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THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

SEATTLE DIVISION

Charles Haywood, PLAINTIFF; *v.* **Amazon.com, Inc.**, and its affiliate **Amazon.com Services LLC**, DEFENDANTS.	No. 2:22-cv-01094-JHC **Response in Opposition to Motion to Dismiss Complaint** NOTING DATE: October 28, 2022

Plaintiff Charles Haywood hereby responds to and opposes Defendants' ("Amazon's," the singular for the plural) *Motion to Dismiss Complaint* ("Motion").

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I. Introduction

Amazon's motion to dismiss Mr. Haywood's complaint both misreads the parties' contract—even to the point of denying any such contract exists—and mischaracterizes the facts as to the parties' conduct. Amazon essentially argues that to the extent there was a contract, that contract imposed no restrictions on Amazon. This argument cannot be reconciled with the words of Amazon's Conditions of Use and Community Guidelines, fundamental principles of contract law (including the implied duty of good faith and fair dealing under Washington law), or the facts as pleaded in Mr. Haywood's complaint.

Not only has Mr. Haywood stated a viable claim for breach of contract; he has also pleaded salient facts—ignored in Amazon's motion—that make plain Amazon's self-serving, deceptive, and viewpoint-discriminatory conduct which violated the Washington Consumer Protection Act (the "WCPA"). Amazon literally confirms the viability of Mr. Haywood's WCPA claim in its own motion by arrogantly disavowing any responsibility to conform its conduct to the words of its published policies, or to do so in good faith—all while it profits from the activities of Mr. Haywood and other users on its site induced by, and undertaken in reliance upon, those same policies.

Not surprisingly, Amazon seeks to deflect scrutiny of its breach of its contract with Mr. Haywood and its violation of the WCPA by claiming immunity from what it calls Mr. Haywood's "non-contract" claims under § 230 of the Communications Decency Act (the "CDA") and the First Amendment. Pursuant to controlling precedent, Amazon has no choice but to acknowledge that § 230 and the First Amendment do not bar Mr. Haywood's breach-of-contract claim. But, as explained below, this same precedent also precludes the dismissal of Mr. Haywood's good-faith-and-fair-dealing and WCPA claims, both of which arise from the same conduct by Amazon with respect to its contractual promises and its breach thereof. The First Amendment adds nothing to Amazon's arguments; it does not protect breaching contracts, acting in bad faith, or engaging in

deceptive practices.

Amazon illogically argues that Mr. Haywood's fourth claim—for a declaratory judgment that § 230 does not apply to his other claims—is barred by § 230 itself. Specifically, Amazon takes the position that § 230(c)(1) bars Mr. Haywood's claims and that § 230(c)(2) therefore never comes into play. This is backward and begs the question. Mr. Haywood's claims do not implicate § 230(c)(1). Rather, his claims are subject to and, as pleaded, are not vulnerable to dismissal under § 230(c)(2). Section § 230 could insulate Amazon from liability only if its decision to de-platform Mr. Haywood had been undertaken in good faith; therefore, Mr. Haywood's claim that it was not undertaken in good faith is well pleaded.

II. Factual Background

Rhetorical characterizations and arguments aside, Amazon accepts, as it must for purposes of its motion to dismiss, the following relevant facts as stated by Mr. Haywood in his complaint:

1. Amazon's Conditions of Use provide, under the heading "Reviews, Comments, Communications, and Other Content," that a user may post reviews on its site "so long as the content is not "illegal, obscene, threatening, defamatory, invasive of privacy, infringing of intellectual property rights (including publicity rights), or otherwise injurious to third parties or objectionable," and that "Amazon reserves the right (but not the obligation) to remove or edit such content, but does not regularly review posted content." Compl., Dkt. # 1, at ¶ 42; Ex. A to Compl., Dkt. # 1-1, at 2.

2. The Conditions of Use also provide, under the heading "Your Account," that Amazon "reserves the right to … remove or edit content … in its sole discretion" and, under the prior "Reviews" heading, that "Amazon has the right but not the obligation to monitor and edit or remove any activity or content." Ex. A to Compl. at 2.

3. Amazon's Community Guidelines provide, under the heading "Profanity and harassment": "We don't allow: Profanity, obscenities, or name-calling[;] Harassment or

threats[;] Attacks on people you disagree with; [or] Libel, defamation, or inflammatory content ….” Under the heading “Hate Speech,” they say: “It’s not allowed to express hatred for people based on characteristics like: Race[,] Ethnicity[,] Nationality[,] Gender[,] Gender identity[,] Sexual orientation[,] Religion[,] Age[, or] Disability.” Compl. at ¶ 43; Ex. B to Compl., Dkt. # 1-2, at 2–3.

4. The Guidelines also provide, under the heading “Consequences for violations,” that if a user violates the guidelines, Amazon may, among other things, “[r]emove their content,” “[l]imit their ability to use community features,” and “[s]uspend or terminate their account.” Ex. B to Compl. at 4.

5. Amazon took down all of Mr. Haywood’s reviews and suspended his review privileges in 2019 supposedly because he posted a review in which he called Donald Trump “a buffoon” and another in which he said that two authors of a book he was reviewing were “unable to realize not that the joke is on them, but that they themselves are the joke.” Compl. at ¶ 37.

