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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

DIVINO GROUP LLC, a California limited liability company, CHRIS KNIGHT, an individual, CELSO DULAY, an individual, CAMERON STIEHL, an individual, BRIAANDCHRISSY LLC, a Georgia limited liability company, BRIA KAM, an individual, CHRISSY CHAMBERS, an individual, CHASE ROSS, an individual, BRETT SOMERS, an individual, LINDSAY AMER, an individual, STEPHANIE FROSCH, an individual, SAL CINQUEMANI, an individual, TAMARA JOHNSON, an individual, and GREG SCARNICI, an individual,

Plaintiffs,

vs.

GOOGLE LLC, a Delaware limited liability company, YOUTUBE, LLC, a Delaware limited liability company, and DOES 1-25,

Defendants.

Case No. 5:19-cv-04749-VKD

PLAINTIFFS' MOTIONS FOR: (1) LEAVE TO FILE A MOTION FOR RECONSIDERATION RE CHANGE OF LAW PURSUANT TO LOCAL RULE 7-9(B)(2); AND/OR (2) ENTRY OF FINAL JUDGMENT UNDER FED. R. CIV. P. 54(B) TO ALLOW FOR EXPEDITED APPEAL OF ORDER DISMISSING UNRUH ACT AND UCL CLAIM UNDER CDA § 230(C)

Judge: Hon. Virginia K. DeMarchi
Crtrm.: 2

Action Filed: August 13, 2019
Trial Date: None Set

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Plaintiffs Divino Group, LLC, Chris Knight, Celso Dulay, Cameron Stiehl, BriaandChrissy LLC, Bria Kam, Chrissy Chambers, Chase Ross, Brett Somers, Lindsay Amer, Stephanie Frosch, Sal Cinquemani, Tamara Johnson, and Greg Scarnici (collectively the "Plaintiffs"), respectfully request leave of Court to file a Motion for Reconsideration, pursuant to Local Rule of Court 7-9(b)(2)[1], on the grounds of a recent change in existing law that is material to ***Dkt. #107, page 26, line 16, through page 30, line 13***, dated September 30, 2022, ("Order"), the portions of the Court's Order dismissing the Plaintiffs' claims for intentional LGBTQ+ discrimination under California Civil Code § 51, *et seq*. (the Unruh Act) and California Business and Professions Code § 17200 *et seq.* (UCL) with prejudice pursuant to § 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c) ("§ 230(c)"). A true and correct copy of the proposed Motion for Reconsideration to be filed is attached hereto as ***Exhibit 1***.

In conjunction with the request for reconsideration, Plaintiffs also request that the Court enter final judgment under Rule 54(b) of the Federal Rules of Civil Procedure to any portions of the Order dismissing with prejudice the claims for intentional LGBTQ+ discrimination under California Civil Code § 51, *et seq*. (the Unruh Act) and California Business and Professions Code § 17200, *et seq.* (UCL) under § 230(c), including (c)(2)(A) & (B), so that Plaintiffs may take an expedited appeal on the application and constitutionality of granting statutory immunity to ISP's who engage in unlawful and intentional LGBTQ+ discrimination under a consumer contract. *See* Dkt. #107, Order 25:1-31:17.

I. INTRODUCTION

Pursuant to Civil L.R. 7-9(a) and (b)(2), ("Rule 7-9"), Plaintiffs respectfully request leave to file a motion for reconsideration of Dkt. #107, attached hereto as Exhibit 1, in connection with the Court's "Order Dismissing Third Amended Complaint With Leave To Amend," ***Discussion Section III.C at page 26, line 16, through page 30, line 13*** (dismissing Plaintiffs' claims under California Civil Code § 51, *et seq*., (the Unruh Act) and California Business and Professions Code § 17200, *et seq.* (UCL) as barred as a matter of law under § 230(c)(1) of the Communications

[1] *See generally* CA R USDCTND Civil L.R. 7-9(a)(b)(2).

