IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 05-36189
(O'Scannlain, Graber, and Callahan, JJ.)

CECILIA L. BARNES,

Plaintiff/Appellant,

v.

YAHOO! INC.,

Defendant/Appellee.

On Appeal from the United States District Court
For the District of Oregon

Civil Action No. 6:05-CV-926-AA

APPELLEE YAHOO! INC.'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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STATEMENT OF COUNSEL

It is my reasoned and professional judgment that the panel's discussion in Part II of its opinion conflicts with Ninth Circuit precedent and generally established law that a defendant may invoke an affirmative defense on a motion to dismiss under Fed. R. Civ. P. 12(b)(6) when the elements of that defense are apparent from the face of the complaint. *See, e.g.*, *Scott v. Kuhlman*, 746 F.2d 1377 (9th Cir. 1984). Thus, rehearing by the panel or the en banc court is necessary to secure and maintain uniformity of this Circuit's decisions.

/s Patrick J. Carome
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CORPORATE DISCLOSURE STATEMENT

Yahoo! Inc. is a publicly traded corporation. It has no parent, and no publicly-held corporation owns 10% or more of its stock.

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TREATISES

Defendant Yahoo! Inc. (Yahoo!) seeks rehearing of Part II of the panel's opinion, which concluded that 47 U.S.C. § 230 ("Section 230") provides an "affirmative defense" that must be asserted by "responsive pleading" and cannot "justify dismissal under Rule 12(b)(6)."[1] Slip op. 5317. As the panel recognized, neither the district court nor the parties raised this question or briefed it at any point in this litigation. Moreover, the panel's conclusion on this point is wholly unnecessary to its decision: it acknowledged that the district court's ruling of dismissal was a final decision over which this Court had jurisdiction and proceeded to review that decision on the merits, "declin[ing] to 'fuss[] over procedural niceties to which the parties are indifferent.'" *Id.* at 5317-5318 (quoting *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003)).

Yahoo! respectfully requests that the panel, on rehearing, delete from its opinion the unnecessary *dicta* concerning whether Section 230 may ever be raised on a Rule 12(b)(6) motion or, alternatively, that the Court rehear this limited issue en banc. Because the panel did not have the benefit of any briefing on this issue, Yahoo! did not have the opportunity to point to authority—including from this Court—establishing that, although "[o]rdinarily affirmative defenses may not be raised by motion to dismiss," that "is not true when, as here, the defense raises no

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[1] Although Yahoo! respectfully disagrees with the panel's conclusion that Section 230 would not preclude liability under a theory of "promissory estoppel" (Slip op. 5330-5335), it does not seek rehearing of that determination here.

disputed issues of fact." *Scott v. Kuhlman*, 746 F.2d 1377, 1378 (9th Cir. 1984). Thus, even assuming Section 230 is appropriately deemed an affirmative defense, declaring that it can never be raised by way of a motion to dismiss under Rule 12(b)(6) is not only unnecessary but contrary to law.

Further, a requirement that defendants invoking Section 230 must in all cases—even those in which the elements of the statute are apparent from the face of the complaint—first file responsive pleadings and then seek judgment on the pleadings under Rule 12(c) (*see* Slip op. 5317) would serve no practical purpose and undermine one of Congress's key purposes in enacting Section 230. As a practical matter, a district court addressing a motion on the pleadings under Rule 12(c) would apply the same standard as that for a motion to dismiss under Rule 12(b)(6). The only difference would be that the defendant would be put to the burden of filing a responsive pleading and that responsive pleading might initiate required scheduling and discovery conferences, discovery, and other steps. In addition, if a defendant has other defenses that could be raised in a Rule 12(b) motion, the panel's conclusion would require the defendant either (1) to engage in a three-step process of filing a Rule 12(b) motion, an answer, and then a Rule 12(c) motion rather than presenting a single motion for decision or (2) to forego its rights to file a Rule 12(b) motion altogether. As a result, the court and the parties would be put to the time, effort, and resource costs of substantial litigation even if it was

clear all along, on the face of the complaint, that the claims fail as a matter of law under Section 230.

