridges and focus significantly on statements by Amazon itself, statements made on platforms other than Amazon's website, statements made on packaging and labels, and conduct that does not involve Amazon's operation of a website. None of those claims treats Amazon as a publisher or seeks to impose liability for publication of statements on Amazon's website.

Even as to the claims that arise from misrepresentations in product descriptions and promotions on Amazon's website, the FAC alleges extensively that Amazon was so deeply involved in the marketing, sale and distribution of clone ink cartridges sold over its website that it became an information content provider by helping to develop the challenged content. The FAC details Amazon's involvement in approving and regulating what sellers may say about their products on its website and the entire process of their selling misrepresented printer ink cartridges. It also describes Amazon's collection and analysis of customer data in a manner that enhances the sales of misrepresented clone cartridges – facts which this Court has repeatedly held indicate that a website operator contributed to the development of unlawful statements and therefore eliminate Section 230 immunity. In all these ways, the FAC contains allegations that indicate that Amazon contributed materially to the misrepresentations that form the basis of Planet Green's claims, which is fatal to any argument that the claims arise from the publication of statements by third parties. For this additional reason, accepting the facts pled in the FAC as true for the purpose of resolving a motion to dismiss, Amazon cannot establish either the second or third element Section 230 immunity under this Court's governing standard and the District Court erred in finding that it had.

The District Court's conclusion that Section 230 bars all of Planet Green's claims must also be reversed because it would give Amazon a "get-out-of-jail-free" card for its extensive involvement in conduct that has decimated the remanufactured printer cartridge industry. Section 230 was intended only to protect website operators and similar internet companies from being held to a publisher's duty of assuring that third-party content appearing on their platforms complies with the law. The broad immunity that the District Court granted Amazon here sweeps well beyond publisher's duties (*i.e.*, whether Amazon can be held liable for truly third-party statements appearing on its website) and far exceeds what Congress intended.

The District Court also erred in its decisions on the merits of Planet Green's claims:

With respect to the conclusion that Planet Green did not properly plead its claims under the Lanham Act, California's Unfair Competition Law and False Advertising Law, and for common law unfair competition because it did not identify any false statements that Amazon created or otherwise contributed to creating, the District Court misstates the law. Liability for false statements does not turn on whether the Defendants created them. It is sufficient that the Defendant used the statements in commerce in a manner that is likely to confuse consumers, regardless of who created the statements originally. The FAC plainly

alleges that Amazon used misrepresentations about clone printer ink cartridges in commerce in a manner likely to cause consumer confusion about whether the clone cartridges are truly remanufactured or recycled. That is sufficient to support Planet Greens claims under the Lanham Act, UCL, FAL and for unfair competition.

The District Court also applied an incorrect legal standard when it held that Planet Green's claims under Section 43(a)(1)(A) of the Lanham Act and for common law unfair competition had to be dismissed because the FAC does not properly allege passing off. The District Court held that the passing off claims failed because Planet Green did not allege misuse of its trade names or trademarks or that it was the exclusive source of remanufactured printer ink cartridges in the United States, but neither allegation is required to plead passing off. All that is required is that a plaintiff plead that the defendant presented it products in a manner likely to cause consumer confusion about whether they originated with or were approved by the plaintiff. Planet Green plainly alleged that is the source of the vast majority of remanufactured printer ink cartridges sold at retail in the United States, including over Amazon's website and that consumers who purchase ink cartridges that are identified as remanufactured or recycled understand them to come from the lawful source of such products, which is overwhelmingly likely to be Planet Green. Those allegations are sufficient to satisfy the governing standard, which is "likelihood of confusion." The District Court imposed an unduly high

standard of "certainty of confusion," which finds no support in this Court's unfair competition jurisprudence, to Planet Green's passing off claims. Its decision to dismiss the claims under this erroneous legal standard must therefore be reversed.

Finally, the District Court erred in holding that Planet Green's negligence claim must be dismissed because the FAC fails to allege a legal duty. The FAC alleges a duty on Amazon's part to sell and distribute printer ink cartridges in a manner that does not cause foreseeable harm to Planet Green's business by verifying that the printer ink cartridges it sells and distributes conform to their packaging and labelling, especially when they identify the cartridges as remanufactured. Imposing such a duty is particularly appropriate in this case because Amazon has been notified at least three times about the existence or a problem in this product category and a neutral trade association offered Amazon a simple verification process that it still refuses to implement.

For all of these reasons, the District Court erred by dismissing Planet Green's FAC against Amazon and that decision should be reversed.

VII. Argument

A. Section 230 Does Not Bar Any Of Plaintiff's Claims

In holding that Section 230 immunizes Amazon against all of Planet Green's claims in this case, the District Court committed three critical errors that mandate reversal of the decision below.

- *First*, the District Court misused Section 230 to immunize Amazon from claims that arise from conduct other than publication of third party content over its own website, which is the only conduct that is even arguably subject to Section 230 immunity.
- *Second*, it misapplied this Court's governing standard for Section 230 analysis, giving dispositive weight to the fact that part of Amazon's business involves running a website, when it should have focused on the extent to which Planet Green's claims assert that Amazon breached duties that derive from conduct other than publishing third party content over that website and therefore are beyond the scope of Section 230.
- *Finally*, by immunizing Amazon from all claims relating to the promotion, importation, distribution and sale of recycled ink cartridges, solely because the cartridges may have been promoted on Amazon's website by a third-party seller, the District Court effectively gave Amazon the "all-purpose get-out-of-jail-free card for businesses that publish user content on the internet" that this Court has warned Section 230 was never intended to provide.

If the lower court's decision is not overturned, the message to internet businesses will be that they can promote, import, distribute, and sell products that they know to be falsely and misleadingly packaged and labeled and profit handsomely from those activities, with confidence that Section 230 will shield

them from any potential liability so long as the products, at some point, were promoted by third-party sellers over the defendant's website. That was never the intent of Section 230 and, for all these reasons, this Court should reverse.