6. Amazon did not tell Mr. Haywood which passages in his reviews supposedly triggered its decision, nor did it specify the rule it concluded he violated. Later, in the course of an arbitration brought by Mr. Haywood, Amazon claimed that the basis of its decision was that these two passages had been flagged as “spite” and that they consisted of “impermissible name-calling or attack[ing] people based on whether you agree with them.” *Id.* at ¶¶ 37–38.

7. The arbitrator in that proceeding issued an award in favor of Amazon, but Amazon never reduced that award to judgment. *Id.* at ¶ 39.

8. Mr. Haywood and Amazon settled these claims in November of 2021, and Amazon reinstated Mr. Haywood’s reviews and privileges. *Id.*

9. In January of 2021, Amazon again took down Mr. Haywood’s reviews and suspended his privileges, claiming after the fact it was because he had posted a new review in which he wrote, “many millennials are woketards” and another in which he referred to

COVID-19 as the "Wuhan plague." *Id.* at ¶ 46.

10. Amazon did not inform Mr. Hawyood of the reasons for this second de-platforming at the time it was carried out, but later identified these phrases (via counsel) as violating some unspecified rule in its Community Guidelines. *Id.*[1]

Mr. Haywood's complaint seeks the restoration of his reviews and privileges and an order that Amazon not engage in undisclosed viewpoint discrimination. *See* Compl. at 15; Motion at 9. Mr. Haywood's complaint does not seek, despite Amazon's mischaracterizations, the right to post "abusive, xenophobic, and derogatory reviews," nor does it ask that Amazon be "precluded from moderating the content published in its online store." *See* Motion at 9. Rather, Mr. Haywood simply seeks to require Amazon to abide by the terms of its contract, as objectively and reasonably understood, to do so in good faith, and to not shield its conduct from scrutiny with a misreading of federal law.[2]

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[1] Only now, in its motion, does Amazon offer the partial explanation that the word "woketard" was deemed unacceptable because it is derived in part from the word "retard" and that the phrase "Wuhan plague" is "a xenophobic label." Motion, Dkt. # 12, at 8.

[2] Though not necessary for the Court to consider in order to dispose of Amazon's motion to dismiss, Mr. Haywood notes, for the record, that Amazon's motion contains two references to material outside the scope of the pleadings that, if considered by the Court, would convert its motion to one for summary judgment under Federal Rules of Civil Procedure 12(d) and 56, thereby preventing the Court from ruling upon it until Mr. Haywood has had the opportunity to adduce evidence in discovery to give him "a reasonable opportunity to present all the material that is pertinent to the motion."

First, Amazon quotes and characterizes statements made by Mr. Haywood in his online magazine, claiming Mr. Haywood incorporated its (presumably entire) contents because he references the fact that it exists and generally describes his "writings" in his complaint. *See* Motion at 2 & n.1; *see also* Compl. at ¶¶ 24–27. But the mere mention of a document—let alone a whole website—does not suffice to incorporate its contents into a plaintiff's complaint. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002–03 (9th Cir. 2018). Consideration of such material on a motion to dismiss is only proper "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's

claim." *Id.* at 1002 (quoting *U.S. v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)). Defendants are not allowed "to insert their own version of events into the complaint," and even where the reference is allowed, "what inferences a court may draw from an incorporated document should also be approached with caution." *Khoja, 899 F.3d at 1002–03.* Mr. Haywood's general reference to his writing does not allow Amazon to inject anything and everything he has written into the record for purposes of determining the legal sufficiency of his complaint on a motion to dismiss.

Second, Amazon also submits an affidavit of counsel attaching the arbitration decision from Mr. Haywood's prior claim against Amazon. Motion at 4–5 & n.4; Sieff Aff., Dkt. # 13, at Ex. A. This is improper on two grounds. First, Mr. Haywood's complaint expressly disclaims any reliance on the prior arbitration by noting that he released all such claims. Compl. at ¶ 39. Second, Mr. Haywood's complaint does not quote from the arbitration award. His complaint only mentions that Amazon did not provide any explanation of his first de-platforming until he initiated an arbitration proceeding and states that the arbitrator ruled in Amazon's favor, but Amazon never reduced the award to judgment. Compl. at ¶¶ 37, 39. Amazon's claim that the complaint thus incorporates the arbitration decision by reference meets neither prong of the test set out by the Ninth Circuit in *Khoja*, which requires that to be considered on a motion to dismiss, the material cited must either be "referred to extensively in" or must "form the basis of" the complaint. *See* 899 F.3d at 1002–03. Amazon's citation of the Ninth Circuit's decision in *Ritchie* in support of is argument is disingenuous. *Ritchie* held a district court erred in considering documents submitted via an affidavit in response to the motion (filed by a criminal defendant) that it construed as a civil complaint. 342 F.3d at 907–08.

In addition, the prior arbitration award cannot be given any preclusive effect in this litigation. It has long been the rule under both federal and Washington law that an arbitration award not reduced to judgment is not the equivalent of a final judgment by a court. *Channel v. Mills*, 61 Wn. App. 295, 810 P.2d 67 (Div. 2 1991). This long-standing rule was codified in RCW Chapter 7.04A, as recognized in *Billings v. Town of Steilacoom*, 2 Wn. App. 2d 1, 17, 408 P.3d 1123, 1132 (Div. 2 2017) (noting that "the law remains unchanged" on this issue, though declining to apply the rule in a labor dispute, as such awards were expressly excluded from the scope of the statute); *see also* 9 U.S.C. § 9. Amazon's false contention that Mr. Haywood's claims have already been the subject of a final judgment must therefore be rejected. *Contra* Motion at 15 & n.8.