Those burdens not only would be unnecessary, but also would undermine a critical purpose of Section 230. As this Court has recognized, Congress passed Section 230 in part to encourage the free flow of information on the Internet by insulating interactive computer service providers from liability for third-party content and thereby eliminating incentives they might otherwise have to remove such content whenever they received a complaint that it might be tortious or otherwise actionable. Yet a rule under which service providers would incur substantial litigation costs even in a situation where Section 230 protected them as a matter of law based on the facts as pleaded in a complaint would re-create such incentives: service providers would have reason to delete content in such situations simply to avoid those litigation costs. That outcome would defeat one of Congress's objectives in enacting Section 230. Because that result is not required by the rules of civil procedure—and indeed prevailing authority clearly supports the right of a defendant to invoke an affirmative defense where the necessary elements are apparent on the face of the complaint—Yahoo! respectfully submits that the panel (or the en banc court) should delete part II of the opinion suggesting the contrary.

COURSE OF PROCEEDINGS AND DISPOSITION

Plaintiff Cecelia Barnes was allegedly the victim of a cruel hoax in which her ex-boyfriend allegedly created bogus online "profiles" available on the Internet that contained nude photographs of Barnes, along with open invitations for men to visit Barnes at her place of work.[2] E.R. 5-6, Compl. ¶ 3. In addition, the ex-boyfriend allegedly visited "chat rooms" where, again posing as Barnes, he invited strangers to examine the profiles and visit her at work. *Id.* Rather than suing the ex-boyfriend, Barnes sued Yahoo! based on the fact that Barnes' ex-boyfriend happened to use Yahoo!'s Internet-based services as his vehicle for posting the bogus profiles and masquerading as Barnes in chat rooms. *Id.*

Yahoo! indisputably had no role whatsoever in creating or developing any of the online profiles or the chat room conversations about which Barnes complains. Instead, Barnes focused exclusively on a phone conversation she had with a Yahoo! employee in which Barnes alleges the employee said that "Yahoo! would put a stop to the unauthorized profiles." E.R. 6, Compl. ¶¶ 4-6. According to Barnes, by allegedly making this statement, Yahoo! "assumed an affirmative duty" to assist the plaintiff, which it then breached by allegedly "fail[ing] to remove the

[2] As the panel notes, Yahoo! must treat the plaintiff's factual allegations as true for purposes of its motion to dismiss, but will "hotly contest" those allegations if and when they are addressed on remand. Slip op. 5315 n.1.

unauthorized profiles and prohibit[ing] them from being posted again." E.R. 6-7, Compl. ¶¶ 7, 9.

Yahoo! moved to dismiss Barnes' complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the ground, *inter alia*, that Section 230(c)(1)—which states 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"—barred her claim. Yahoo! explained in particular that each element of Section 230(c)(1) was apparent from the face of the complaint. The district court agreed and granted Yahoo!'s motion.

On appeal, the panel (O'Scannlain, Graber, and Callahan, JJ.) affirmed the district court's holding as to Barnes' negligent undertaking claim. Slip op. 5321-5329. The panel held that the heart of Barnes's claim was that Yahoo! failed to remove the allegedly bogus profiles, "[b]ut removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove" in contravention of Section 230(c)(1). *Id.* at 5324. The panel further concluded, however, that Barnes's claim "might be 'recast' in terms of promissory estoppel" based on the alleged conversation between Barnes and the Yahoo! employee and that Section 230(c)(1) would not bar such a claim. *Id.* at 5330-5335.

Despite addressing and resolving the district court's decision on the merits, the panel suggested in Part II of its opinion that Yahoo! had inappropriately raised Section 230 on a Rule 12(b)(6) motion. While acknowledging that neither party had raised or briefed the issue and ostensibly "declin[ing] to 'fuss[] over procedural niceties to which the parties are indifferent,'" the panel "hasten[ed] to clarify . . . that section 230 *is* an affirmative defense and district courts are to treat it as such." *Id.* at 5317-5318 (emphasis in original) (quoting *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003)). In particular, the panel asserted that because Section 230 is an "affirmative defense," it "does not by itself justify dismissal under Rule 12(b)(6)." Slip op. 5317. Instead, the panel said, "Yahoo ought to have asserted its affirmative defense by responsive pleading" and "might then have sought judgment on the pleadings under Rule 12(c)." *Id.*

ARGUMENT

Rehearing or en banc review of Part II of the panel opinion is warranted because the panel's determination that, as an affirmative defense, Section 230 cannot be invoked on a Rule 12(b)(6) motion to dismiss is contrary to existing precedent and would undermine one of the key purposes of Section 230. Because Part II of the opinion serves as mere dicta that is unnecessary to the actual holdings in the opinion and addresses an issue the parties did not even brief, Yahoo! respectfully requests that it be deleted on panel rehearing or that an en banc panel

rehear the issue whether Section 230 can be raised on a motion to dismiss under Rule 12(b)(6) where all its elements are apparent on the face of the complaint.