1. The District Court Erred In Applying Section 230 to Planet Green's Claims That Do Not Arise From Amazon's Publication of Third-Party Statements Over Its Website

Section 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The Ninth Circuit has interpreted that language to provide immunity from tort liability when three conditions are met: (1) the defendant is "an interactive computer service;" (2) "whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider." *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096, 1100 (9th Cir. 2009); *see Rigsby v. GoDaddy Inc.*, 59 F.4th 998, 1007 (9th Cir. 2023). In short, Section 230 creates immunity from claims arising from an interactive computer service's publication of third party statements over its internet platform.

Emphasizing the limitations of the statutory grant of immunity, this Court has cautioned that, "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Fair Hous. Council of San Fernando*

Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008) (*en banc*). "Congress has not provided an all-purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses." *Doe v. Internet Brands, Inc.,* 824 F.3d 846, 853 (9th Cir. 2016). Courts "must be careful not to exceed the scope of the immunity provided by Congress…." *Roommates*, 521 F.3d at 1164-65 n.15. Accordingly, the first question the District Court should have addressed when analyzing Amazon's Section 230 defense was whether the statute even reaches Planet Green's claims. In most instances, it does not and the defense therefore should have been rejected without further inquiry.

Under the Ninth Circuit's precedents, a simple test has emerged to determine whether a claim falls within the scope of Section 230 – "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker'" of third-party content over the defendant's interactive computer service. *Barnes v. Yahoo!, Inc.,* 570 F.3d at 1100. If not, Section 230 provides no immunity from tort liability.

Applying this test, the Ninth Circuit has held that a claim based on a website operator's failure to warn the plaintiff about a rape scheme that the defendant knew two of its users were perpetrating through its service fell beyond the scope of Section 230. The claim did not derive from the website's actions as publisher or

speaker, but instead arose from its duty to warn the plaintiff of dangers of which it was actually aware. *Internet Brands*, 824 F.3d at 851-53. On the same reasoning, the Court of Appeals refused to extend Section 230 immunity to a promissory estoppel claim based on a website's broken promise to take down fraudulent profiles with nude photos of the plaintiff because the website's duty arose from an enforceable promise and not from its conduct and publisher or speaker of third-party content. *Barnes,* 570 F.3d at 1107. *See also HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 684 (9th Cir. 2019) (Section 230 does not apply to a claim under an ordinance prohibiting rental bookings for properties that were not licensed and listed on a registry because liability was premised on whether the bookings were licensed and not on the content of user posts); *Roommates*, 521 F.3d at 1168-72 (Section 230 did not immunize room rental matching website from claim that its mandatory user questionnaire facilitated discrimination in violation of the Fair Housing Act because the claim was premised on the website's conduct as an information content provider (when it required users to respond to problematic questions) and not as a publisher of user content); *accord Lemmon v. Snap*, 995 F.3d 1085 (9th Cir. 2021) (Section 230 did not immunize social media company from claim that a built-in speedometer in its app was defective and

dangerous because it arose from the company's duties as a product designer and not as a publisher of third party statements).[1]

a. Planet Green's Claims Substantially Derive From Conduct Other Than Amazon's Publication of Third-Party Content Over Its Website

The District Court's Section 230 analysis rests on the erroneous premise that Planet Green's claims arise exclusively from Amazon's publication of third-party sellers' advertising and listings on its website. In fact, Planet Green's claims in the FAC substantially derive from conduct by Amazon that does not involve publication of third-party content over its websites. Under the Ninth Circuit decisions discussed above, Section 230 does not immunize Amazon from liability for such claims and the District Court's decision must therefore be reversed.

Among other non-publication activities, Plaintiff's claims derive substantially from:

- Amazon's own promotion of misrepresented clone ink cartridges through emails to consumers and over websites and search engines not controlled by

[1] California courts have applied these precedents to hold that Section 230 does not immunize online sellers from strict products liability claims, *Bolger v. Amazon.com, LLC,* 53 Cal. App. 5th 431,464-466 (2020), and claims for failure to provide warnings under Proposition 65, *Lee v. Amazon.com, Inc.,* 76 Cal. App. 5th 200, 218 (2022), because neither claim derives from the publication of third-party content on the defendant's website.

Amazon: These communications constitute statements by Amazon that do not occur on Amazon's website. Amazon could remedy the alleged legal violations by reforming its own practices with respect to communicating directly with consumers via email and over other websites, without editing or removing any third-party content from its own website. ER-43, ER-55 - ER-56, ¶¶ 36, 49, 50. This conduct forms part of the basis of Planet Green's Count 1 (False Advertising under 15 U.S.C. § 1125(a)(1)(B)); Count 2 (False Association and False Designation of Origin under 15 U.S.C. § 1125(a)(1)(B)); Count 3 (Common Law Unfair Competition); Count 4 (Cal. Bus. & Prof. Code § 17200); and Count 5 (Cal. Bus. & Prof. Code § 17500) in the FAC.

- Amazon's importation and distribution of misrepresented clone ink cartridges in a manner that is likely to deceive and/or harm consumers or cause harm to Planet Green by diverting lawful sales: These actions constitute conduct by Amazon (*i.e.*, importation and distribution of ink cartridges) that is not publication of third party content over its website. Amazon could remedy the alleged violations by assuring that the ink cartridges it imports and delivers conform to the representations made about them in promotions, packaging, and labeling, without editing or removing any third-party content from its own website. ER-18, ER-53, ER-77, ¶¶ 2,

47, 75. This conduct forms part of the basis of Planet Green's first five causes of action 1-5 in the FAC, as well as Count 6 (Negligence).