III. Standard of Review

Mr. Haywood's complaint "may be dismissed only if it appears beyond doubt that [he] can prove no set of facts in support of his claim which would entitle him to relief." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (internal citations omitted). The Court must accept "all material allegations of the complaint … as true, as well as all reasonable inferences to be drawn from them. *Id.*; *City of Pomona v. SQM North Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014). It must construe those allegations and inferences "in the light most favorable to the nonmovant." *City of Pomona*, 750 F.3d at 1049. "Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro*, 250 F.3d at 732 (quoting *Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir. 1988)).

IV. Argument

A. Mr. Haywood's complaint alleges a breach of contract by Amazon.

Amazon's first argument in support of its motion to dismiss Mr. Haywood's breach-of-contract claim is that Mr. Haywood failed to allege the contract terms Amazon violated. Motion at 15–16. This is an ironic argument coming from Amazon, which has itself refused to identify to Mr. Haywood the terms of the contract that Mr. Haywood supposedly violated that caused Amazon to (improperly) remove his reviews and suspend his review privileges. In any event, Mr. Haywood's complaint plainly alleges the contract terms at issue. *See* Compl. at ¶¶ 2, 4–5, 10, 34–36, 38, 42–44, 46–49, 54–57, 59, 63, 69.

Mr. Haywood's complaint alleges that Amazon claimed it initially de-platformed Mr. Haywood because his statements regarding Donald Trump and two authors, "violated its 'Community Guidelines'" that it claimed prohibited "name-calling or attack[ing] people based on whether you agree with them" and that any questioning of the beliefs or expertise of another be "done in a respectful and non-threatening manner." Compl. at ¶ 38. Mr. Haywood further alleged that Amazon had never offered any explanation of its decision to de-platform him (allegedly) because of his use of the word "woketards" and the

phrase "Wuhan plague." Amazon's only statement, made long after the de-platforming was done, was that the use of such words "violate[d] Amazon's Community Guidelines." *Id.* at ¶ 46. In its motion to dismiss, Amazon now states for the first time that its contention with the words in Mr. Haywood's review was that "woketards" invoked the word "retard" and that the phrase "Wuhan Plague" was "xenophobic," yet Amazon still declines to identify which provision of the Conditions of Use or the Community Guidelines these terms violated. Motion at 12.[3]

Faced with Amazon's blanket nonjustifications, Mr. Haywood's complaint sets out the contractual provisions that address prohibited content, which must have (or should have) served as the basis for Amazon's conduct. Specifically, Mr. Haywood's complaint expressly recites the contract terms describing what users were not allowed to post.

The Conditions of Use prohibit content that is "illegal, obscene, threatening, defamatory, invasive of privacy, infringing of intellectual property rights (including publicity rights), or otherwise injurious to third parties or objectionable." Compl. at ¶ 42; Ex. A to Compl. at 2. The Community Guidelines prohibit: "Profanity, obscenities, or name-calling[;] Harassment or threats[;] Attacks on people you disagree with; [or] Libel, defamation, or inflammatory content …," and further state: "It's not allowed to express hatred for people based on characteristics like: Race[,] Ethnicity[,] Nationality[,] Gender[,] Gender identity[,] Sexual orientation[,] Religion[,] Age[, or] Disability." Compl. at ¶ 43; Ex.

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[3] Amazon's claim that it is a "common tactic" by plaintiffs is likely more the result Amazon's own tactic—namely, not explaining its conduct to those it treats improperly so that it can later argue, if sued, that a plaintiff has failed to sufficiently specify which particular clause in its contract Amazon violated. *See* Motion at 23. *Hard 2 Find Accessories, Inc. v. Amazon, Inc.*, has little in common with this case (other than the defendant and defense counsel). *See* 58 F. Supp. 3d 1166 (W.D. Wash. 2014). That case involved a seller of allegedly counterfeit iPad cases who failed to identify any provisions in Amazon's Business Solutions Agreement that contradicted other provisions giving Amazon the express right to delay the payments at issue, and its express provision allowing either party to terminate the agreement "for any reason at any time." *Id.* at 1169–73.

B to Compl. at 2–3.

Mr. Haywood's complaint *does not* allege that Amazon may not remove content or revoke privileges if a user posts prohibited content. Mr. Haywood's complaint *does* allege that Amazon either did not actually apply these terms to the content Mr. Haywood posted or did not properly apply them, whether because it did so inconsistently or pretextually because of its interpretation of, and reaction to, the political views expressed by Mr. Haywood. Compl. at ¶¶ 47–49. Mr. Haywood alleges that this failure breached Amazon's duty to allow such posts unless they violate the stated restrictions, "as written or as reasonably and objectively interpreted." *Id.* at ¶¶ 52–55. There is no fair reading of Mr. Haywood's complaint, considering its reasonable implications and interpreted in a light most favorable to Mr. Haywood, that leaves any doubt as to what Mr. Haywood alleges as to Amazon's wrongdoing.