The panel's decision appears to announce a blanket rule that, because Section 230 is an affirmative defense, it cannot "by itself justify dismissal under Rule 12(b)(6)." Slip op. 5317. But prior Ninth Circuit decisions have rejected such an approach. Instead, this Court has explained that, although "*[o]rdinarily* affirmative defenses may not be raised by motion to dismiss," that "is not true when, as here, the defense raises no disputed issues of fact." *Scott v. Kuhlman*, 746 F.2d 1377, 1378 (9th Cir. 1984) (emphasis added); *see also Cedars-Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126, 1128-1129 (9th Cir. 1999) ("[A]ffirmative defenses like the statute of limitations may also be raised in motions to dismiss filed before the first responsive pleading."); *Bayone v. Baca*, 130 Fed. Appx. 869, 871 & n.5 (9th Cir. 2005) (affirming dismissal based on affirmative defense of res judicata); *Conerly v. Westinghouse Elec. Corp*., 623 F.2d 117, 119 (9th Cir. 1980) ("When

the running of the statute is apparent from the face of the complaint . . . then the defense may be raised by a motion to dismiss.").[3]

The panel decision does not mention, or attempt to distinguish, these prior rulings of this Court. Rather, it cites only a single case involving qualified immunity in which the Supreme Court stated that "[s]ince qualified immunity is a defense, the burden of pleading it rests with the defendant." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Yet a subsequent Supreme Court case made clear that qualified immunity *can* be raised on a motion to dismiss where its applicability is apparent from the face of the complaint. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Indeed, the general rule is that dismissal pursuant to rule 12(b)(6) is entirely appropriate so long as the facts necessary to establish an affirmative defense are evident from the complaint. *See* 5 Wright & Miller, *Federal Practice & Procedure*

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[3] This is the prevailing rule in other circuits as well. *See, e.g.*, *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998) ("[A]n affirmative defense may be raised by pre-answer motion under Rule 12(b) when the facts that give rise to the defense are clear from the face of the complaint."); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998) ("An affirmative defense may be raised by a pre-answer motion to dismiss under Rule 12(b)(6), without resort to summary judgment procedure, if the defense appears on the face of the complaint."); *ALA, Inc. v. CCAIR, Inc*., 29 F.3d 855, 859 (3d Cir. 1994) ("[A] complaint may be subject to dismissal under Rule 12(b)(6) when an affirmative defense like the statute of frauds appears on its face."); *Garrett v. Commonwealth Mortgage Corp. of America*, 938 F.2d 591, 594 (5th Cir. 1991) (dismissal of a complaint on the basis of an affirmative defense is appropriate "if [the] affirmative defense . . . appears on the face of the complaint").

§ 1277, at 634 (3d ed. 2004) ("When there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense, the recent cases seem to agree that the matter may be disposed of by a motion to dismiss under Rule 12(b)."); 2 *Moore's Federal Practice* § 12.34[4][b], at 12-99 (3d ed. 2003) ("Dismissal under Rule 12(b)(6) may also be appropriate when a successful affirmative defense or other bar to relief appears on the face of the complaint, such as the absolute immunity of a defendant, claim preclusion, or the statute of limitations.").

That is precisely the case here. As the panel recognized, the parties litigated Yahoo!'s motion to dismiss assuming that the allegations in the complaint were true and therefore raised no disputed issues of fact. Slip op. 5315 n.1. Both the district court and the panel itself determined that, even based on that assumption, Section 230 barred imposition of liability against Yahoo! for plaintiff's tort claims as a matter of law. In other words, the panel had no trouble applying the standard for motions under Rule 12(b)(6) to Yahoo!'s invocation of Section 230, regardless of whether Section 230 is characterized as an "affirmative defense." In so doing, the panel acted in accordance with a long line of cases that have granted motions to

dismiss based on Section 230 where the defendant's entitlement to the defense was apparent on the face of the complaint.[4]

To require all defendants seeking to invoke Section 230, even in cases in which the complaint already alleges all the elements of immunity, to first file a responsive pleading and then seek judgment on the pleadings under Rule 12(c), as the panel opinion suggests (Slip. Op. 5317), would serve no practical purpose. A motion on the pleadings under Rule 12(c) and a motion to dismiss under Rule 12(b)(6) are "functionally identical" and "the principal difference . . . is the time of filing." *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Thus, from a practical standpoint, the main effect of requiring a defendant to invoke Section 230 by way of a motion under Rule 12(c) rather than Rule 12(b)(6) would be to force the defendant to file an answer, and that responsive pleading might initiate required scheduling and discovery conferences, discovery, and other steps. As a result, the parties would incur greater litigation costs even in a case where the defendant's entitlement to protection under Section 230 was apparent on the face of the complaint and the court would be applying the same standard to