- Amazon's importation, distribution and sale of clone printer ink cartridges in packaging, and bearing labeling, that misrepresents them as remanufactured and recyclable: These actions involve Amazon's dissemination of actionable misstatements about the ink cartridges that appear on product packaging and labeling and not third-party misstatements published over Amazon's websites. ER-18, ER-19, ¶¶ 2, 4. Amazon could remedy the alleged violations by assuring that the products it imports and delivers conform to the representations made about them on packaging and labels, without editing or removing any third-party content from its own website. It could require sellers to use truthful packaging and labels or refuse to import or distribute the product. This conduct forms part of the basis of all six of Planet Green's causes of action in the FAC; and
- Amazon's promotion of clone ink cartridges that Amazon itself sells (and as to which it holds itself out to the public as seller) over its website through its Amazon Warehouse program. ER-19, ¶ 4. *See Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139 (4th Cir. 2019) (Section 230 does not immunize Amazon from its actions as a direct seller of products, including statements that it makes or adopts in the sale of the products). These claims

concern Amazon's own statements about products it sells and not the publication of third-party statements. Amazon could remedy the alleged violations by assuring that what it says about ink cartridges that Amazon itself sells is truthful, without editing or removing third-party statements from its website. This conduct forms part of the basis of Planet Green's first five causes of action in the FAC.

The allegations of the FAC thus reveal substantial bases for each of Planet Green's claims that do not involve the publication of third-party content over Amazon's website. Premising tort liability on the conduct outlined above would not require Amazon to monitor third-party content on its website or to engage any publishing activities. As a result, Section 230 does not immunize Amazon from any of the claims in the FAC.[2] *See HomeAway*, 918 F.3d at 682-83. The District

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[2] Should this Court conclude that certain claims fall outside the scope of Section 230, while others do not, or that particular claims fall partially within the scope of Section 230 immunity (because they derive, in part, from Amazon's publication of third-party statements on its websites) and partially beyond its scope (because they derive, in part, from non-publication conduct), the Ninth Circuit's precedents teach that Planet Green's claims should survive Amazon's Section 230 challenge to the extent that they fall outside the scope of the statutory immunity. It is incumbent on the Court to parse which claims and which bases for particular claims are beyond the scope of Section 230 and to allow those claims to proceed on the merits. *See*, *e.g.*, *Barnes*, 570 F.3d at 1102-03 (Section 230 barred claims for negligent provision of services, but not promissory estoppel claim that did not derive from publishing activity by the defendant); *Roommates*, 521 F.3d at 1172-73 (Section 230 did not bar claims based on information provided in response to defendant's questionnaire, which were treated as arising from information generated by defendant, but the statute did immunize defendant from the same claims to

(Continued...)

Court, for its part failed to analyze these bases for Planet Green's claims against Amazon and, as a result, erroneously held that Section 230 immunizes Amazon for claims based on conduct that the statute simply does not cover. For this reason, the decision below must be reversed.

b. Planet Green's UCL Claim Derives From Conduct Other Than Publication of Third-Party Statements On Amazon's Website

Planet Green's claim under Cal. Bus. & Prof. Code § 17200 (the "UCL Claim") survives Amazon's Section 230 challenge for at least two additional reasons. *First*, the claim is based, in part, on Amazon's importation, distribution and sale of misrepresented clone ink cartridges in violation of Cal. Pub. Res. Code § 42355.51, which prohibits the importation, distribution or sale of products or packaging, or bearing labeling or markings, that make deceptive or misleading claims about the product's recyclability. *See* ER-82, ¶ 102. The duty imposed by that statute, which serves as a premise for liability under the UCL's "unlawful" prong, derives from Amazon's importation of products that are misleadingly marked, labeled or packaged. It does not relate to the publication of third-party

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the extent they were based on additional comments provided independently by website users).

statements on Amazon's website and therefore falls beyond the scope of Section 230 immunity.[3] *See HomeAway*, 918 F.3d at 681; *Barnes* 570 F.3d at 1100-01.

Second, the same is true of the other statutory bases for Planet Green's UCL Claim – Cal. Bus. & Prof. Code §§ 17500 & 17580.5 and the FTC Act and its regulations – at least to the extent the alleged statutory violations are premised on misrepresentations on product packaging and labeling. Holding that a UCL Claim based on these violations is not subject to Section 230 immunity would be consistent with both the precedents discussed above and the Ninth Circuit's admonition that, "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet," *Roommates*, 521 F.3d 1164, or to "give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability," *id.* at 1164-65 n.15; *accord HomeAway*, 918 F.3d at 683 ("Like their brick-and-mortar counterparts, internet companies must also comply with any number of . . . regulations").

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[3] The District Court dismissed the relevance of Public Resources Code § 42355.51 as a basis for Planet Green's UCL claim because the statute went into effect on January 1, 2024. But Planet Green's claim is based on both the UCL's unlawful and unfair prongs and the Public Resources Code standard could be applied to articulate the unfairness that gives rise to UCL liability under the latter prong. Moreover, Planet Green alleges continuing misconduct by Amazon and seeks forward looking injunctive relief under its UCL claim. Amazon's continuing violations of a statute that is currently in effect are therefore plainly relevant to Planet Greens UCL claim and provide a basis for liability that does not relate to the publication of third-party statements over Amazon's website and therefore is not subject to any claim of immunity under Section 230.

c. Planet Green's Negligence Claim Is Not Based on Amazon's Publishing Activity

Planet Green's negligence claim is premised on Amazon's failure to undertake reasonable steps to verify that ink cartridges it imports, distributes and sells are actually remanufactured and recyclable, as their packaging and labeling represents, and not clone cartridges that are not remanufactured. ER-87 - ER-88, ¶ 117. The FAC notes that an independent trade association proposed a verification process that is similar to one Amazon already uses to verify the authenticity of OEM ink cartridges. ER-88, ¶ 119. However, Amazon has not adopted that process and therefore continues to cause foreseeable harm to Planet Green's sales when consumers purchase illicit clone cartridges that are deceptively packaged and labeled. ER-88, ER-89, ¶¶ 118, 120. Amazon's publishing activities form no part of the basis for Planet Green's negligence claim, which therefore is not subject to any claim of immunity under Section 230. The District Court did not even analyze this argument in its decision on Amazon's motion to dismiss.