Decency Act, 47 U.S.C. § 230(c)(1) ("§ 230(c)(1)") on grounds that "a change of law" has occurred regarding the construction, scope, and application of § 230(c)(1) under *Henderson, et al. v. The Source for Public Data L.P.*, U.S. Court of Appeal for the Fourth Circuit Appeal No. 21-1678 (4th Cir. 11/3/2022) (emphasis original), Slip Op. at 12-17. A true and correct copy of the Fourth Circuit's decision in *Henderson* issued on November 3, 2022, is attached hereto as ***Exhibit 2***.

In the event that the Court denies Plaintiffs' Motion for Leave to Reconsider and/or declines to amend its opinion to address the content based limitations imposed by *Henderson* on § 230(c)(1), Plaintiffs respectfully request that the Court enter final judgment under Rule 54(b) of the Federal Rules of Civil Procedure, to those portions of its Order dismissing both the Unruh Act and § 17200 *et seq.* of the Cal. Bus. Prof. Code (UCL) with prejudice under § 230(c), so as to allow Plaintiffs to take an expedited appeal on whether § 230(c)(1) and (2) protect an ISP from liability for unlawful and intentional LGBTQ+ discrimination under a consumer contract. Fed. R. Civ. P. 54(b); Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2659 at 111; *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10-11 (1980); *James v. Price Stern Sloan*, 283 F.3d at 1068 n.6; *Morales v. Anco Insulations Inc.*, No. CV 20-996, 2022 WL 2867094, at *2 (E.D. La. July 21, 2022); *Crowe v. San Diego*, 2005 WL 8156612, Slip Op at **2-3 (quoting *James*, 283 F.3d at 1068 n.6; *see also Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1075 (9th Cir. 1994); *Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981); *Ford Motor Credit Co. v. S. E. Barnhart & Sons, Inc.*, 664 F.2d 377, 380 (3d Cir. 1981); *American Triticale, Inc. v. Nytco Services, Inc.*, 664 F.2d 1136, 1139 n.1 (9th Cir. 1981).

II. THE *HENDERSON* DECISION

On November 3, 2022, the Fourth Circuit Court of Appeal held that to establish immunity under § 230(c)(1) a defendant ***must*** show that its conduct was "'based on the *content of the speech published*' by the interactive service provider." *Henderson,* Slip Op. at 13 (emphasis original). In so doing, the Court clarified and announced the definition and scope of publishing immunity under § 230(c)(1):

> to paraphrase the test we began with, a claim only treats the defendant "as the publisher or speaker of any information" under § 230(c)(1) if it (1) bases the defendant's liability on the disseminating of information to third parties and (2*) imposes liability based on the information's improper content.*

Id., at p. 15 (emphasis added); *see also id*. pp. 12-16 (discussing the statutory language and concepts on which Congress based § 230(c)(1) (citing *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139–40 (4th Cir. 2019)). Thus, where "[t]here is no claim made based on the content of speech published by [Defendant]—such as a claim that [Defendant] had liability as the publisher of a misrepresentation of the product or of defamatory content" § 230(c)(1) is not available. *Id.*

As set forth in detail in ***Exhibit* 1**, Plaintiffs' [Proposed] Motion for Reconsideration, this is precisely the argument advanced by Plaintiffs and rejected by the Court in its Order: that Defendants' discriminatory conduct is not based on the Defendants' publishing of defamatory content, let alone anything to do with the publishing of third party ***content*** whatsoever. Dkt #85 2:13-18; 24:21-25; 25:23-26:11; *see also* Order 18:9-18;19:13-19. In this case, the Court dismissed Plaintiffs' Unruh Act and UCL claims with prejudice because it believed that allegations of intentional identity based profiling and redlining of LGBTQ+ users by Defendants to deprive Plaintiffs of benefits and rights under a consumer contract was consistent with the "traditional function" of a publisher so as to meet the requirements for protection under § 230(c)(1). *See* Order 18:9-18;19:13-19.

