

1 **PERKINS COIE LLP**

2 Sunita Bali, Bar No. 274108
SBali@perkinscoie.com
3 Danielle Sivalingam, Bar No. 294369
DSivalingam@perkinscoie.com
4 Tyler Fergusson, Bar No. 345065
TFergusson@perkinscoie.com
5 605 Howard Street, Suite 1000
San Francisco, CA 94105
6 Telephone: 415.344.7000
Facsimile: 415.344.7050
7

8 Michael R. Huston (*pro hac vice*)
MHuston@perkinscoie.com
9 Matthew R. Koerner (*pro hac vice pending*)
MKoerner@perkinscoie.com
10 2901 N. Central Avenue, Suite 2000
Phoenix, AZ 85012
Telephone: 602.351.8000
11 Facsimile: 602.648.7000

12 Ryan Spear (*pro hac vice*)
RSpear@perkinscoie.com
13 1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
14 Telephone: 206.359.8000
Facsimile: 206.359.9000
15

16 *Attorneys for Defendant Google LLC*

17 **UNITED STATES DISTRICT COURT**
18 **EASTERN DISTRICT OF CALIFORNIA**
19

20 REPUBLICAN NATIONAL COMMITTEE,

21 Plaintiff,

22 v.

23 GOOGLE LLC,

24 Defendant.
25
26
27
28

Case No. 2:22-cv-01904-DJC-JDP

**DEFENDANT GOOGLE LLC'S MOTION
TO DISMISS THE REPUBLICAN
NATIONAL COMMITTEE'S VERIFIED
FIRST AMENDED COMPLAINT**

Date: January 18, 2024

Time: 1:30 p.m.

Dept: Courtroom 10, 13th Floor

Judge: The Hon. Daniel J. Calabretta

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 18, 2024, at 1:30 p.m. in Courtroom 10, 13th Floor, of the United States District Court for the Eastern District of California, located at 501 I Street, Suite 4-200, Sacramento, California 95814, Defendant Google LLC (“Google”) will, and hereby does, move, pursuant to Federal Rule of Civil Procedure 12(b)(6), for an Order dismissing all claims against it, with prejudice. In compliance with this Court’s standing order that parties must meet and confer before noticing a motion, Google’s counsel contacted counsel for the Republican National Committee (“RNC”) on November 13, 2023 to discuss this motion. The parties discussed the arguments in Google’s motion but were unable to agree on it. The RNC confirmed that it will be filing a responsive brief in opposition to Google’s motion.

This motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the documents that this Court has judicially noticed, all pleadings and papers on file in this action, and such other and further matters as the Court may consider.

TABLE OF CONTENTS

1				Page
2				
3	I.		Introduction.....	1
4	II.		Background.....	4
5		A.	Gmail and Gmail’s spam filters.....	4
6		B.	The RNC’s claims against Google.....	5
7		C.	This Court’s previous Order dismissing the RNC’s claims.....	7
8	III.		Argument.....	7
9		A.	The RNC still fails to plead any intentional interference with its prospective economic relations (Count Four).....	8
10				
11		1.	The RNC again does not plead any independently wrongful act.	8
12		2.	Other required elements are also still missing.	10
13		B.	The RNC still fails to state a claim for relief under California’s Unfair Competition Law (Count Three).....	12
14				
15		1.	The RNC fails to plead a remedy under the UCL.....	12
16		2.	The RNC again fails to plead fraudulent, unlawful, or unfair conduct.	14
17		C.	Google is immune to the RNC’s claims under Section 230 of the Communications Decency Act.	15
18				
19		1.	The RNC still fails to plausibly allege that Google did not act in “good faith,” so its claims are barred by Section 230(c)(2)(A).	16
20				
21		a.	Several allegations in the Amended Complaint continue to undermine the RNC’s discrimination theory.....	17
22				
23		b.	The RNC’s remaining allegations do nothing to support its discrimination theory.	19
24		2.	The RNC’s claims are also barred by the separate immunity provisions of Section 230(c)(2)(B) and Section 230(c)(1).....	23
25				
26	IV.		Conclusion.....	25
27				
28				

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..... 8, 16, 17

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....8, 17

Carafano v. Metrosplash.com, Inc.,
339 F.3d 1119 (9th Cir. 2003)..... 15

City of Los Angeles v. Lyons,
461 U.S. 95 (1983)..... 13

Clapper v. Amnesty Int’l USA,
568 U.S. 398 (2013)..... 13

Daniels v. Alphabet, Inc.,
No. 20-cv-04687, 2021 WL 1222166 (N.D. Cal. Mar. 31, 2021).....22

Divino Grp. LLC v. Google LLC,
No. 19-cv-04749, 2022 WL 4625076 (N.D. Cal. Sept. 30, 2022)..... 24, 25

Domen v. Vimeo, Inc.,
433 F. Supp. 3d 592 (S.D.N.Y. 2020), *aff’d*, No. 20-616, 2021 WL
4352312 (2d Cir. 2021)..... 16

Dreamstime.com, LLC v. Google LLC,
No. 20-16472, 2022 WL 17427039 (9th Cir. Dec. 6, 2022).....21

Dyroff v. Ultimate Software Grp., Inc.,
934 F.3d 1093 (9th Cir. 2019).....25

e360Insight, LLC v. Comcast Corp.,
546 F. Supp. 2d 605 (N.D. Ill. 2008).....20

Enigma Software Group USA, LLC v. Malwarebytes, Inc.,
946 F.3d 1040 (9th Cir. 2019).....24

Esparza v. Safeway, Inc.,
36 Cal. App. 5th 42 (2019), *as modified on denial of reh’g* (June 28,
2019)..... 12, 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (continued)