2. The District Court Erred In Its Application of This Court's Three-Element Standard for Section 230 Analysis

Despite the numerous alternative bases for Planet Green's claims outlined above, the District Court focused its analysis of Amazon's Section 230 challenge exclusively on the aspects of Planet Green's claims that relate to product listings

and promotional communications on Amazon's website. As a result, it erroneously concluded that the all three elements of Section 230 immunity were satisfied, even for claims that do not involve publication of third party content over Amazon's website. Even as to aspects of the claims that focused on product listings and promotional statements on the website, the Court erred by accepting factual assertions as true that cannot be resolved at the pleading stage.

a. Amazon Is Not An "Interactive Computer Service" In All Aspects Of Its Business Or As To All Of Planet Green's Claims Solely Because It Operates a Website

With respect to the first element, the District Court held that, because Amazon offers its users the ability to purchase products over a website, that fact alone makes it an "Interactive Computer Service" that it is entitled to Section 230 immunity from claims concerning products available for purchase on Amazon's website. That is not the law. The District Court erred by not conducting a more nuanced analysis of the extent to which: (a) Planet Green's claims derived from aspects of Amazon's business that do not involve providing consumers access to a website; and (b) Amazon was sufficiently involved in the creation of the misleading statements that form the partial basis of some of Planet Green's claims that it was both an Interactive Computer Service and an Information Content Provider and therefore not entitled to Section 230 immunity.

Website operators are not necessarily "interactive computer services," as this Court has used that term in its Section 230 jurisprudence, with entitlement to Section 230 immunity for all aspects of their businesses. Amazon is good example of the sort of internet company for which a more nuanced analysis is necessary. "The prototypical service qualifying for Section 230 immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others." *Dyroff v. Ultimate Software Grp., Inc.,* 934 F.3d 1093, 1097 (9th Cir. 2019). Amazon, which is a multi-billion dollar business that imports, distributes, sells, and promotes millions of products, strays far from that prototype.

One consequence of the complexity of Amazon's business is that it engages in a wide variety of conduct and communication that, as discussed above, is not covered by Section 230. ER-18, ER-72, ¶¶ 2, 64. For example, Amazon does not act as an interactive computer service when it imports printer ink cartridges or distributes them to purchasers in packaging that misrepresents its contents or bearing labels that falsely identify the cartridges as remanufactured. Another consequence is that, with respect to many products and sellers, Amazon is so deeply involved in the creation and dissemination of promotional content that it is both an Interactive Computer Service and an Information Service Provider and, as such, is not entitled to Section 230 immunity.

The Ninth Circuit has long recognized that a "website operator can be both a service provider and a content provider," *Roommates*, 521 F.3d at 1162, and only enjoys Section 230 immunity with respect to content published over its site if it is *not* also the information content provider — that is, someone "responsible, in whole or in part, for the creation or development" of the content at issue. *Id.*; *see Vargas v. Facebook, Inc.*, No. 21-16499, 2023 WL 6784359 at *2-*3 (9th Cir. Oct. 13, 2023). The first Section 230 element —whether Amazon is an interactive computer service or an information content provider with respect to website listings and promotional communications on Amazon's website that form part of the basis of certain of Planet Green's claims— thus turns on factual questions surrounding the extent to which Amazon was responsible for creating or developing that content. For the purposes of Amazon's motion to dismiss, Planet Green's allegations that Amazon was responsible, at least in part, for the development of those listings and promotional communications must be accepted as true and, as a result, Amazon cannot establish any entitlement to Section 230 immunity based on the allegations of the FAC.

b. Planet Green's Claims Do Not Treat Amazon As A Publisher

To satisfy the second element of Section 230 immunity, Amazon must establish that Planet Green's claims "inherently require[] the court to treat

[Amazon] as the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1102. To resolve that issue, "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker." *Id.* Publishing encompasses 'any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.'" *Gonzalez v. Google LLC*, 2 F.4th 871, 894 (9th Cir. 2021) (quoting *Roommates*, 521 F.3d at 1170-71), *rev'd on other grounds*, *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023).

The District Court erred in finding the second element satisfied for two principal reasons. *First,* it is simply false that "Plaintiff's claims are all based on the theory that Defendants 'continue to allow unlawful sellers to maintain their accounts' and 'permit them to advertise' on [Amazon's] website." ER-8, Dkt. 53 at 6. Planet Green's claims derive significantly from conduct by Amazon that has nothing to do with whether to publish or exclude third-party material on its website.

As discussed above, claims that Amazon itself misrepresented the ink cartridges in its own statements, including statements made on other Internet platforms or in emails, do not arise from decisions about whether to publish or remove third party statements from Amazon's website. Nor do claims that arise from Amazon's importation, distribution and sale of printer ink cartridges,

including in packaging and bearing labels that falsely represents them as remanufactured when they are not. Indeed, such claims involve conduct that does not even take place on the internet, let alone turn on decisions about what third-party statements should be published on, or removed from, Amazon's website.

Second, in assessing whether any of Planet Green's claims treat Amazon as the publisher or speaker of information provided by another information content provider, *Barnes*, 570 F.3d at 1100-01, the Court must decide whether Amazon itself is an information content provider with respect to any website statements that may form a partial basis for those claims. If so, Amazon is not entitled to immunity because it is not being subjected to liability for publication of third-party content. To determine whether Amazon is an information content provider, the Court asks simply whether Amazon helped to develop the challenged content, at least in part. *Roommates*, 521 F.3d at 1165. This same inquiry determines both the second and third elements of Section 230 immunity.

c. The FAC Sufficiently Alleges That Amazon Is Responsible, At Least In Part, For Actionable False And Misleading Content

The District Court also erred by concluding that the third Section 230 element was satisfied because "third parties provided the allegedly false or misleading content." ER-9, Dkt. No. 53 at 7. The Ninth Circuit has long held that

the fact that third-party advertisers are the providers of certain content does not preclude a website proprietor like Amazon "from *also* being an information content provider by helping 'develop' the information" at issue, at least "in part." *Roommates*, 521 F.3d at 1165 ("the party responsible for putting information online may be subject to liability, even if the information originated with a user"); *accord Liapes v. Facebook, Inc.,* 95 Cal. App. 5th 910 (2023) (applying Ninth Circuit Section 230 jurisprudence). This Court has emphasized that developing information for Section 230 purposes consists of "researching, writing, gathering, organizing and editing information for publication on web sites." *Roommates*, 521 F.3d at 1168. A website operator loses Section 230 immunity when its development of the content at issue contributes materially to the alleged illegality of the content. *Id.* at 1167-68.