Amazon's second argument in support of its motion to dismiss Mr. Haywood's breach-of-contract claim is that the parties' contract expressly reserved to Amazon the right to take any action it wished with respect to Mr. Haywood's posts and privileges because the Conditions of Use elsewhere provide (under the heading "Your Account") that Amazon "reserves the right to … remove or edit content … in its sole discretion." Motion at 23; Ex. A to Compl. at 2. Amazon maintains that the "sole discretion" clause in the "Account" section of the Conditions of Use suffices to insulate it against any claim whatsoever for removing content or access. Motion at 16–17. Indeed, Amazon argues these words disclaim any duty whatsoever with regard to either posted content or the users who post it. *Id.* at 16. Amazon's argument, however, is inconsistent with both the plain language of the contract and Amazon's own conduct thereunder as alleged by, and in a light construed most favorably to, Mr. Haywood.

The core problem with Amazon's "sole discretion" argument is that its reading of this general statement in a different section of the contract cannot logically be read to void the more specific and explicit provisions related to prohibited content. The "Your

Account" section of the Conditions of Use contains the general statement that: "Amazon reserves the right to refuse service, terminate accounts, terminate your rights to use Amazon Services, remove or edit content, or cancel orders in its sole discretion." Ex. B to Compl. at 1. With respect to "Reviews, Comments, Communications, and Other Content," the Conditions of Use also contain the much more specific provisions that expressly grant users the right to post such content, "so long as the content is not illegal, obscene, threatening, defamatory, invasive of privacy, infringing of intellectual property rights (including publicity rights), or otherwise injurious to third parties or objectionable." *Id.*

The most logical, objectively reasonable reading of these review-specific provisions is that (1) users may post reviews, provided they do not violate the enumerated restrictions, and (2) Amazon may or may not decide to review this material for compliance, but has no obligation to do so, and in fact does not regularly do so. These provisions spell out the discretion Amazon has regarding whether to scrutinize reviews, but they do not logically grant Amazon the right to ignore its promise to allow reviews that do not violate the restrictions, or to use undisclosed criteria to make such decisions that would effectively add to the list of restrictions with no notice to or consent from its counterparty, the user posting reviews. Given these promises, the general "sole discretion" sentence in the "Account" section is most logically read to reflect the same discretion reserved by Amazon; namely, that Amazon may or may not, in its "sole discretion," undertake the removal of content, or restrict privileges *on the terms outlined in the "Reviews" section.* Nothing in the contract logically indicates—let alone dictates—that Amazon can unilaterally change the content restrictions, or decide to ignore them altogether.

The logic of Mr. Haywood's reading of the contract is reinforced by the sentence that ends the "Review" section: "Amazon takes no responsibility and assumes no liability for any content posted by you or any third party." One of Amazon's primary concerns—indeed likely a much greater concern than whether or not a reader of a review is offended—

is that it not be held liable for content written by others. It therefore makes sense for Amazon to avoid any obligation to review posted content, such as, for example, to determine whether the content is obscene or violative of another's property rights, by repeatedly emphasizing that it only undertakes any review for these and other issues and may decide to take action in its "sole discretion."[4]

Amazon's motion to dismiss advocates a different reading of these provisions: that the "sole discretion" sentence in the "Account" section and the "reserves the right" sentence in the "Review" section do not only give Amazon the discretion to scrutinize reviews and take appropriate action, but to take whatever action it desires, regardless of whether or not the content complies with the enumerated restrictions. Amazon's interpretation of the parties' contract violates two of the fundamental principles of contract interpretation. First, it impermissibly elevates a general provision over a specific one. *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 194 Wn. 2d 413, 423, 450 P.3d 150, 155 (2019) ("A basic rule of textual interpretation is that the specific prevails over the general."); *see S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885 (9th Cir. 2003). Second, it impermissibly renders the specific prohibitions placed on reviews meaningless and of no force and effect, since they are always subject to change or disregard based on Amazon's unilateral "discretion." *City of Seattle v. Ballard Terminal Railroad Company, L.L.C.*, 22 Wn. App. 2d 61, 74, 509 P.3d 844, 852 (1st 2d Div.022) ("Interpretations giving lawful effect to all the provisions in a contract are favored over those that render some of the language meaningless or ineffective."); *see U.S. v. Hathaway*, 242 F.2d 897, 900 (9th Cir. 1957) ("A fundamental rule of construction is that a court must give effect to every word or term employed by the parties and reject none as meaningless or surplusage in arriving at the intention of the contracting parties.").

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[4] The "Reviews" section also discusses several restrictions related to intellectual property issues and in that context similarly states that "Amazon has the right but not the obligation to monitor and edit or remove any activity or content." Ex. B to Compl. at p. 1.

Mr. Haywood's—but not Amazon's—reading of the Conditions of Use is further supported by the relevant provisions of the Community Guidelines. The Community Guidelines provide that if a user violates the guidelines, Amazon may, among other things, "[r]emove their content," "[l]imit their ability to use community features," and "[s]uspend or terminate their account." Motion at 22; Ex. B to Compl. at 4. Contrary to Amazon's representation, the Community Guidelines do not say that Amazon may take these actions, "*if Amazon determines* that a user has 'violat[ed]' the Guidelines." Motion at 16 (emphasis added). Rather, they say only that "*if someone violates* the Guidelines, we may" take those actions. Ex. B to Compl. at 4. That the contract uses the passive voice is important, because it recognizes that Amazon's actions must be predicated on an actual violation, not merely Amazon's "determination"—much less an apparently unfettered, and therefore meaningless, determination—that the user violated the guidelines. Nothing in the Community Guidelines grants any unfettered discretion to Amazon to remove reviews and restrict rights "for any reason, without qualification." *But see* Motion at 16. The "if" in the parties' contract means "if the user violates the restrictions," not "if Amazon decides to do whatever it wants."