Page(s)

Summers v. Earth Island Inst.,
555 U.S. 488 (2009)..... 13

Swipe & Bite, Inc. v. Chow,
147 F. Supp. 3d 924 (N.D. Cal. 2015)..... 11

Sybersound Recs., Inc. v. UAV Corp.,
517 F.3d 1137 (9th Cir. 2008)..... 12

UMG Recordings, Inc. v. Glob. Eagle Ent., Inc.,
117 F. Supp. 3d 1092 (C.D. Cal. 2015)..... 11

United States v. Bestfoods,
524 U.S. 51 (1998)..... 21

Universal Grading Serv. v. Ebay, Inc.,
No. C-09-2755, 2012 WL 70644 (N.D. Cal. Jan. 9, 2012), *aff'd*, 563 F.
App'x 571 (9th Cir. 2014) 9

Westside Ctr. Assocs. v. Safeway Stores 23, Inc.,
42 Cal. App. 4th 507 (1996)..... 10

Zango, Inc. v. Kaspersky Lab, Inc.,
568 F.3d 1169 (9th Cir. 2009)..... 4, 24

STATUTES

15 U.S.C. § 7701(a)(2)..... 4

15 U.S.C. § 7701(a)(3)..... 4

15 U.S.C. § 7701(a)(12)..... 4

47 U.S.C. § 230(c)(1) 23, 24, 25

47 U.S.C. § 230(c)(2) 22, 24

47 U.S.C. § 230(c)(2)(A) passim

47 U.S.C. § 230(c)(2)(B)..... 23, 24

47 U.S.C. § 230(e)(3) 24

Cal. Bus. & Pro. Code § 17200 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (continued)

Page(s)

RULES

Federal Rule of Civil Procedure 9(b)..... 15

Federal Rule of Civil Procedure 12(b)(6)..... 7

MEMORANDUM OF POINTS AND AUTHORITIES**I. Introduction**

Google, like almost every email service provider, uses sophisticated filtering technology to protect users of its free Gmail service from unwanted and dangerous spam emails. First Amended Complaint (“FAC”) ¶ 46. The Republican National Committee (“RNC”) directly benefits from Google’s spam filters because they make Gmail a safer, more convenient, and more popular platform for the RNC to engage with its supporters. FAC ¶¶ 21-23, 46. The RNC nevertheless seeks to hold Google liable for operating those spam filters, claiming that Google uses them to discriminate against the RNC’s emails based on the RNC’s “political affiliations and views.” FAC ¶ 1. This Court already dismissed the RNC’s claims once because they are implausible and legally defective. Dkt. 53, 2023 WL 5487311 (Aug. 24, 2023) (“Order”). The RNC’s Amended Complaint does not change that analysis. If anything, the Amended Complaint makes it even more clear that the RNC’s claims are based on nothing but speculation and unreasonable inferences.

After two failed opportunities to plead viable claims even with the benefit of this Court’s guidance, there is no reason to believe that the RNC will ever be able to state a claim for relief against Google on these theories. The Amended Complaint should accordingly be dismissed with prejudice.

* * *

The RNC sends millions of bulk emails to Gmail users every year. FAC ¶ 2. The RNC concedes that the vast majority of those emails have been and continue to be delivered to users’ inboxes. *Id.* But according to the RNC, that changed over a 10-month period in 2021 and 2022 when many of its emails to Gmail users were sorted into users’ spam folders (not inboxes) for one or a few days each month (primarily at the end of the month). FAC ¶¶ 26, 103. The RNC admits that all those emails were delivered to and accessible by the recipients. FAC ¶ 46. It also admits that

1 the alleged end-of-month “inboxing” fluctuations have stopped: the RNC does not
2 allege any drop in its inboxing rate since October 2, 2022. FAC ¶¶ 4, 103.

3 According to the RNC, those alleged inboxing fluctuations cannot be explained
4 by mundane aspects of bulk email administration, such as the volume, frequency, and
5 timing of the RNC’s emails and Gmail users’ reactions to them. Instead, the RNC says,
6 the only plausible explanation is that Google “relegated millions of RNC emails en
7 masse” to users’ spam folders because Google is “antagonistic” to the RNC’s political
8 views. FAC ¶¶ 2, 171. But the Amended Complaint reveals that the RNC’s allegations
9 are based on guess-work—not actual Google data. The RNC acknowledges that
10 “Google does not provide data on whether an email reaches a Gmail user’s inbox.”
11 FAC ¶ 36. And while the RNC allegedly hired a third-party vendor to attempt “a
12 statistical analysis ... to estimate the inboxing rate of the email[s] the RNC sent,” *id.*,
13 the RNC concedes that the inboxing rates that it alleges at FAC ¶ 4 and elsewhere are
14 mere “estimate[s].” FAC ¶ 36 (emphasis added).

15 Even assuming the RNC’s inboxing-rate estimates are accurate, they hardly
16 suggest a plot by Google to “secretly suppress[] the political speech and income of
17 one major political party.” FAC ¶ 171. There is nothing odd or remarkable about bulk
18 emails being sorted into spam folders, regardless of whether the sender is or is not a
19 political entity. See Matt Binder, *Gmail isn’t biased against Republicans. They’re just*
20 *bad at sending emails.*, Mashable (May 11, 2022), perma.cc/AW99-6B4B
21 (incorporated at FAC ¶ 108 n.6) (“It’s not unusual for mass email campaigns, like the
22 ones often sent by political campaigns, to land in a user’s spam folder.”). Sorting email
23 into spam folders happens every day for myriad reasons attributable to the actions of
24 the bulk sender, including sending too many emails in one period; not configuring
25 emails correctly; or because “a lot of Gmail users are marking ... messages as spam.”
26 FAC ¶ 61.