The FAC details Amazon's deep involvement in the marketing, sale and distribution of clone ink cartridges sold over its website. ER-48, ¶ 42. That involvement includes Amazon's approval of seller listings on its website, taking possession of ink cartridges, storing them at its warehouses and distributing them to consumers. ER-18, ER-43, ¶¶ 2, 36. Amazon controls consumer access to seller information, as well as seller access to consumer information, and requires sellers to communicate with consumers over its website. ER-44, ¶ 37. Amazon sets detailed policies for the marketing of printer ink cartridges, ER-45, ¶ 38, and

regulates environmental marketing, including as relates to clone cartridges. ER-52 - ER-53,¶ 46-47. It holds itself out to the public as the actual seller of clone cartridges ER-55, ¶ 50, and in fact takes possession of and directly sells clone cartridges through its Amazon Warehouse program. ER-63 - ER-64, ¶¶ 52-54.

Notably, Amazon collects and analyzes customer data and creates promotional emails and search engine optimization to enhance sales of mislabeled clone ink cartridges. It also uses that data to promote the cartridges within its website, including by attaching the Amazon's Choice badge to particular brands. ER-55 - ER-51, ¶¶ 49-50. In all of these ways, the FAC clearly and plausibly alleges that Amazon contributed materially to the misleading statements on its website by printer ink cartridge sellers that form part of the basis for Planet Green's claims.

Amazon protests that this sort of support for targeted marketing involves the use of neutral tools that do not constitute "develop[ing]" content published on its website, as that term is used in Section 230. But "neutral tools" must do " 'absolutely nothing to enhance' " the unlawful message at issue "beyond the words offered by the user" in order to avoid constituting the sort of content "development" that vitiates Section 230 immunity. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016). Courts have repeatedly held that analysis of customer data to enable advertisers to target their messages more accurately constitutes

"development" of the advertising message and eliminates Section 230 immunity. *See Vargas*, 2023 WL 6784359, at *2-*3 (Facebook's Ad Platform facilitated targeted advertising that contributed materially to the illegality of the content); *Roommates*, 521 F.3d at 1167, 1172 (claim based on developing an ad targeting and delivery system "directly related to the alleged illegality" survives Section 230 challenge; *accord Liapes*, 313 Cal. Rptr. 3d at 347 ("Because the algorithm ascertains data about a user and then targets ads based on the users' characteristics, the algorithm renders Facebook more akin to a content developer.")

The FAC thus alleges multiple bases for this Court to conclude that Amazon helped to develop misleading content about clone ink cartridges in ways that contribute materially to the alleged illegality of that content. It did so by developing user data that enabled sellers to identify and target consumers more effectively with their false and misleading listings, promotions, packaging and labeling, as well as through its extensive involvement in the sales process and review and approval of website listings and promotional statements. The District Court did need not to make any findings on the merits of these factual allegations to resolve Amazon's Rule 12 motion. Indeed, it was required to accept them as true for purposes of the motion. In any event, the allegations were sufficient to withstand the Section 230 challenge on the pleadings and proceed to discovery.

3. The District Court Erred By Using Section 230 To Give Amazon An "All-Purpose Get-Out-of-Jail-Free Card For Businesses That Publish User Content On The Internet"

The FAC details Amazon's involvement in decimating the domestic remanufactured printer ink cartridge industry by importing, distributing, selling, and facilitating the sale of misrepresented clone cartridges that are not actually remanufactured, by distributing them in packaging and bearing labels falsely represent them as remanufactured, by selling the clone cartridges itself and lending Amazon's own credibility to false statements about the cartridges, and by participating in the sale and promotion of the clone cartridges by sellers on Amazon's website. Notwithstanding these allegations, the District Court held that Section 230 immunizes Amazon from all of Planet Green's claims because: (1) Amazon operates a website; (2) Planet Green's claims arise from the sale of products that are available over the website; and (3) in some instances, the claims seek to hold Amazon accountable for statements about those products that appear on its website.

As discussed above, this Court's Section 230 precedents do not support the District Court's decision, which must therefore be reversed. More fundamentally, however, the District Court used Section 230 to give Amazon the "get-out-of-jail free card" that this Court has cautioned it was never intended to provide. Under

the District Court's ruling, Amazon does not need to concern itself with complying with federal or state unfair competition or false advertising laws or even avoiding negligence with respect to products sold over its website. It can participate actively in the destruction of a domestic industry, even importing, distributing and selling misrepresented product itself and making or adopting false statements about those products, with impunity because Section 230 shields it from liability so long as the claims arise from misrepresentations about products that are sold on Amazon's website.

Such an outcome stretches Section 230 far beyond its true and more modest purpose of preventing internet companies from being held liable as the publishers of third-party statements appearing on their websites or platforms.[4] It uses the

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[4] In *Roommates*, this Court, sitting *en banc*, explained that the "principal or perhaps the only purpose" of Section 230 was "to overrule *Stratton-Oakmont v. Prodigy*," 521 F.3d at 1163 & n.12. In *Stratton-Oakmont*, a New York court imposed strict defamation liability on an online message board operator named Prodigy by labeling it a "publisher" of user posts on its website. Under New York law, that meant Prodigy had a publisher's legal duty to assure that the material it published complied with the law. Prodigy argued that it was not a publisher because it could not exert editorial control over the 60,000 messages posted on its message board daily by its users. But the New York court held that Prodigy was a publisher because it had adopted community guidelines for its users and implemented technology to screen posts for obscenity. According to the New York court, those content moderation activities were sufficiently similar to a newspaper's level of editorial control to hold Prodigy to the same legal duty as a traditional publisher to avoid publication of tortious material. In response, Congress enacted Section 230 to spare internet companies from what this Court described as a "grim choice" between voluntarily engaging in content moderation and thus accepting a publisher's duty to monitor third party posts for unlawful material or abandoning content moderation entirely in order to escape potential liability.

statute as a vehicle to free Amazon from any accountability for the sale of falsely labeled and misrepresented clone printer ink cartridges, even where Planet Green's claims do not allege breach of a publisher's duty to monitor, edit or remove unlawful third-party content, if the cartridges are sold on Amazon's website. Section 230 was never intended to provide internet companies with that sort of free pass from basic legal obligations that bind their brick-and-mortar competitors. The District Court's decision that Section 230 immunizes Amazon from all of Planet Green's claims therefore must also be reversed because it "exceed[s] the scope of the immunity provided by Congress…." *Roommates*, 521 F.3d at 1164-65 n.15.