In its Order, the Court did not apply the law and test announced last Thursday in *Henderson* for determining whether a Defendant has met the requirements of § 230(c)(1). Furthermore, once that test and law are applied, Defendants cannot meet the requirements for publishing immunity under § 230(c)(1) where, as here, the unlawful conduct giving rise to liability is based on intentional identity based discrimination against and classification of LGBTQ+ YouTubers that Defendants then use to deprive Plaintiffs of their rights and benefits under a consumer contract.

III. THE COURT SHOULD GRANT LEAVE TO FILE A MOTION FOR RECONSIDERATION OF ITS FINDING THAT § 230(c)(1) BARS CLAIMS FOR LGBTQ+ DISCRIMINATION

Rule 7-9(a) provides that leave of the Court be given before filing a motion for reconsideration: "No party may notice a motion for reconsideration without first obtaining leave of Court to file the motion." To obtain leave to file a motion for reconsideration, Plaintiffs must demonstrate "reasonable diligence" and any of the following: (1) "a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order" which Plaintiffs, having exercised "reasonable diligence," "did not know at the time of the interlocutory order;" (2) after the order, "new material facts or a change of law" emerged or occurred; or (3) "[a] manifest failure by the Court to consider material facts or dispositive legal arguments which were presented" before the interlocutory order issued. Rule 7-9(b).

Accordingly, the Court has authority to reconsider and modify its orders, including inherent authority to modify its interlocutory orders. *Smith v. Massachusetts*, 543 U.S. 462, 475 (2005). While reconsideration is an "extraordinary remedy, to be used sparingly," the Court should grant relief when "there is an intervening change in the controlling law." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). This is such a case. *See Henderson*, Slip Op. at 12-17.

A. The Court Should Reconsider Its Ruling That § 230(c)(1) Bars Plaintiffs Unruh Act Claim For LGBTQ+ Discrimination Under The Common Law Publishing Test Set Forth In *Henderson*

In its Order, the Court found that Plaintiffs had stated viable claims for intentional discrimination under the Unruh Act and UCL. Dkt. 107, Order 14:2-19:15. But the Court went on to dismiss those discrimination claims and allegations with prejudice because it found as a matter of law that Defendants' intentional discrimination constituted tradition publishing conduct protected under § 230(c)(1):

> Each of plaintiffs' claims arises from defendants' activities that fall within a publisher's traditional functions. What matters in this analysis "is not the name of the cause of action," but "whether the cause of action inherently requires the court

> to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1101-02. "To put it another way, 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.' If it does, section 230(c)(1) precludes liability." *Id*. at 1102; *Roommates*, 521 F.3d at 1170-71 (stating that "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.").
>
> The remaining Unruh Act and UCL claims in the TAC are based on defendants' decisions to remove, restrict, or demonetize plaintiffs' videos. For example, the Unruh Act claim seeks damages based on defendants' demonetization of plaintiffs' content and placing their videos in Restricted Mode. Dkt. No. 67 ¶ 320. Similarly, the UCL claim is premised on defendants' alleged unlawful or unfair restriction and demonetization of videos. *See id*. ¶ 327. Such conduct constitutes publishing functions under CDA Section 230. *See, e.g., Barnes*, 570 F.3d at 1102 ("We have indicated that publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content."); *Domen*, 433 F. Supp. 3d at 602 ("In this case, Vimeo plainly was acting as a 'publisher' when it deleted (or, in other words, withdrew) Plaintiffs' content on the Vimeo website."); *Fed. Agency of News LLC*, 432 F. Supp. 3d at 1120-21 (N.D. Cal. 2020) (concluding that plaintiff's claims, including under the Unruh Act, were based on defendant's decision not to publish plaintiff's content and therefore sought to treat defendant as a publisher); *Lewis*, 461 F. Supp. 3d at 954-55 (concluding that claims, including federal discrimination claim, concerned defendants' removal, restriction and demonetization of plaintiff's postings sought to treat defendants as publishers); *Sikhs for Justice*, 144 F. Supp. 3d at 1095 (concluding that plaintiff's federal discrimination claim sought to hold defendant liable as a publisher where "the act that Defendant allegedly conducted in a discriminatory manner is the removal of the [plaintiff's] Page in India.").