27 The allegations in the Amended Complaint strongly suggest that, if some of the
28

1 RNC's emails were treated as spam, then it was for those and other equally valid
2 reasons. The RNC concedes that the "average spam rate" of its bulk emails before it
3 filed this lawsuit "was approximately 0.14%" and sometimes as high as "0.3%." FAC
4 ¶ 42; see *id.* ("the spam rate is the percentage of emails marked as spam by users").
5 Importantly, that RNC spam rate is *at least 40% higher than it should be*, according to
6 both Google and the RNC's own vendors. Google advises all bulk senders that they
7 "should aim to keep their spam rate *below 0.10%*," and that "a spam rate of 0.30% or
8 higher should be avoided." *Prevent Mail to Gmail Users from Being Blocked or Sent to*
9 *Spam*, Google Help, perma.cc/95SX-5HJM (emphasis added) ("*Bulk Email*
10 *Recommendations*"); see FAC ¶ 32 (incorporating these "Gmail best practice[s]"). And
11 the RNC's vendor Salesforce, which "provides the RNC advice and expertise on
12 deliverability and inboxing" and "helps ensure the RNC minimizes its spam rate," FAC
13 ¶¶ 39, 43, agrees the appropriate "limit for spam complaints is 1 per every thousand
14 emails, or 0.1%," Salesforce, Abuse Reports, perma.cc/NQT6-556B?type=image.

15 Those admitted facts are wholly inconsistent with the RNC's representations
16 that "by any measure the RNC's e-mails are not spam" and "[t]here were ... no
17 significant complaints" that the RNC's emails "were spam." 07/13/2023 Hearing Tr.
18 ("Hearing.") 12:6-7, 9:16-17. And those facts are also fatal to the RNC's claims here. It
19 is uncontestable that "maintaining a high spam rate will lead to increased spam
20 classification," and that "[i]t can take time for improvements in spam rate to reflect
21 positively on spam classification." *Bulk Email Recommendations*. Thus, the RNC's
22 admitted average spam rate is an obvious reason why some of its millions of bulk
23 emails were sorted into spam folders. Because the RNC's entire case depends on the
24 premise "that the process by which the RNC's e-mails were diverted [to spam] was not
25 the ... normal functioning of a spam-filtering system," Hearing. 12:9-11, the RNC's
26 admittedly excessive spam rate is reason enough to reject the RNC's claims.

27 In short, just as the original complaint failed to allege facts plausibly suggesting
28

1 that Google discriminated against the RNC based on its “political affiliation,” FAC
2 ¶ 139, so too the Amended Complaint offers nothing to support that imaginative
3 reading of events. Rather, as explained in more detail below, the RNC’s allegations
4 continue to undermine rather than support its implausible theory. The Amended
5 Complaint should be dismissed with prejudice.

6 **II. Background**

7 **A. Gmail and Gmail’s spam filters**

8 Gmail is a free web-based email service offered by Google. Consumers who
9 agree to Google’s Terms of Service can create a Gmail account and use Gmail to
10 compose, view, and store emails. See FAC ¶ 9. But the RNC “is not a Gmail user.”
11 Order 36. The RNC is instead a bulk sender that sends emails via the Internet to Gmail
12 users. FAC ¶ 2; Order at 17-18.

13 The RNC’s claims turn on Gmail’s spam filters, which protect users from
14 unwanted and unsafe email content typically described as “spam.” Spam is a serious
15 problem. “[O]ver half of all [email] traffic” on the Internet consists of spam. Controlling
16 the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C.
17 § 7701(a)(2). And spam is not just irritating and distracting. It is also potentially
18 dangerous because it may contain malware, phishing attacks, and many other kinds of
19 harmful material. See, e.g., *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1171 (9th
20 Cir. 2009) (malware can “compromis[e] a user’s privacy, damag[e] computer files,
21 steal[] identities, or spontaneously open[] ... links to unwanted websites”); Order 34
22 (“[I]f Google did not filter spam,” then its users would be “subject[ed] ... to harmful
23 malware or harassing messages.”). As Congress has recognized, spam filtering is thus
24 essential to providing a safe and enjoyable experience for email users. See, e.g., 15
25 U.S.C. § 7701(a)(3) and (12) (encouraging “[t]he development and adoption of
26 technological approaches” to combat the harms of spam).

27 To determine whether each of the tens of billions of messages that Google
28

1 processes every day might be spam, Gmail necessarily uses “automated systems and
2 algorithms.” Dkt. 30-12 (Google Terms of Service) at 7; see Order 37-38 (“grant[ing]
3 judicial notice of th[is] document[]”). Those systems are “based on thousands of
4 signals” reflecting constantly changing conditions and inputs. *Get Started with*
5 *Postmaster Tools*, Gmail Help, perma.cc/33FE-ZPRA (cited at FAC ¶ 41). Relevant
6 signals include how frequently a particular email address is used to send emails; the
7 volume of emails that an address sends; “domain reputation,” which generally means
8 a domain’s history and volume of user complaints; whether an email address has the
9 same or “separate root domains” as another address; and more. FAC ¶¶ 4, 24-25. But
10 the most important signal is user input: “When Gmail users mark emails as spam, it
11 increases the likelihood that future messages [from that sender] will also be classified
12 as spam by [Google’s] anti-abuse systems.” Dkt. 30-13 (Gmail Program Policies) at 3;
13 see Order 37-38 (granting judicial notice of this document). The effectiveness of
14 Gmail’s spam filters is one of the main reasons that Gmail is, as the RNC alleges, “the
15 leading email service provider.” FAC ¶ 15.