Amazon's authorities that it says endorse its "sole discretion" theory are all distinguishable from this case. In the cases cited, the "sole discretion" provisions were, unlike in Mr. Haywood's complaint, part of or expressly linked to the contract term allegedly breached. None of them presented a case where, as here, the grant of discretion appears in a different section of the contract, and none concluded that the grant of discretion rendered illusory other specific provisions of the contract that the plaintiff alleged has been breached.

In *Talyanich v. Microsoft Corp.*, the plaintiff claimed Microsoft improperly sent an update to her Xbox gaming console that disabled it. 2012 WL 12941690 (W.D. Wash. Nov. 2, 2012). The court granted Microsoft's motion to dismiss because the relevant terms stated that Microsoft could "withdraw, suspend, or discontinue any functionality … by

the automatic download of related software to your Authorized Device." *Id.* at *2. Unlike Amazon's claimed "sole discretion" to disregard the particulars of a separate content restriction provision, Microsoft's express reservation of its right to disable the console via automatic download was presented in a single integrated sentence that could not reasonably be read to mean the opposite of what it said.

As noted above, the dismissed claim in *Hard 2 Find Accessories* was based on an alleged violation of a payment provision, where the contract specified that Amazon may "in our sole discretion, delay initiating any remittances and withhold any payments." 58 F. Supp. 3d at 1172.[5] This is a specific and logical grant of discretion with respect to a particular topic—not a general license to abide by or ignore any other term in the contract, as Amazon proposes to do here.

Stach v. Amazon Services LLC involved a claim that Amazon breached its contract by modifying a seller's inventory list. 2015 WL 13283841 (C.D. Cal. Sept. 8, 2015). The contract provision at issue in that case expressly gave Amazon the "sole discretion to determine the content" and other aspects of a laundry list of items, "including any product listings." *Id.* at *1. Again, the grant of discretion was expressly tied to the alleged breaching conduct in the same sentence of the contract. *Stach* does not stand for the proposition that Amazon's general discretion to engage in the review and editing of content according to particular guidelines elsewhere specified allows it to disregard the other, and presumably all other, specific terms of the contract.

In *Green v. America Online (AOL)*, the plaintiff claimed AOL improperly failed to restrict harmful content, a claim which ran afoul of an express provision of the contract stating that "AOL 'does not assume any responsibility' for content provided by third parties." 318 F.3d 465, 471 (3rd Cir. 2003). Mr. Haywood does not allege Amazon was required to police any third-party content, only that it was required to review and take

[5] *See supra* note 3 and accompanying text.

action with regard to *his* content in accordance with the express conditions spelled out in *his* contract with Amazon.

Young v. Facebook, Inc. does not specify any relevant contract terms that governed Facebook's alleged wrongful termination of the plaintiff's account, and thus provides no support for Amazon's position. *See generally* 790 F. Supp. 2d 1110 (N.D. Cal. 2011). The only argument these cases collectively appear to support is the untenable, spurious, and not-well-masked proposition advanced by Amazon that internet service providers should always win motions to dismiss.

Moreover, it is evident from the very terms of the contract that Amazon's own conduct supports Mr. Haywood's reading of the provisions at issue. The Conditions of Use state, in the "Reviews" section, that Amazon "does not regularly review posted content." Ex. B to Compl. at 2. This statement is consistent with Amazon's reservation of the discretion to undertake any review of posted content and thus ultimately even the right to decline to enforce or enforce the content restrictions.[6] It is not, however, consistent with the proposition—advanced by Amazon in its motion—that Amazon reserved the discretion to act without any regard to the specific conditions under which users are not allowed to post reviews.

In sum, Mr. Haywood's complaint alleges that Amazon was only allowed to remove his reviews and to suspend his privileges if in fact he violated the enumerated restrictions in the Conditions or Use or the Community Guidelines. This is the only logical reading of the text of the parties' written agreement. In contrast, Amazon urges the Court to read the parties' contract to say, on the one hand, that users may post reviews provided that they do not include any of a number of types of specified prohibited content, but on the

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[6] This is also consistent with a proper reading of § 230(c)(1) of the CDA, as discussed below, which limits Amazon's liability for claims related to content it allegedly impermissibly permitted to be posted or remain on its platform.

other hand, to say that these provisions mean nothing, as Amazon retains "discretion" to require or prohibit whatever it pleases, regardless of any of the conditions spelled out in the Conditions of Use or the Community Guidelines.

Amazon's interpretation cannot be reconciled with the words of the parties' contract without rendering many, if not all, of those words illusory, which is inconsistent with long-established law in Washington and everywhere else. *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340, 344 (1st Div. 1997) ("[T]he court will not give effect to interpretations that would render contract obligations illusory."); *Seattle-First Nat. Bank v. Westlake Park Associates*, 42 Wn. App. 269, 274, 711 P.2d 361, 364 (1985) ("An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective."). Indeed, Amazon essentially asks the Court to add new provisions to the parties' contract after every content restriction and guideline reading, "but Amazon reserves the right to take down content and restrict your privileges for any reason whatsoever, whether or not you follow these rules." Amazon chose not to put a "sole discretion" clause where it now says it nevertheless exists. This is precisely Mr. Haywood's point: He alleges that Amazon did not abide by the contract as written, that its actions were taken for reasons it did not wish to disclose, and that it should not be insulated from liability under a distorted reading of the parties' contract.