Dkt. #107, Order 28:7-29:5; *see also id*, 26:16-27:22. The Court then dismissed Plaintiffs' claims with prejudice because it found as a matter of law that "Defendants have demonstrated that they satisfy all three requirements for § 230(c)(1) immunity and that plaintiffs' claims under the Unruh Act and the UCL are barred." Dkt. #107, Order 30:12-13.

Plaintiffs respectfully submit that the Court did not apply the correct test to determine whether § 230(c) could possibly apply to intentional LGBTQ+ discrimination under a consumer contract. Under *Henderson*, publisher immunity granted under § 230(c)(1) is limited to conduct involving claims based only on common law publishing liability: claims that seek "to impose liability based on the publishing defendant's dissemination of information to someone who is not the subject of the information" in the actual published content:

> Thus, the scope of "the role of a traditional publisher," and therefore the scope of what § 230(c)(1) protects, is guided by the common law. *See id*. ("[Defendant] falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity." (citing W. Page Keeton et al., *Prosser and*

> *Keeton on the Law of Torts* § 113, at 803 (5th ed. 1984)).
>
> At common law, a publisher was someone who intentionally or negligently disseminated information to third parties. In this context, a third party is someone other than the subject of the information disseminated. Thus, for a claim to treat someone as a publisher under § 230(c)(1), the claim must seek to impose liability based on the defendant's dissemination of information to someone who is not the subject of the information.
>
> But that alone is not enough. To meet the second requirement for § 230(c)(1) protection, liability under the claim must be "based on the content of the speech published" by the interactive service provider. *Erie Insurance Co*., 925 F.3d at 139. At common law, defamation required publishing a "false and defamatory statement." Restatement (Second) of Torts § 558(a), at 155 (Am. L. Inst. 1965). The publisher was held liable because of the improper nature of the content of the published information.[15] In other words, to hold someone liable as a publisher at common law was to hold them responsible for the content's improper character. We have interpreted "publisher" in § 230(c)(1) in line with this common-law understanding. Thus for § 230(c)(1) protection to apply, we require that liability attach to the defendant on account of some improper content within their publication. *See Erie Ins. Co*., 925 F.3d at 139–40 ("There is no claim made based on the content of speech published by [Defendant]—such as a claim that [Defendant] had liability as the publisher of a misrepresentation of the product or of defamatory content.").
>
> ***This improper-content requirement helps dispel Public Data's notion that a claim holds a defendant liable as a publisher anytime there is a "but-for" causal relationship between the act of publication and liability.*** See Appellee's Response Brief 20–21 ("Put another way, had Public Data not published court records on its website, Plaintiffs could not have brought their Section 1681g(a) claim."). This "but-for" publication test would say a claim treats an entity as a "publisher" under § 230(c)(1) if liability hinges in any way on the act of publishing. This but-for test bears little relation to publisher liability at common law. ***To be held liable for information "as the publisher or speaker" means more than that the publication of information was a but-for cause of the harm.*** *See Erie Ins. Co*., 925 F.3d at 139–40; *HomeAway.com*, 918 F.3d at 682.

Henderson, Slip Op, at 11-14 (emphasis added); *see also id.,* at 15-17.

In this case, the core allegation for which Plaintiffs seek relief is Defendants' profiling and use of Plaintiffs' protected identities, including their identity and classification as LGBTQ+ YouTubers and consumers, to make what are supposed to be purely neutral content based decisions about whether content is improper under YouTube's neutral content based rules set forth in their contract with Plaintiffs and millions of other similarly situated consumers. Dkt. #85, 2:13-18; 24:21-25:5; 25:23-26:11; *see also* Dkt. #107, Order 18:9-18. For the reasons set forth in detail here (and in ***Exhibits* 1 and 2)**, the Court should grant Plaintiffs leave to file their [Proposed] Motion for Reconsideration and reconsider that portion of its Order dismissing the Unruh Act and