16 Google works hard to help high-volume email senders like the RNC know how
17 to maximize their “inboxing rate”—the rate at which emails are placed in users’ inboxes
18 rather than their spam folders. FAC ¶¶ 35, 44-45, 61. Google publishes guidelines
19 and “Help Center” articles that explain how “bulk” senders can help prevent their
20 emails from being blocked or sent to spam. FAC ¶ 32 (citing *Bulk Email*
21 *Recommendations*). Google also offers free data and diagnostics tools to bulk
22 senders. FAC ¶¶ 61-64. Some senders retain vendors to help design and evaluate
23 their email campaigns, as the RNC allegedly did here. FAC ¶¶ 4, 39-40.

24 **B. The RNC’s claims against Google**

25 The RNC allegedly sends millions of bulk emails to Gmail users for “election
26 fundraising,” “community building,” and other purposes. FAC ¶ 2. The RNC concedes
27 that Gmail has delivered “nearly all” of the RNC’s bulk emails to users’ inboxes for
28

1 “most of each month.” *Id.* But starting in December 2021 and ending in early October
2 2022, Gmail allegedly sorted many RNC bulk emails into users’ spam folders for short
3 periods of time. Those “dips” in the RNC’s inboxing rate allegedly occurred for just a
4 few days during each of those months, typically (though not always) “at the end of
5 each month.” *Id.* For several of those months, it was either one or two days only.
6 FAC ¶ 103. The RNC acknowledges that the alleged monthly dips in its inboxing rate
7 stopped at some point after October 2, 2022, which the RNC attributes, without
8 explanation, to the filing of this case on October 21, 2022. FAC ¶¶ 4, 103.

9 The RNC asserts that Gmail sorted a fraction of its bulk emails into users’ spam
10 folders exclusively because of Google’s alleged disagreement with the RNC’s
11 “political affiliation and views.” FAC ¶ 1. And the RNC further asserts that, because of
12 Google’s allegedly discriminatory spam filtering, the RNC lost “valuable revenue” and
13 the “ability to communicate” with supporters during “critical” times. FAC ¶ 3.

14 Yet the Amended Complaint itself identifies multiple obvious explanations for
15 the alleged dips in the RNC’s inboxing rate that have nothing to do with the RNC’s
16 political views. The RNC acknowledges being told, for example, that “the issue could
17 be a result of” Google’s spam-filtering algorithm that “collects spam reports over the
18 course of the month and eventually causes a sender’s email to be diverted to ... spam”
19 for a period of time based on the cumulative effects of that reporting. FAC ¶ 85.
20 Nevertheless, according to the RNC, the “only reasonable inference” is that “Google
21 ... intentionally sen[t] critical RNC emails to ... spam folder[s] because [it was] the RNC
22 sending them.” FAC ¶ 3. The RNC does not allege that political entities or candidates
23 with different viewpoints did not also sometimes experience significant drops in their
24 inboxing rate. And although the RNC states that “its inboxing rates on [other email]
25 platforms did not reflect *any* dramatic cyclical decreases,” the Amended Complaint
26 itself does not support that claim: It shows instead that the RNC’s emails sent to
27 Microsoft (“MSN”) users experienced five dramatic inboxing-rate drops of 50 or more
28

1 percentage points in five separate months, including in the latter part of October
2 2022—just before the midterm election. FAC ¶ 105.

3 **C. This Court’s previous Order dismissing the RNC’s claims**

4 The RNC’s original complaint (Dkt. 1) asserted seven claims against Google.
5 The Court granted Google’s Rule 12(b)(6) motion and dismissed Counts One, Two,
6 Five, Six, and Seven “without leave to amend.” Order 23, 28, 35. For Counts Three and
7 Four—alleging a violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. &
8 Pro. Code § 17200, and the California state-law tort of intentional interference with
9 prospective economic relations—the Court found that the RNC had failed to establish
10 certain required elements but allowed the RNC to amend its complaint to try to
11 remedy those deficiencies. Order 28–30, 36–37.

12 As an additional ground for dismissal, the Court held that “Google is entitled to
13 immunity from [the RNC’s] suit under Section 230 of the Communications Decency
14 Act.” Order 6. Specifically, the Court recognized that Section 230(c)(2)(A) barred the
15 RNC’s claims because the RNC did not plausibly allege that Google acted with “an
16 absence of good faith” when it sorted some of the RNC’s emails into users’ spam
17 folders. Order 10. The Court granted the RNC leave to amend to attempt “to establish
18 a lack of good faith.” Order 15.

19 **III. Argument**

20 This Court’s Order dismissing the RNC’s original complaint in its entirety,
21 described at length the many flaws in its claims—including the only two claims that the
22 RNC was allowed to re-plead. And the Amended Complaint still fails to state any claim
23 upon which relief can be granted. The RNC continues to “lack[] a ‘cognizable legal
24 theory,’” and “its factual allegations” still “do not support a cognizable legal theory.”
25 Order 5 (quoting *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir.
26 2019)). Moreover, the Amended Complaint does nothing to undermine this Court’s
27 prior conclusion that Google’s spam-filtering decisions are protected by Section 230.