At a minimum, Mr. Haywood's complaint rests upon a reasonable reading of an ambiguous contract and is therefore sufficient to state a breach-of-contract claim. Mr. Haywood is entitled to undertake to prove that his interpretation is correct, and to adduce the evidence in discovery to prove that Amazon in fact breached the parties' contract. *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1118 (9th Cir. 2018) ("If a contract is ambiguous, it presents a question of fact inappropriate for resolution on a motion to dismiss."); *see also Tanner Electric Co-op. v. Puget Sound Power & Light Co.*, 128 Wn. 2d 656, 674, 911 P.2d 1301, 1310 (1996) (contracts cannot be interpreted as a matter of law unless there is only

one reasonable interpretation). This precludes any dismissal of his breach-of-contract claim on a motion to dismiss.

B. Mr. Haywood's complaint states a claim for breach of the duty of good faith and fair dealing.

Though not stated as a separate cause of action, Mr. Haywood's breach-of-contract claim alleges that, in addition to violating the terms of the parties' agreement as described above, Amazon also breached the parties' contract by failing to apply the content restrictions provisions at issue in good faith. Compl. at ¶¶ 56–58. Specifically, Mr. Haywood's complaint alleges that Amazon failed to identify how what he wrote violated the Community Guidelines, failed to provide any explanation or justification for its actions until after Mr. Haywood instituted legal proceedings, and failed to disclose the actual basis for its conduct, which was triggered by its response to the political viewpoints it perceived Mr. Haywood to have expressed in his reviews. *Id.* at ¶ 57. The complaint also alleges that, to the extent Amazon retained the discretion to monitor and remove restricted content, Amazon failed to exercise that discretion in good faith; specifically, Amazon failed to disclose the criteria it would employ and that it did so in an arbitrary and capricious manner. *Id.* at ¶ 58.

Amazon admits that, under Washington law, "There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Badgett v. Secretary State Bank*, 116 Wn. 2d 563, 569, 807 P.2d 358, 360 (1991). *See* Motion at 13. The parties' contract allowed Mr. Haywood to post reviews "so long as the content" did not contain any of the enumerated categories of restricted content. Ex. A to Compl. at 2. With respect to these restrictions, Amazon expressly "reserve[d] the right (but not the obligation) to remove or edit such content, but does not regularly review posted content." *Id.* Amazon was therefore required to undertake any such review or editing, if it decided to do so, in keeping with "an implied duty of good faith and fair dealing," and "to cooperate" with

Mr. Haywood so that he could "obtain the full benefit of performance." This is entirely in keeping with *Badgett*, in that it alleges a breach of a duty directly connected to Amazon's performance of a specific provision of the contract—application of the content restrictions—and does not seek to add any new terms into the parties' agreement.

Amazon's argument that Mr. Haywood's complaint seeks to impose a "new" or "free floating" obligation on Amazon is predicated entirely on the supposition that the "sole discretion" clause in the "Account" section of the contract precludes any scrutiny of Amazon's exercise of its rights with respect to the content restrictions and that the clause is not otherwise subject to the implied duty of good faith and fair dealing. Amazon's argument necessarily fails unless one accepts the proposition that Amazon had "unqualified discretion" to review and remove reviews. *See* Motion at 14. As explained above, however, Amazon did not have such unqualified discretion to do whatever it wished when it reviewed the content posted by Mr. Haywood.

Mr. Hawyood's reasonable reading of the contract is that Amazon's "sole discretion" is to review or not review content, to act or not to act as a moderator. The discretion to review, however, does not constitute discretion to review according to whatever criteria it might wish. The review and removal of content or privileges must instead be done in accordance with the contract provisions specific to that undertaking—and in good faith. To conclude otherwise is to let Amazon impose a "free floating" power to nullify or amend the parties' contract at will, rendering provisions meaningless and making illusory any benefit to Mr. Hawyood in exchange for his contributions to Amazon's platform, which, Mr. Hawyood alleges, were encouraged by, and of value to, Amazon.

Again, Amazon's authorities are inapposite. They each involve situations where the contract term at issue gave a party a clear *specific* right that the opposing party sought to modify or change through the assertion of the implied duty of good faith and fair dealing. None of them present a situation like Mr. Haywood's, where the issue is whether Amazon, having chosen to exercise its general discretion to police Mr. Haywood's reviews,

did so in good faith.

In *Johnson v. Yousoofian*, 84 Wn. App. 755, 762, 930 P.2d 921, 924 (1st Div. 1996), the parties' lease agreement gave the landlord the power of consent over any assignment of the lease. The court held that the implied duty of good faith did not place any limitation on the landlord's decision whether to consent, as the lease established no duty to consent, and therefore nothing to scrutinize for the lack of good faith. *Id.* Likewise, *Mayer v. Pierce County Medical Bureau, Inc.* involved a contract under which a physician was required to resolve disputes with a provider network via arbitration, but which gave either party the right to cancel the agreement on 30 days' notice. 80 Wn. App. 416, 422, 909 P.2d 1323, 1327 (1st Div. 1995). The court held that the duty of good faith did not require the provider to engage in arbitration in order to cancel the agreement. *Id.* The decision in *Myers v. State* summarized the rule: "We will read an implied covenant of good faith and fair dealing into a contract when the contract gives one party discretionary authority to determine a contract term. But covenants of good faith and fair dealing do not trump express terms or unambiguous rights in a contract. 152 Wn. App. 823, 828, 218 P.2d 241, 244 (3d Div. 2009).