UCL claims with prejudice as barred as a matter of law under § 230(c)(1) in light of the recent legal test announced and clarified in *Henderson*.[2]

IV. THE COURT SHOULD ALSO EXERCISE ITS DISCRETION TO ENTER FINAL JUDGMENT UNDER RULE 54(b) TO ALLOW PLAINTIFFS TO TAKE AN EXPEDITED APPEAL TO THE NINTH CIRCUIT OF ANY CLAIMS DISMISSED UNDER § 230(C)(1) OR (2)

Plaintiffs also request that the Court enter final judgment under Rule 54(b) to allow Plaintiffs to take an expedited appeal on both the construction and constitutionality of § 230(c) as applied to Plaintiffs' Unruh Act and UCL claims for relief to redress Defendants' LGBTQ+ and other identity based discrimination. Thus, to the extent that the Court declines to reconsider and amend its Order under *Henderson* or dismisses any portion of Plaintiffs' Unruh Act and UCL claims under § 230(c), the Court should enter final judgment under Rule 54(b) as to all portions of the Court's Order dismissing any part of the Unruh Act or UCL claims with prejudice, whether under either, or both, of §§ 230(c)(1) and (c)(2).

Rule 54(b) "permits the district judge to direct entry of judgment if there is no just reason for delay, thus making the decision appealable." *Ford Motor Credit Co. v. S. E. Barnhart & Sons, Inc.*, 664 F.2d 377, 380 (3d Cir. 1981); *see also* Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d § 2658.2 at 90 ("Section 1292(b) and Rule 54(b) address two different situations."). "In contrast" to § 1252(b), "Rule 54(b) applies where the district court has entered a judgment as to particular claims or parties, 'yet that judgment is not immediately appealable because other issues in the case remain unresolved.'" *Crowe* at **2-3 (quoting *James*, 283 F.3d at 1068 n.6).[3]

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[2] In its Order, the Court found that § 230(c)(2) barred only that the discrimination claims arising from Defendants use of Restricted Mode. Order 30-14-31:17 (citing *Prager Univ.* 2019 WL 8640569 at *10.) That limited portion of the Court's ruling forms the basis for expediting an appeal under Fed. R. Civ. P. 54(b). Thus, unless Defendants can establish the second requirement for publishing immunity under § 230(c)(1) under *Henderson*, the other discrimination claims including the monetization and advertising allegations, are not subject to CDA immunity whatsoever.

[3] The Court resolved the subject immunity claims in favor of Defendants on a motion under Rule

"No precise test exists for determining whether there is a just reason to delay the entry of judgment that can be satisfactorily or easily applied in every case." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2659 at 111. As stated by Chief Justice Burger in *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10-11 (1980), "because the number of possible situations is large, we are reluctant either to fix or sanction narrow guidelines for the district courts to follow." Nonetheless, the court in *Curtiss-Wright Corp.* set forth two general areas of consideration in deciding whether there is no just reason to delay the appeal of a partial grant of judgment pursuant to Rule 54(b): the "judicial administrative interests" and "the equities involved." *Id*. at 8. Because, Plaintiffs have been waiting years to advance their case and this Court is the first to expressly hold that unlawful, intentional discrimination against LGBTQ+ consumers under a consumer contract in violation of an antidiscrimination law is barred as a matter of law under § 230(c)(2), the ruling warrants expedited appellate review for reasons of both good administration and equity.

A. Judicial Administrative Interests Warrant The Entry Of Judgment

Consideration of judicial administrative interest "is necessary to assure that application of the Rule effectively 'preserves the historic federal policy against piecemeal appeals.'" *Crowe*, at **4-5 (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956)); *see also Reiter v. Cooper*, 507 U.S. 258, 265 (1993). In considering the "judicial administrative interests" it is proper for a district court to consider factors such as whether the claims subject to Rule 54(b) are "separable from the others remaining to be adjudicated" and whether appellate court will have to decide the same issues more than once in the event of subsequent appeals. *Curtiss-Wright Corp.,* 446 U.S. at 8. Thus, as the Ninth Circuit explained in *James*, "[i]n reality, issuance of a Rule 54(b) order is a fairly routine act that is reversed only in the rarest instances.'" *James*, 283 F.3d at 1067 n. 6.