28

1 While the RNC offers conclusory assertions that Gmail’s spam filter operated in bad
2 faith, the RNC’s factual allegations still do not “raise a right to relief above the
3 speculative level” and instead reveal “obvious alternative explanation[s].” *Bell Atl.*
4 *Corp. v. Twombly*, 550 U.S. 544, 555, 567 (2007). The RNC accordingly does not
5 allege sufficient facts “to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
6 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).¹

7 **A. The RNC still fails to plead any intentional interference with its**
8 **prospective economic relations (Count Four).**

9 To state a claim for relief based on this tort, the RNC must show five elements:
10 “(1) the existence, between the plaintiff and some third party, of an economic
11 relationship that contains the probability of future economic benefit to the plaintiff;
12 (2) the defendant’s knowledge of the relationship; (3) intentionally wrongful acts
13 designed to disrupt the relationship; (4) actual disruption of the relationship; and
14 (5) economic harm proximately caused by the defendant’s action.” *Roy Allan Slurry*
15 *Seal, Inc. v. American Asphalt South, Inc.*, 2 Cal. 5th 505, 512 (2017).

16 This Court previously dismissed the RNC’s intentional-interference claim
17 because the RNC failed to allege, as required by the third element, that Google’s
18 “alleged interference constituted a separate, independently ‘wrongful act’ that would
19 be an appropriate predicate offense.” Order 30; see Order 28-30. The Court allowed
20 the RNC “to amend this claim to establish that [Google’s] conduct was unlawful by
21 some legal measure.” Order 30. But the RNC still does not do so. And it still fails to
22 allege disruption of any specific economic relationship.

23 **1. The RNC again does not plead any independently wrongful act.**

24 “[T]he act of interference with prospective economic advantage is not tortious

25 _____
26 ¹ The Amended Complaint alleges, in addition to the two live claims, each of the claims that this
27 Court previously dismissed *without* leave to amend. See FAC 42 n.7; Order 23, 28, 35 (dismissing
28 Counts One, Two, Five, Six, and Seven). The RNC acknowledges that it is not necessary “[u]nder Ninth
Circuit precedent” to re-plead those dismissed-with-prejudice claims to accomplish the RNC’s goal of
merely “preserv[ing]” them for “appeal.” FAC 42 n.7 (citing cases). Google rests on this Court’s prior
Order dismissing those claims with prejudice.

1 in and of itself." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159
2 (2003). Rather, the alleged interference must be "independently wrongful." *Id.* A
3 "plaintiff seeking to recover for" this tort "must plead ... that the defendant not only
4 knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was
5 wrongful by some *legal measure other than* the fact of interference itself." Order 28
6 (emphasis added) (quoting *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th
7 376, 393 (1995)). And "[a]n act is independently wrongful" only "if it is unlawful, that is,
8 if it is proscribed by some constitutional, statutory, regulatory, common law, or other
9 determinable legal standard." Order 28 (quoting *Korea Supply*, 29 Cal. 4th at 1159). A
10 "determinable legal standard" must "provide[] for, or give[] rise to, a sanction or
11 means of enforcement for a violation." Order 29 (quoting *Stevenson Real Est. Servs.,*
12 *Inc. v. CB Richard Ellis Real Est. Servs., Inc.*, 138 Cal. App. 4th 1215, 1223 (2006)).

13 Here, the RNC still fails to allege that Google's alleged spam filtering
14 constituted an "independently wrongful" act. Critically, the Amended Complaint does
15 not point to any new determinable legal standard that Google supposedly violated
16 when it sorted some of the RNC's emails to users' spam folders. See FAC ¶¶ 154-163.
17 Instead, the main thrust of the RNC's claim is that "Google's conduct is independently
18 wrongful to the extent that any asserted count (e.g., [California's Unruh Act], common
19 carrier [law], UCL) states a claim." FAC ¶ 158. But this Court dismissed virtually all
20 those counts "without leave to amend," Order 23, 28, so they cannot form the basis for
21 any "independently wrongful" conduct here. See *Universal Grading Serv. v. Ebay, Inc.*,
22 No. C-09-2755, 2012 WL 70644, at *11 (N.D. Cal. Jan. 9, 2012), *aff'd*, 563 F. App'x 571
23 (9th Cir. 2014). Nor can the RNC's UCL claim, which the RNC still fails to plausibly
24 plead for the reasons explained below at Part III.C.1.

25 The RNC's only other theory of independent wrongfulness is that Google
26 somehow "violat[e] established industry, trade or professional rules or standards,
27 such as Google's own terms of service and implied warranties." FAC ¶ 158. Those
28

1 allegations are implausible for all the reasons discussed below at Part III.C.1,
2 explaining why the RNC's admittedly high spam rates, rather than its political views,
3 provide the obvious explanation for the alleged dips in the RNC's inboxing rate. But
4 regardless, this Court has already explained that merely alleging "[t]hat a defendant's
5 conduct may be 'unethical' or may have violated industry standards is insufficient."
6 Order 29 (quoting *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, 95 Cal.
7 App. 4th 1249, 1259 (2002)). And as explained in the very case that the RNC invokes
8 (FAC ¶ 158), the RNC's vague references to "industry, trade or professional rules or
9 standards" fail for three independent reasons. First, the RNC does not even identify
10 those purported industry standards, let alone allege facts indicating that they are well-
11 defined and well-established. Second, the RNC does not explain how Google's
12 conduct supposedly violated those standards. And third, the RNC does not try to
13 show that any of the unnamed standards are backed by some "sanction or means of
14 enforcement for a violation." *Stevenson*, 138 Cal. App. 4th at 1223. Nor can the RNC
15 rely on Google's own terms of service because those terms apply only to Gmail users
16 and the RNC "is not a Gmail user." Order 36.

17 **2. Other required elements are also still missing.**

18 Even if the RNC could allege independently wrongful conduct, its intentional-
19 interference claim would still fail because it does not allege the remaining elements.