Amazon's motion distorts this rule: Amazon intentionally conflates its sole discretion to scrutinize posts, with the notion that it has the discretion to remove posts at will for any reason, despite its promise to allow posts so long as they abide by certain restrictions, which the implied duty of good faith and fair dealing requires Amazon to apply in an honest and cooperative manner—not, as Mr. Haywood has alleged, arbitrarily, pretextually, or opaquely.

Mr. Haywood's claim is thus akin to the plaintiff's claim in *Rekhter v. State Dept. of Social and Human Services*, where the contract gave DSHS discretion as to how to comply with certain provisions (in that case determining for what services providers would be paid and how much they would be paid). 180 Wn. 2d 102, 323 P.3d 1036 (2014). In *Rekhter* the Washington Supreme Court explained that the doctrine, "*limits* the authority

of a party retaining discretion to interpret contract terms," and that "[w]hen DSHS exercised discretion … its actions were governed by an implied covenant of good faith." *Rekhter*, 180 Wn. 2d at 115 (emphasis in original; internal citations omitted). The contract provisions at issue here—the content restrictions—on their face call for the exercise of some discretion or judgment on the part of Amazon to determine what is, for example, defamatory or injurious. This discretion must, under Washington law, be exercised in good faith—and Mr. Haywood's complaint alleges that Amazon failed to do just that.

C. Mr. Haywood's complaint states a claim under the Washington Consumer Protection Act.

Amazon seeks dismissal of Mr. Haywood's WCPA claim on the grounds that he fails to allege: "an unfair or deceptive practice," "impacting the public interest," and "injury to [his] business or property." Motion at 18. None of these arguments are correct.

Amazon's assertion that Mr. Haywood has failed to allege "an unfair or deceptive practice" is simply a rehash of its argument in support of its motion to dismiss Mr. Haywood's breach-of-contract claim. While appealing on its face, Amazon's argument, *i.e.*, that if a contract grants a particular right to a party, the other party cannot claim the exercise of that right was "unfair or deceptive," does not apply here. All the cases cited by Amazon were based on a review of how the relevant terms were written and presented to the complaining party and rest upon a finding that the defendant expressly retained the specific right to engage in the conduct at issue. *See Lowden v. T-Mobile USA, Inc.*, 2009 WL 537787, at *2 (W.D. Wash. Feb. 18, 2019) (agreement at issue "adequately discloses" the right at issue); *Smale v. Cellco Partnership*, 547 F. Sup.. 2d 1181, 1188–89 (W.D. Wash. 2008) (same); *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 115–16, 22 P.3d 818, 825 (1st Div. 2001) (reviewing evidence showing charges at issue were expressly disclosed). The question in all these cases is not whether the contract technically speaks to an issue, but whether the contract as written and presented (here the Conditions of Use and Community Guidelines) "had the capacity to deceive a substantial portion of the

public." *Robinson*, 106 Wn. App. at 114, 22 P.3d at 824. Amazon's contract is different. It contains a plain statement that users may post reviews so long as they do not include enumerated content. This provision would mean nothing if Amazon could prohibit posts for any reason or no reason at all. The presence of what Amazon argues is a meaningless statement in the parties' contract easily raises a reasonable inference of deception of a substantial number of Amazon's millions of users.

Amazon's argument with respect to the "public interest" is also easily disposed of. *But see* Motion at pp. 12–13. "In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it … has the capacity to injure other persons." RCW 19.86.020(3)(c). Mr. Haywood's complaint speaks to Amazon's domination of the market for books and book reviews, references Conditions of Use and Community Guidelines that apply to Amazon's entire userbase, and expressly alleges that Amazon's conduct affects other users as well as himself. *See* Complaint at ¶¶ 5–10, 13, 27–34, 42–43, 63–67, 69. His claim also implicates the interests of the hundreds of users who followed his posts on Amazon and the thousands who read and endorsed his work to the point where he earned a ranking of #31 out of all the people who post reviews on Amazon.

The Court should be skeptical of Amazon's argument that the Washington Consumer Protection Act does not protect Mr. Haywood as a consumer against the actions of the world's fifth largest company by market capitalization and as a user of Amazon's website—if one can call the world's largest on-line retailing platform a mere "website." The Washington Supreme Court has stated that to cognize a claim under the WCPA, there must "be an injury to 'business or property;'" however, "the injury involved need not be great, or even quantifiable," and that the term "property" encompasses "the right to possess, use, and enjoy a determinate thing," and includes "proprietary rights," which, of course, include his writings and the posting thereof. *Ambach v. French*, 167 Wn. 2d 167, 172, 216 P.3d 405, 407 (2009). Mr. Haywood's reputation as a writer is likewise

protected, whether or not he chooses to monetize it, precisely because it is an activity typically "engaged in for livelihood or gain" and therefore a proprietary right. *Id.*

D. Section 230 of the Communications Decency Act does not bar Mr. Haywood's claims.

Section 230(c) of the CDA contains two subjections. As Justice Thomas explained in his statement respecting the Supreme Court's denial of certiorari in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, the first of these, subsection (c)(1), "indicates that an Internet provider does not become the publisher of a piece of third-party content … simply by hosting or distributing that content." Thus, if a company like Amazon, "unknowingly leaves up illegal third-party content, it is protected from publisher liability." 141 S. Ct. 13, 14–15 (2020) . Justice Thomas goes on to criticize lower court decisions that have expanded this grant of "publisher" liability to include "distributor" liability, which protects providers against claims "even when a company distributes content that it knows is illegal." *Id.* at 15. However, regardless of the scope of this protection that may exist against claims pertaining to content which a provider like Amazon may allow on its site, § 230(c)(1) necessarily only concerns claims based on publishing or, at maximum to Justice Thomas's chagrin, distributing such content.