12(b)(6). Thus, entry of judgment under Rule 54(b), not certification of an interlocutory appeal under§ 1292(b), "is the applicable rule." *Crowe*, 2005 WL 8156612 at (citing and quoting *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1075 (9th Cir. 1994) and *Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981); *see also American Triticale, Inc. v. Nytco Services, Inc.*, 664 F.2d 1136, 1139 n.1 (9th Cir. 1981).

In recent years the Ninth Circuit has directed district courts to consider whether a prompt resolution of the claim is "essential and efficient," *American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 889 (9th Cir. 2003), and whether application of Rule 54(b) "will aid 'expeditious decision' of the case." *Texaco, Inc. v. Ponsoldt,* 939 F.2d at 797 (quoting *Sheehan v. Atlanta Int'l Ins. Co*., 812 F.2d 465, 468 (9th Cir. 1987)). Thus, only in cases that will result in piecemeal appeals that should really be reviewed as a single unit should certification be denied for administrative reasons. *Texaco*, 939 F.2d at 797-98. In determining the risk of piecemeal appeals, a relevant factor is "whether the nature of the claims to be determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *H & W Indus., Inc. v. Formosa Plastics Corp., USA*, 860 F.2d 172, 175 (5th Cir. 1988) (quoting *Curtiss-Wright*, 446 U.S. at 8).

By issuing a Rule 54(b) judgment as to these parties, there is no risk that a subsequent appeal in this case will present the Ninth Circuit with the same legal question. The Court's Order makes clear on its face that the § 230(c) immunity claims are legally distinct from the remaining claims in the case. *See* Order 25:1-31:17. Allowing the Ninth Circuit to review the application and constitutionality of § 230(c) to non-content based intentional LGBTQ+ discrimination will help streamline this litigation because the Court has already found that Plaintiffs' core discrimination claims and allegations are viable but for the application of § 230(c). And, the fact that there may be some overlapping factual issues between the remaining claim and the claims barred by statutory immunity is not a basis to deny certification, especially where the subject claims on appeal turn on important issues of law involving the application immunity to the central claim in the case. *See Crowe*, **4-5 (citing and discussing Ninth Circuit cases that immunity claims form the heart of the case despite overlapping factual issues with the remaining claims). If the court enters final judgment pursuant to Rule 54(b) on the immunity claims, and plaintiffs immediately appeal those claims, the Ninth Circuit can quickly determine whether the core discrimination claims should proceed, and all remaining claims can then be the subject of a single discovery, class certification, summary judgment, and, if necessary, a single trial.

Furthermore, issuing a partial final judgment will serve the interests of judicial economy

and administration by hastening the ultimate resolution of the important construction, preemption, and constitutional questions of law that plague the application of § 230(c). Here, the subject immunity claims in this case involve novel, complex, unsettled, but nagging issues of law that will determine once and for all whether the scope, application, and constitutionality of a federal law that purports to immunize Defendants from liability for intentional identity based discrimination under a consumer contract. Thus, a further factor in favor of granting partial judgment under Rule 54(b) is the undeniable conclusion that this appeal will assist numerous courts in this and other districts and jurisdictions in resolving the nagging and continuing issue regarding the scope and limits of § 230(c) to intentional, identity based, and otherwise unlawful discrimination. *See, e.g.*, *Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO-CLC v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1099 (3d Cir. 1980) (affirming the district court's entry of partial final judgment under Rule 54(b) when the district court considered arguments that "the claim involved a novel issue which is likely to recur" and finding that this factor "weigh[s] in favor" of granting certification under Rule 54(b)) (internal quotation marks omitted). *See also Order* 31:14 (citing *Prager Univ. v. Google, LLC,* 2019 WL 8640569 at *10, Appeal Pending in Case Number H047714 (*see also Enigma Software Grp. USA, LLC v. Malwarebytes, Inc*., 946 F.3d 1040 at *10:46-10:52 (9th Cir. 2019) ("*Enigma"*). Thus, "there is no just reason for the delay" and, in the event that the Court declines to reconsider its ruling in light of the Fourth Circuit's recent decision in *Henderson*, *supra*, the Court should at least expedite the appeal by granting Plaintiffs' motion for entry of a partial final judgment under Rule 54(b) on the 230(c) issues. *See, e.g*., *Morales v. Anco Insulations Inc.*, No. CV 20-996, 2022 WL 2867094, at *2 (E.D. La. July 21, 2022).