B. The FAC Plausibly Alleges Actionable False Statements By Amazon

The District Court dismissed Planet Green's claims under the Lanham Act, 15 U.S.C. §§ 1125(a)(1)(A) & (B), California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, and False Advertising Law, *id.* § 17500, and for common law unfair competition, because it found that Planet Green did not identify any false statement of fact made by Amazon. ER-11, Section B. In reaching that conclusion, the District Court committed reversible error by disregarding both the governing legal standards for all five claims and the clear factual allegations of the FAC.

Under this Court's precedents, the elements of a Lanham Act false advertising claim are: (1) a false or misleading statement of fact used by a

defendant in a commercial advertisement about its own or another's product; (2) which actually deceived or has the tendency to deceive a substantial segment of its audience; (3) which is material, in that it is likely to influence the purchasing decision; (4) which defendant caused to enter interstate commerce; and that (5) the plaintiff has been injured as a result of the false or misleading statement. *See Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc.,* 758 F.3d 1069, 1071 (9th Cir. 2014).

The factual allegations in the FAC more than satisfy the pleading requirements for false advertising against Defendants. As discussed above, the FAC alleges extensively that Amazon contributed to false statements on its website concerning third-party sales of clone printer ink cartridges. But that is not the only basis for Planet Green's claim, which also arises from Amazon's use of false statements in its role as direct seller of the cartridges.

The FAC alleges, and Amazon acknowledges, that it directly promotes, offers for sale and sells the falsely labelled ink cartridges to consumers. ER-19, ¶ 4. ("Amazon itself sells the cartridges and holds itself out to the world as the seller."); ER-63, ¶ 52. ("Defendants can dispose of any item or sell it on the Amazon Warehouse, listed as "Sold by Amazon Warehouse and Fulfilled by Amazon."" (quoting screenshot of Amazon's policy regarding direct sales of products); ER-64, ¶ 54; (including screenshots of Amazon's policy of selling products through Amazon Warehouse and showing screenshots of examples of

identified illicit brands of ink cartridges that were purchased by Plaintiff, sold by Amazon Warehouse and fulfilled by Amazon). These allegations plausibly state a claim for false advertising under the Lanham Act.

1. The District Court Erred When It Dismissed the False Advertising Claim Because Defendants Did Not "Create" or "Contribute" to the False Product Descriptions

Despite these specific factual allegations and screenshots from Defendants' website showing that Amazon itself sells falsely labelled ink cartridges to consumers, the District Court dismissed the false advertising claim because it concluded that there was no allegation that Amazon "created or otherwise contributed" to the false product descriptions. ER-12, Section B. As discussed above, that conclusion disregards both the extensive allegations that Amazon contributed to the false statements that third party sellers made on its website and the legal standard governing claims under the Lanham Act.

The Lanham Act does not require a defendant to have created or contributed to the creation of a false statement in order to be held liable for false advertising or misrepresentation. The express language of Section 43(a) provides that it is not the defendant's creation of a false statement used in advertising that gives rise to liability, but the *use of a false statements in advertising* about its own or another's product. False advertising prohibits the use of false statements, regardless of who

authored or created them. *See* 11 U.S.C. § 1125(a)(1)(A) (prohibiting a "person who, on or in connection with any goods or services, or any container for goods, ***uses in commerce*** any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact" in commercial advertising or promotion) (emphasis added); *see also JST Distribution, LLC v. CNV.com, Inc.,* 2018 WL 6113092, at*4 (C.D. Cal. Mar. 7, 2018) (denying motion to dismiss false advertising claim despite the fact that defendant has not authored the statement); *see also Vitamins Online, Inc. v. HeartWise, Inc.,* 207 F. Supp. 3d 1233, 1241 (D. Utah 2016) ("[T]o fall within the text of the Lanham Act, a defendant does not need to make a statement but only needs to use a statement or other form of conduct specified in the Act.").

Planet Green alleges precisely such conduct by Amazon. The FAC alleges that Amazon advertised and sold product that was falsely labelled as remanufactured and recycled, both on the packaging and through recycled symbols on the products themselves, deceiving millions of consumers, and Plaintiff was thereby damaged and incurred the loss of substantial revenue as a result. ER-18, ER-24, ER-78, ¶¶ 1, 20, 80. These allegations (and the accompanying screen shots supporting the factual allegations) are plainly sufficient to plead false advertising.

The FAC plausibly alleges Amazon used false and misleading statements of fact in commerce in connection with both its sales of falsely promoted, packaged, and labeled clone cartridges and similar sales of misrepresented ink cartridges by others over its website. Those allegations are sufficient to withstand a motion to dismiss. *See San Diego Cnty. Credit Union v. Citizens Equity First Credit Union,* 360 F. Supp. 3d 1039, 1049 (S.D. Cal. 2019) (denying motion to dismiss where allegations in FAC of a false statement used in commerce that damaged plaintiff). The District Court's contrary decision erroneously ignored key allegations from the FAC and applied the wrong legal standard to claims arising from false statements and, for those reasons, should be reversed.