Meanwhile, claims against providers that arise when they restrict or "take down" content do not implicate § 230(c)(1). Rather, these claims are covered by § 230(c)(2), which provides:

> No provider or user of an interactive computer service shall be held liable on account of— (A) any action voluntarily taken *in good faith* to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

47 U.S.C. § 230(c)(2) (emphasis added). "[I]f [a provider] takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)." *Malwarebytes*, 141 S. Ct. at 15. As is evident from the text of this statute, this limitation of liability for restricting content is

not absolute but limited to actions undertaken *in good faith*. Section 230 does not grant Amazon, or any other internet provider, immunity from a claim, like Mr. Haywood's, that it restricted content but failed to do so in good faith.

As with its other arguments, Amazon engages in unabashed overreach to protect itself. It argues that § 230(c)(1) protects it from any and all claims whenever it acts to "select, arrange, and promote," "moderate," make "editorial judgments," "curate," "exclude," "label," "restrict," or "promote" or otherwise make "publishing decisions." None of these verbs appear in the statute, and courts endorsing the view Amazon promotes here "have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress." *Malwarebytes*, 141 S. Ct. at 15.

More important for Mr. Haywood's case, the overbroad reading of § 230(c)(1) advanced by Amazon has "also eviscerated the narrower liability shield Congress included in the statute," *i.e.*, § 230(c)(2), which only protects companies insofar as "they *decide* to exercise those editorial functions in good faith." *Id.* at 17 (emphasis added). Allowing subsection (c)(1) to override any possible application of subsection (c)(2) effectively grants immunity to any provider for any action it might take to censor content, and even "apparently protects companies who racially discriminate in removing content." *Id.*

Because Mr. Haywood alleges that Amazon failed to act with good faith in the application of the terms of the parties' contract as reflected in the Conditions of Use and Community Guidelines, his claim is not barred by § 230 of the CDA.[7]

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[7] Even if § 230 were to bar Mr. Haywood's "non-contract" claims, it would not bar his claim for the breach of good faith and fair dealing. *But see* Motion at p. 7 n. 5. It is not a separate tort (regardless of any case that may have invoked such reasoning for statute-of-limitations purposes), but part and parcel of Mr. Haywood's breach-of-contract claim. The existence and breach of any such duty can only arise in connection with a contract. This is analogous to the situation in *Barnes v. Yahoo!, Inc.*, where the Court rejected the defendant's argument that plaintiff's promissory estoppel claim was barred by § 230(c)(1), finding it an alternative theory for establishing a breach of contract. *Cf.* 570

E. The First Amendment does not bar Mr. Haywood's claims.

Having been given an inch under § 230, Amazon tries to take a mile in arguing that, as a "publisher," its actions with respect to Mr. Haywood were insulated from claims by the First Amendment. Motion at 10–11. The Fifth Circuit recently held the following in response to the argument that providers like Amazon have "a sort of constitutional privilege to eliminate speech":

> We reject the Platforms' efforts to reframe their censorship as speech. It is undisputed that the Platforms want to eliminate speech—not promote or protect it. And no amount of doctrinal gymnastics can turn the First Amendment's protections for free *speech* into protections for free *censoring*.

NetChoice L.L.C v. Paxton, 49 F.4th 439, slip op. at 20 (5th Cir. Sept. 16, 2022) (emphasis added).

As far as Mr. Haywood is concerned, and as his complaint alleges, Amazon can say or not say whatever it wants. It can even prohibit and censor content along any lines allowed under the law. It can even arguably say it does not allow the posting of book reviews that advocate conservative or libertarian views. Moreover, Mr. Haywood's claims do not require concluding that Amazon, because of its size and ubiquity and conduct, has established or become a public or quasi-public forum (though that may still well be true). They only seek to hold Amazon accountable for not honestly stating, revealing, or following its "editorial" policies and for not adhering to the language of its own Community Guidelines and Conditions of Use, as promised to Mr. Haywood and other users.

Mr. Haywood's claim does not seek to hold Amazon liable for censoring his speech, but to hold Amazon liable for failing to honestly censor his speech according to the actual

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F.3d 1096, 1106–08 (9th Cir. 2009).

The same is true for Mr. Haywood's claim under the WCPA, as that claim is based on deceptive conduct with respect to the parties' contract. Amazon cannot argue both that these claims are all precluded under the terms of the contract and that they must be dismissed under § 230 because they are not contract claims.

terms of its agreement rather than the illusory and unbounded terms it now claims in its own favor.

REQUEST FOR RELIEF

For the foregoing reasons, the Court should deny Amazon's motion to dismiss in its entirety.

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Respectfully submitted,

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