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[4] *See, e.g., Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003); *Goddard v. Google, Inc.*, No. C-08-2738JF (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 564 F. Supp. 2d 544 (E.D. Va. 2008); *Noah v. AOL Time Warner*, 261 F. Supp. 2d 532, 534 (E.D. Va. 2003); *PatentWizard, Inc. v. Kinko's Inc.*, 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006).

judge the applicability of Section 230 as it would under a Rule 12(b)(6) motion. Such a rule would waste the resources of the parties and the courts to no good end.

To make matters worse, a blanket rule against presenting the Section 230 defense via a threshold motion to dismiss would undermine one of the key purposes of Section 230. As this Court has recognized, Congress enacted Section 230 "to encourage the unfettered and unregulated development of free speech on the Internet," and "there is little doubt that [Section 230] sought to further First Amendment and e-commerce interests on the Internet." *Batzel v. Smith*, 333 F.3d 1018, 1027-1028 (9th Cir. 2003). Thus, as the panel observed, Section 230 is intended to "'promote the free exchange of information and ideas over the Internet.'" Slip op. 5318 (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003)). Section 230 encourages "freedom of speech in the new and burgeoning Internet medium" by eliminating the "threat [of] tort-based lawsuits" that would impose burdens on interactive computer services with respect to the communications of their millions of users. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Batzel*, 333 F.3d at 1027-1028 ("[m]aking interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet.").

The panel's procedural determination in part II of its opinion would undermine this purpose. If service providers must incur substantial litigation costs

even in situations where Section 230 protects them as a matter of law based on the facts as pleaded in a complaint, they would have strong incentive to delete third-party content every time they received a complaint that such content might be tortious or otherwise unlawful simply to avoid those costs. Indeed, such a regime might cause providers "to severely restrict the number and type of messages posted" on their services. *See Zeran*, 129 F.3d at 331. As this Court's recent en banc decision cautioned, to avoid such a result, "section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008).

The panel's discussion in Part II of its opinion would have the opposite effect. And it is contrary to established precedent in this Circuit and elsewhere making clear that a defendant can invoke an affirmative defense in a Rule 12(b)(6) motion to dismiss so long as the necessary elements are apparent from the face of the complaint. Accordingly, Yahoo! respectfully suggests that the panel should

delete Part II of its opinion, or that in the alternative an en banc panel should rehear that issue.[5]

CONCLUSION

For the reasons set forth above, Appellee Yahoo! respectfully requests that that the panel grant its petition for rehearing, or in the alternative that the Court grant is petition for rehearing en banc, and the relief requested herein.

[5] Yahoo! notes that the panel opinion observed that Section 230(c)(1) protects a defendant "whom a plaintiff seeks to treat, *under a state law cause of action*, as a publisher or speaker." Slip op. at 5320 (emphasis added). In an accompanying footnote, the panel stated that Section 230(e) contains exceptions for several federal laws but that those were not relevant to this case. *Id.* at 5320 n.4. Yahoo! understands the quoted text and footnote to simply say that the application of Section 230(c)(1) to federal claims is not at issue here because Barnes has brought only state claims. If, however, the highlighted language was intended to suggest that Section 230(c)(1) applies only to state law claims, that clearly would be mistaken, and Yahoo! would respectfully ask that the panel (or en banc court) correct that error on rehearing. For example, this Court's recent en banc decision in *Roommates.com* held that Section 230(c)(1) barred a claim under the *federal* Fair Housing Act based on the "additional comments" section of an online roommate profile. *Fair Housing Council*, 521 F.3d at 1173-1175. Moreover, the exceptions for several specific federal laws in Section 230(e) noted by the panel would be wholly superfluous if Section 230 did not generally apply to claims under federal law.

Respectfully submitted,

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May 21, 2009

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules 35-4(a) and 40-1(a), the undersigned hereby certifies that the foregoing Petition for Rehearing and Petition for Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more, and contains 3,239 words, which is below the word limit of 4,200.

/s/ Patrick J. Carome
Patrick J. Carome

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2009, I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system: Appellee Yahoo! Inc.'s Petition for Rehearing and Petition for Rehearing En Banc.

I certify that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the appellate CM/ECF system.

/s/ Patrick J. Carome
Patrick J. Carome