2. The District Court Erred When It Held That Retailer Immunity Precludes Defendants' Liability For Sales of the Illicit Cartridges

As an alternative basis for dismissing the false advertising claim (and other claims based on false statements), the District Court held that, with respect to Amazon's own sales of clone cartridges, the claim failed because a retail or wholesale store cannot be found liable for false information appearing on the packages of the products that they sell. ER-9, Section A(2) ("However, Defendants cannot be held liable for third-party content merely because it resold third-party products and re-posted third-party content.") (citing *Corker v. Costco*

Wholesale Corp., 2019 WL 5895430, at *2-3 (W.D. Wash. Nov. 12, 2019) (concluding that retailers are immune under Section 230 "to the extent they [are] simply retailing products produced, manufactured, and packaged by third parties")). In reaching that conclusion, the District Court incorrectly characterized Amazon as a retailer with respect to such sales, despite the repeated specific factual allegations in the FAC that these are *direct sales* of falsely labelled products by Amazon to consumers. ER-19, ¶ 4. ("Amazon itself sells the cartridges and holds itself out to the world as the seller."); ER-64 - ER-67, ¶ 54. ("Amazon Warehouse offers deals on quality used, pre-owned, or open box products. Defendants claim, "For each used product we sell, we thoroughly test the condition of the item and provide detailed descriptions to make it easier for you to make a decision.").

Given the District Court's error, it bears repeating that the FAC alleges that, in connection with these sales, Amazon is the direct seller of misrepresented cartridges, and not a retailer. Dismissing claims based on the erroneous view that the Planet Green alleges that Amazon was a retailer in these transactions disregards the well pled allegations of the FAC and thus constitutes reversible error. *See Kangaroo Mfg. Inc. v. Amazon.com Inc.,* N2019 WL 1280945, at *2 (trademark infringement claims based on allegations of Amazon's own sales of counterfeit product manufactured by third party were sufficient to proceed to trial). The

District Court was required to treat the allegations of Amazon's direct sales as true, rather than overlooking the allegations and making an unsupported factual determination that Defendants' direct sales deserve retailer immunity.

C. The District Court Erred In Finding That Planet Green Had Not Sufficiently Alleged "Passing Off"

The FAC contains two claims that arise from Amazon's "passing off" clone printer ink cartridges for genuine remanufactured cartridges produced by Planet Green – for false association under Section 43(a)(1)(A) of the Lanaham for California common law unfair competition. *See Obesity Research Institute, LLC v. Fiber Research International, LLC*, 165 F.Supp.3d 937, 949 (2016) (setting forth the elements of a Lanham Act false association claim, which include use of a designation in connection with goods or services in a manner that is likely to cause confusion or mistake as to the affiliation, connection, or association of the goods or services with another person); *Bank of the West v. Superior Ct.,* 2 Cal. 4th 1254 (1992) ("The common law tort of unfair competition is generally thought to be synonymous with the act of 'passing off' one's goods as those of another."); *accord Southland Sod Farms v. Stover Seed Co*., 108 F.3d 1134, 1147 (9th Cir. 1997) (claim for unfair competition can be stated by alleging ""passing off" or its equivalent"). The District Court granted Amazon's motion to dismiss both claims based on the erroneous view that Planet Green cannot prove passing off because it

does not allege that either (a) Amazon misused its names or marks or (b) Planet Green is the exclusive seller of remanufactured ink cartridges in the United States. Order at 11, Section C. In truth, neither allegation is essential to a successful passing off claim and the District Court's decision on these issues was reversible error.

As to the first point, "passing off" does *not* require a defendant to use a plaintiff's trade name or trademark. On the contrary, passing off claims, including claims for false designation and false association under Section 43(a) and common law unfair competition claims, are sufficiently pled when there are plausible allegations that the defendant presents its goods to consumers in a manner likely to cause confusion as to whether the goods originate or are associated with the Plaintiff. *See Hokto Kinoko Co. v. Concord Farms, Inc*., 810 F. Supp. 2d 1013, 1032 (C.D. Cal. 2011) ("The decisive test of common law unfair competition is whether the public is likely to be deceived about the source of goods or services by the defendant's conduct."; *Deckers Outdoor Corp. v. Team Footwear, Inc.,* 2013 WL 12131287 (C.D. Cal. July 11, 2013) ("Unfair competition prohibits the 'passing off' of ones goods as those of another. One 'passes off' a product when they use confusingly similar products to exploit a competitor's reputation in the marketplace."); *cf. Rearden LLC v. Rearden Commerce, Inc*., 683 F.3d 1190, 1209 (9th Cir. 2012) (likelihood-of-confusion inquiry "generally considers whether a

reasonably prudent consumer in the marketplace is likely to be confused as to the origin or source of the goods or services"). That can involve the misuse of trademarks, but it is not required. *See Sybersound Recs., Inc. v. UAV Corp.,* 517 F.3d 1137, 1153 (9th Cir. 2008); *Obesity Rsch. Inst., LLC v. Fiber Rsch. Int'l, LLC,* 165 F. Supp. 3d 937, 949 (S.D. Cal. 2016) ("though the allegations in this case do not involve trademark infringement," claims for false advertising and false designation of origin were sufficiently pled).

Planet Green alleges that it is "the nearly exclusive lawful producer and supplier of remanufactured printer ink cartridges in the United States." ER-79 - ER-80, ¶ 87. When consumers buy remanufactured cartridges on Amazon's website, they believe that they are purchasing legitimate recycled OEM cartridges from the lawful source of remanufactured printer ink cartridges, *i.e.*, Planet Green. ER-23, ER-81, ¶¶ 17, 97. Where the consumer belief results from misleading statements that the clone cartridges are remanufactured, including through the misleading use of recycling symbols on packaging and labels, those allegations are sufficient to state a claim of passing off.