20 For one, the RNC still fails to plead the claim's first element: "a *specific*
21 economic relationship" that made it "reasonably probable that the prospective
22 economic advantage would have been realized but for defendant's interference."
23 *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 522, 525 (1996)
24 (citations omitted). As before, the RNC vaguely alleges a relationship with "supporters
25 who are past, current, and future donors." FAC ¶ 161. But "vague allegations
26 regarding a relationship with an 'as yet unidentified'" individual do not suffice. *Soil*
27 *Retention Prods., Inc. v. Brentwood Indus., Inc.*, 521 F. Supp. 3d 929, 961 (S.D. Cal.

28

1 2021) (quoting *Weintraub Fin. Servs., Inc. v. Boeing Co.*, No. 20-cv-3484, 2020 WL
2 6162801, at *8 (C.D. Cal. Aug. 7, 2020)). The RNC must instead allege a “relationship
3 with a particular individual.” *UMG Recordings, Inc. v. Glob. Eagle Ent., Inc.*, 117 F.
4 Supp. 3d 1092, 1117–1118 (C.D. Cal. 2015) (citations omitted). It does not even try to
5 do so: The Amended Complaint has no concrete allegations about specific donors,
6 their relationship with the RNC or their donation history, or what made it “reasonably
7 probable” that they would have donated if only specific RNC emails had been sorted
8 into their inbox folders rather than their spam folders. *Soil Retention*, 521 F. Supp. 3d
9 at 961; see *id.* at 962 (dismissing claim where the plaintiff “never allege[d] which
10 entities, if any, it was negotiating with, what the terms were, when the contracts were
11 being negotiated” and “how much money, if any, Plaintiff lost as a result”).

12 Because the RNC fails to plead specific relationships with specific individuals, it
13 also necessarily fails to plead that Google knew of those relationships. See *Swipe &*
14 *Bite, Inc. v. Chow*, 147 F. Supp. 3d 924, 935 (N.D. Cal. 2015) (dismissing intentional-
15 interference claim where “Plaintiff merely alleges that [the defendant] knew of the
16 agreements [Plaintiff] had with ‘contractors, vendors, employees, and customers’”);
17 *Soil Retention*, 521 F. Supp. 3d at 962 (claim held insufficient where plaintiff pleaded
18 no “specified third party”). The RNC asserts that it told Google that “the end-of-month
19 and end-of-quarter periods are vital times in to [sic] communicate in these
20 relationships.” FAC ¶ 159. But by not identifying any relationship with anyone in
21 particular, the Amended Complaint provides no basis to infer that Google had
22 knowledge of those relationships. See *Johnson v. Meta Platforms, Inc.*, No. 22-cv-
23 05691, 2023 WL 5021784, at *4 (N.D. Cal. Aug. 4, 2023) (dismissing intentional-
24 interference claims where plaintiff did not “allege that [the defendant] knew about
25 particular [business] relationships”).

26 The fourth and fifth elements require the RNC to plausibly show “actual
27 disruption of [its] existing ... relationship[s] with supporters” and proximately-caused
28

1 economic harm. FAC ¶ 161. But the Amended Complaint again offers “nothing more
2 than conclusory allegations, unsupported by facts, that the [RNC’s] economic
3 relationship was disrupted.” *Soil Retention*, 521 F. Supp. 3d at 963; see also
4 *Sybersound Recs., Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008) (affirming
5 dismissal where plaintiff did “not allege ... that it lost a contract nor that a negotiation
6 with a Customer failed”). The RNC asserts merely “[o]n information and belief” that
7 “Google has caused hundreds of thousands of dollars, if not more, in damages to the
8 RNC to date, and the long-term consequential losses likely total in the millions of
9 dollars.” FAC ¶ 162. If the RNC has a good-faith basis for verifying under oath millions
10 of dollars in losses, then it should be able to describe at least one person who would
11 have donated but did not do so because the RNC’s emails were placed in that
12 person’s spam folder. The RNC’s failure to do so is fatal. See *Soil Retention*, 521
13 F. Supp. 3d at 963 (dismissing claim where plaintiff alleged that it “has incurred and
14 will continue to incur harm in the form of losses, costs, damages, and expenses” but
15 failed “to allege what these losses are”).

16 **B. The RNC still fails to state a claim for relief under California’s Unfair**
17 **Competition Law (Count Three).**

18 This Court previously dismissed the RNC’s UCL claim because it failed to plead
19 “a plausible theory of unfairness or unlawfulness.” Order 37. The Amended Complaint
20 does not cure that deficiency. And the RNC’s UCL claim now fails for another,
21 independent reason: the Amended Complaint confirms the RNC has no available
22 remedy under California law.

23 **1. The RNC fails to plead a remedy under the UCL.**

24 The only remedies available in private actions under the UCL are restitution and
25 injunctive relief. See *Korea Supply*, 29 Cal. 4th at 1144; *Esparza v. Safeway, Inc.*, 36 Cal.
26 App. 5th 42, 53 (2019), as modified on denial of reh’g (June 28, 2019). The RNC is not
27 seeking restitution; that word does not appear in the Amended Complaint.²

28 ² Nor could the RNC seek restitution under the UCL, which “operates only to return to a person