B. The Equities Weigh In Favor Of Entering Final Judgment On The Immunity Claims Under Rule 54(b)

Equity and the prejudice of further delay is another factor that weighs in favor of granting Plaintiffs' request for partial entry of judgment under Rule 54(b) in lieu of reconsideration of the immunity issues by this Court. "The danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases." Advisory Committee Notes to the 1961 Amendment to Rule 54(b).

Despite being filed in 2019, this case has not gotten out of the pleading stages and further proceedings, be they discovery in the district court or final appeal in the Ninth Circuit, and continues to be delayed and stagnated. Furthermore, there are several other cases implicating similar issues. Among them was this Court's finding that the Ninth Circuit's decision in *Enigma* holding that § 230(c)(2) does not extend to identity based filtering of a competitor, was inapplicable to this case under a California trial court's opinion in *Prager Univ. v. Google LLC*, No. 19CV340667, 2019 WL 8640569, at *10 (Super. Ct. Nov. 19, 2019*), appeal pending*, Sixth Dist. Ct. of. App. No. H047714 (*Prager III*). *Prager III* is now on appeal before California's Sixth District Court of Appeals and poses a further risk of inconsistent rulings by a state court on unsettled issues of federal law. *See*, *e.g.*, Order 31:14 (relying on *id.*). Thus, "[c]onsidering the numerous cases in which the [federal issues] ha[ve] arisen, and the likelihood that it will continue to arise in future cases, . . . delaying the potential appeal in this case would prejudice" Plaintiffs. *Morales,* **2-3. At a minimum, therefore, Plaintiffs should be accorded the right not to be prejudiced by further delay or the need to relitigate important issues of the meaning and constitutionality of § 230(c)'s application to otherwise viable legal claims of intentional LGBTQ+ discrimination. *Id*.

V. CONCLUSION

This Court's ruling that § 230(c) immunity extends to non-content based, intentional torts including intentional identity based discrimination against LGBTQ+ internet users under and in violation of a consumer contract, is important and ground breaking, if not astounding. In light of the 4th Circuit's recent decision in *Henderson,* the Ninth Circuit decision in *Enigma*, the plain language of § 230(c), and the constitutional implications of finding that a federal law can be applied to permit intentional LGBTQ+ discrimination under a consumer contract, Plaintiffs respectfully request that the Court grant them leave to file, brief, and argue their motion for reconsideration to clarify the application of § 230(c).

Plaintiffs also request that the Court enter Judgment under Rule 54(b) of the Federal Rules of Civil Procedure to allow Plaintiff to take an expedited appeal of the portion of the Court Order dismissing their discrimination claims arising from Restricted Mode under § 230(c)(2). In the

event that the Court declines Plaintiffs' request for reconsideration, Plaintiffs, in the alternative, also respectfully request that the Court enter partial judgment under Rule 54(b) on all claims related to § 230(c)(1)'s application in this case, as well as (c)(2), and allow Plaintiffs to expedite their appeal of Court's ruling(s) that the CDA bars intentional LGBTQ+ discrimination claims under the Unruh Act and UCL.

DATED: November 8, 2022

Respectfully submitted,

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By: 

Peter Obstler
Attorneys for LGBTQ+ Plaintiffs