The District Court held that Planet Green had not properly pled passing off because the FAC does not allege that Planet Green is the "exclusive seller" of remanufactured ink cartridges in the United States. But that is not the governing standard. Planet Green's passing off claims require only proof of *likelihood* of

consumer confusion as to the source of the clone cartridges sold over Amazon. The District Court's "exclusive seller" requirement would elevate that standard to *certainty* of confusion, which has never been required under the Lanham Act or the common law of unfair competition. Indeed, this is a civil case with a civil standard of proof. Planet Green need only prove that it is more likely than not that consumers would be confused as to the source of the ink cartridges to establish passing off. It is not bound by a standard higher than the criminal law requirement of proof beyond a reasonable doubt, which is what the District Court's "exclusive seller" mandate would impose.[5]

Planet Green has clearly alleged that the sale of misrepresented clone ink cartridges by Amazon and over its website creates a likelihood of confusion as to association of those cartridges with Planet Green because consumers associate what they understand to be remanufactured ink cartridges with the overwhelmingly

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[5] The cases cited by the District Court do not support the restrictive interpretation of passing off law applied in the Order. *In Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003), the Supreme Court rejected a Lanham Act claim involving the unaccredited copying of a work in the public domain because it would conflict with copyright law, which is precisely directed to address uncopyrighted work. *Id*., 123 S.Ct. at 2043. No copyright issues arise in this case nd *Dastar* is therefore inapposite. *In R & A Synergy LLC v. Spanx, Inc*., 2019 WL 4390564 at *14 (C.D. Cal. May 1, 2019), the court focused its analysis on whether the defendant's use of its own brand name was sufficient to eliminate any potential for confusion. To the extent that anyone contends that the use of other brand names may affect the likelihood of confusion analysis in this case, that is a factual question that is not appropriate for resolution on a motion to dismiss.

likely lawful source of such cartridges in the United States, which is Planet Green. Amazon may contest that assertion and the District Court may want to see proof, but that contest is a factual dispute that the District Court erred by attempting to resolve at the pleading stage.

D. The Sixth Claim for Negligence Is Plausible on Its Face

Liability for negligent conduct may be imposed where there is a duty of care owed by the defendant to the plaintiff or a class of which the plaintiff is a member. *J'Aire Corp. v. Gregory*, 24 Cal.3d 799, 803 (1979) (citing *Richards v. Stanley* 43 Cal.2d 60, 63 (1954).).

In *J'Aire Corp.*, 24 Cal. 3d at 803, the California Supreme Court established a six-factor test for determining the duty of care: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm. *Id.* Among these factors, the *J'Aire* court emphasized that the foreseeability of the economic harm to the plaintiff from the defendant's negligent conduct was the critical one. *J'Aire Corp*., 24 Cal.3d at 806-807 ("[r]ather than traditional notions of duty, this court has focused on foreseeability as the key component necessary to establish liability....

(F)oreseeability of the risk a primary consideration in establishing the element of duty." (internal citations and quotations omitted)). Like any other civil defendant, Amazon bears responsibility for the foreseeable consequences of its own conduct.

The District Court erroneously dismissed Planet Green's negligence claim because it held that Plaintiff failed "to identify a legally cognizable duty." ER-14, Order, p. 12, Section D. The Court based its holding on three cases, none of which compels its conclusion with respect to Planet Green's negligence claim.

- In *Dryoff*, 934 F.3d at 1100-01, this Court held that a website operator did not owe a duty to its own users arising from content neutral functions on its website that facilitated communication of user content.
- The Court in *Ginsberg v. Google*, 586 F.Supp.3d 998, 1009 (N.D. Cal. 2022), the Court followed *Dryoff* and held that Google did not owe a duty to the general public resulting from its operation of the "Play Store," which offered access to apps, some of which were used to incite violence, some of which was racially targeted.
- Finally, the court in *Kangaroo Manufacturing*, 2019 WL 1280945, at *6 held that Amazon could not be liable for negligence because the plaintiff's claim was barred by Section 230 of the Communications Decency Act. Id., at *6 (2019).

None of those opinions addresses the circumstances of this case, which does not address duties to a websites own users, a duty to the general public or a negligence claim that derives from the publication of third party content over the Internet and thus is subject to challenge under Section 230. Here, the claim is that Amazon breached a duty to competitors in the recycled printer ink cartridge business where it sold and distributed falsely-labeled and packaged ink cartridges thereby causing foreseeable harm to those competitors. That claim does not implicate a Amazon's ability to continue functioning as a website. It simply requires a distributor and seller to confirm that the products it distributes and sells conform to their descriptions on packaging and labels. *See* ER-87 - ER-88, ¶117 ("Defendants, as sellers and distributors of products, owe Plaintiff a duty of care to undertake reasonable measures to assure that purportedly remanufactured printer ink jet cartridges it promotes, sells and distributes are actually remanufactured, as their packaging and labeling represents, and not clone cartridges.")

The *J'Aire Corp.* factors plainly support the conclusion that Planet Green alleged that Amazon owed it a duty of care to avoid foreseeable harm to Planet Green's business resulting from false and misleading packaging and labeling of ink cartridges that Amazon sells and distributes. As the largest remaining sellers of legitimate OEM remanufactured printer ink cartridges, Amazon's sale and distribution of falsely labelled clone cartridges foreseeably would and did cause

substantial harm to Planet Green's business, in the form of both lost sales and damage to the reputation of Planet Green's products and the company itself. ER-85 - ER-87, ¶¶ 112-115. Planet Green's harm is palpable and certain – as the FAC details, its industry and its business have been decimated by Amazon's sales and distribution of clone cartridges and the proliferation of clone cartridge sales could not be more closely connected to Planet Green's business losses. The sale and distribution of misrepresented products that deceive consumers is obviously conduct as to which society attaches significant moral blame. Indeed, it can give rise to enhanced civil liability such as treble damages and punitive damages, civil penalties and even criminal consequences.

To the extent that Amazon contends that it was not aware of the problem until Planet Green brought the matter to its attention, it bears emphasis that, as alleged in the FAC, Amazon has continued to sell and distribute misrepresented clone ink cartridges even after having received at least three separate briefings on the category-wide problem with this product. And it refused to adopt a simple verification process proposed by an independent trade association, which could go a long way toward eliminating the problem.

For all of these reasons, the policy of preventing future harm, both in the recycled printer ink cartridge business and more broadly to consumers and legitimate businesses supports imposing a duty on Amazon to exercise ordinary

care to assure that products it sells and distributes conform to their labeling and packaging. Planet Green has thus sufficiently alleged both the existence of a duty and Amazon's breach. And the District Court erred by concluding otherwise.

VIII. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that the District Court's order and judgment be reversed and remanded with instructions to permit Plaintiff to proceed with each of its claims as alleged in the FAC.

Date: March 7, 2024

TROYGOULD PC

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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