1 The RNC does request an injunction, FAC ¶ 153, but the Amended Complaint
 2 shows that the RNC is not entitled to one. To have Article III standing to seek injunctive
 3 relief, “a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is
 4 concrete and particularized; the threat must be actual and imminent, not conjectural
 5 or hypothetical; it must be fairly traceable to the challenged action of the defendant;
 6 and it must be likely that a favorable judicial decision will prevent or redress the
 7 injury.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). California law similarly
 8 provides that injunctive relief exists to prevent future harm and can be awarded only if
 9 there is a “threat of continuing misconduct.” *Madrid v. Perot Sys. Corp.*, 130 Cal. App.
 10 4th 440, 463 (2005). “An injunction should not be granted as punishment for past acts
 11 where it is unlikely that they will recur.” *In re Tobacco II Cases*, 46 Cal. 4th 298, 320
 12 (2009) (citation omitted). Thus, when the plaintiff acknowledges that the complained-
 13 of conduct has ceased, mere allegations that the plaintiff was previously harmed are
 14 not enough. See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 422 (2013)
 15 (plaintiffs lacked standing to seek injunctive relief because “they cannot demonstrate
 16 that the future injury they purportedly fear is certainly impending”); *City of Los*
 17 *Angeles v. Lyons*, 461 U.S. 95, 105-107 (1983) (“[Plaintiff’s] standing to seek the
 18 injunction requested depended on whether he was likely to suffer future injury from
 19 the” defendant’s practice challenged in the complaint.); *Madrid*, 130 Cal. App. 4th at
 20 465 (affirming demurrer to UCL claim because plaintiff failed to show another incident
 21 likely to occur).

22 Here, nothing in the Amended Complaint suggests that the RNC is in “actual or
 23 imminent” danger of future harm. The RNC instead admits that, for more than a year
 24 now, “Google has stopped the [alleged] mass relegation of RNC emails to subscribers’

25 _____
 26 those measurable amounts which are wrongfully taken by means of an unfair business practice.”
 27 *Esparza*, 36 Cal. App. 5th at 53 (citation omitted). The RNC’s alleged harm is limited to lost “revenue,”
 28 FAC ¶ 3, which is a form of lost profits. See *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*,
 762 F.3d 829, 843 (9th Cir. 2014) (treating lost revenue as part of calculation of lost profits). And “[l]ost
 profits are damages, not restitution,” which means they are “unavailable in a private action under the
 UCL.” *Lee v. Luxottica Retail N. Am., Inc.*, 65 Cal. App. 5th 793, 797 (2021).

1 spam folders.” FAC ¶ 4. The RNC asserts, with no supporting facts, that it “will
2 continue to suffer irreparable injury to its reputation, goodwill, recruitment efforts,
3 community outreach, and control over its communications.” FAC ¶¶ 113, 152. But
4 those vague and conclusory allegations do not move the needle. The RNC does not
5 even try to explain why it is in “actual or imminent” danger of being harmed by
6 alleged spam filtering that it acknowledges ended a year ago and has not recurred.

7 **2. The RNC again fails to plead fraudulent, unlawful, or unfair conduct.**

8 Even if the RNC could show standing to seek injunctive relief, it still fails to
9 plead any unlawful or unfair conduct. This Court previously dismissed the RNC’s UCL
10 claim because it failed to state a claim under any potential theory of UCL liability.
11 Order 36–37. The Amended Complaint should be dismissed for the same reason.³

12 **First**, the RNC grounds its “unlawfulness” theory mainly on claims from its
13 original complaint, including “California’s common-carrier laws, the Unruh Act, and
14 common-law prohibitions against negligence.” FAC ¶ 144. This Court already
15 explained why none of those claims is legally cognizable and dismissed them all
16 “without leave to amend.” Order 23, 28, 35. Thus, none of those claims can support
17 the RNC’s UCL claim. Order 37 (“Only claims which were sufficiently plead[ed] may
18 serve as a predicate claim.”). That means the only possible grounding for the RNC’s
19 unlawfulness theory is its claim for intentional interference with prospective economic
20 relations. But that renders the Amended Complaint entirely circular: the RNC claims in
21 Count Three that Google violated the UCL by engaging in intentional interference
22 with prospective economic relations, and then claims in Count Four that Google
23 committed that tort by violating the UCL. In any case, the RNC’s intentional-
24 interference claim fails for all of the reasons explained above in Part III.A.

25
26
27 ³ The Court granted the RNC leave to amend only its arguments under the UCL’s “unlawful” and
28 “unfairness” prongs, not the “fraudulent” prong. Order 37. As a result, the Amended Complaint alleges
only that Google engaged in “unlawful” or “unfair” conduct. FAC ¶¶ 144–145.

1 **Second**, as before, much of the RNC’s unfairness theory still “sounds in fraud.”
2 Order 36. Specifically, the RNC still says that Google falsely “presents Gmail as an
3 email service provider that delivers emails in a fair and good-faith manner.” FAC
4 ¶ 151. To prevail on that theory, the RNC must allege *with particularity* under Federal
5 Rule of Civil Procedure 9(b) both (1) that “Google misrepresented how it would deliver
6 emails,” and (2) that the RNC relied on those purported misrepresentations. Order 36.
7 The Amended Complaint does not identify any specific misrepresentation by Google,
8 much less in a way that comports with Rule 9(b)’s requirements. Order 36–37. Nor
9 does it speak to any *reliance* by the RNC on any representation by Google.

10 **Third** and last, the RNC’s theory of “unfairness” still hinges largely on the
11 accusation that Google applied its spam filters to the RNC’s emails in a discriminatory
12 manner. FAC ¶¶ 146–151. But that theory continues to be utterly implausible and
13 undermined by the Amended Complaint itself, as described in Part III.C.1 below.

14 **C. Google is immune to the RNC’s claims under Section 230 of the**
15 **Communications Decency Act.**

16 In addition to the deficiencies above, the RNC’s claims fail because they are
17 barred by Section 230 of the Communications Decency Act. Congress passed Section
18 230 “to promote the free exchange of information and ideas over the Internet and to
19 encourage voluntary monitoring for offensive or obscene material.” *Carafano v.*
20 *Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003). “[T]he Circuits are in
21 general agreement that [Section 230] should be construed broadly in favor of
22 immunity.” *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019). That view is
23 consistent with the legislative purpose of Section 230, which is “to protect defendants
24 ‘not merely from ultimate liability, but from having to fight costly and protracted legal
25 battles.’” Order 6 (quoting *Fair Hous. Council of San Fernando Valley v.*
26 *Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc)).

27 Here, the RNC seeks to hold Google liable based on its “voluntary monitoring”
28 for emails that are unwanted or potentially harmful to users—exactly the conduct that

1 Congress immunized with Section 230. The Court should dismiss the RNC’s Amended
2 Complaint for that reason, too.

3 **1. The RNC still fails to plausibly allege that Google did not act in “good**
4 **faith,” so its claims are barred by Section 230(c)(2)(A).**

5 Section 230(c)(2)(A) immunizes a “provider” “of an interactive computer service”
6 from liability based on “any action voluntarily taken *in good faith* to restrict access to
7 or availability of material that the provider or user considers to be,” among other
8 things, “harassing, or otherwise objectionable.” 47 U.S.C. § 230(c)(2)(A) (emphasis
9 added). In its earlier order dismissing the RNC’s claims, this Court held that Google
10 met all the requirements of Section 230(c)(2)(A) immunity, Order 6–9, and that the
11 RNC failed to plausibly allege “the absence of good faith” in Gmail’s spam-filtering
12 decisions, Order 10. The Court accordingly held that Section 230(c)(2)(A) barred all
13 the RNC’s claims, including its two remaining live claims. Order 12. The Court granted
14 the RNC leave to amend solely to try, once more, to show the absence of good faith.
15 Order 15. The Amended Complaint does not carry that burden.

16 The RNC’s core theory is that Google failed to act in good faith because
17 Google’s spam-filtering decisions were driven by discriminatory political animus. FAC
18 ¶ 1. As in its original complaint the RNC sprinkles throughout the Amended
19 Complaint vague accusations that Google’s conduct was “bad-faith” discrimination or
20 “lack[ed] good faith.” FAC ¶¶ 3, 12. But “mere conclusory statements[] do not suffice”;
21 “they must be supported by factual allegations.” *Iqbal*, 556 U.S. at 678, 679; see
22 *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 604 (S.D.N.Y. 2020) (conclusory
23 allegations of bad faith do not defeat Section 230(c)(2)(A) immunity, especially when
24 other allegations reveal an obvious alternative explanation), *aff’d*, No. 20-616, 2021
25 WL 4352312 (2d Cir. 2021).

26 Further, the new allegations in the Amended Complaint directly conflict with
27 the RNC’s claims of bad faith. The RNC now concedes that Google advises—as does
28

1 the RNC’s own vendor Salesforce—that user-reported spam rates exceeding 0.10% can
2 “lead to increased spam classification,” especially if those rates reach “0.30% or
3 higher.” *Bulk Email Recommendations*; see also Salesforce, Abuse Reports,
4 [perma.cc/NQT6-556B?type=image](https://perma.cc/NQT6-556B) (“[S]pam complaints have a lasting negative
5 impact. The limit for spam complaints is 1 per every thousand emails, or 0.1%.”).
6 Nevertheless, the RNC’s “average spam rate” during the relevant period “was
7 approximately 0.14%,” and even hit “0.3%” at one point. FAC ¶ 42. Those admissions
8 alone provide an “obvious alternative explanation,” *Twombly*, 550 U.S. at 567, why
9 some of the RNC’s emails were sorted into spam folders. See *Iqbal*, 556 U.S. at 679
10 (courts considering a motion to dismiss should draw on “judicial experience and
11 common sense”). Nor can the RNC avoid that obvious explanation by emphasizing its
12 supposedly low spam reports in the few days before its inboxing rate allegedly
13 dropped. See, e.g., FAC ¶¶ 83–84, 103. The RNC acknowledges that “Google’s
14 algorithmic spamming system ... collects spam reports over the course of the month,”
15 not just the few days prior, rendering those allegations irrelevant. FAC ¶ 85.

16 The RNC demands that the Court reject that common-sense explanation and
17 instead conclude that “Google was intentionally sending critical RNC emails to the
18 spam folder because it’s the RNC sending them.” FAC ¶ 3. But even putting aside the
19 RNC’s admission about its excessive spam rate, the Amended Complaint does not
20 make that theory plausible. Rather, its allegations either undercut any inference of
21 discrimination or fail to speak to the issue at all.

22 **a. Several allegations in the Amended Complaint continue to**
23 **undermine the RNC’s discrimination theory.**

24 To start, the Amended Complaint details Google’s long-running and intensive
25 efforts to help address the RNC’s concerns and improve the performance of the RNC’s
26 bulk emails. See, e.g., FAC ¶¶ 31, 32, 41, 42, 44, 45, 54, 74, 78, 81, 82, 84, 89, 94, 95.
27 The RNC acknowledges, for example, that Google worked with the RNC “[f]or nearly a
28 year,” and even traveled to the RNC’s office in August 2022 to “give a training” on

1 “Email Best Practices.” FAC ¶¶ 52, 88, 94. As this Court already observed, “[t]he fact
2 that Google engaged with the RNC for nearly a year and made suggestions that
3 improved email performance is inconsistent with a lack of good faith.” Order 11. That
4 common-sense observation remains just as true now.⁴

5 Relatedly, it is not plausible to infer that Google “discriminated” just because
6 Google employees allegedly did not immediately grasp or resolve the RNC’s many
7 queries and complaints. See, e.g., FAC ¶¶ 52, 54, 61, 79, 85. Nobody disputes that
8 Google’s spam filters are complex and necessarily rely on sophisticated algorithms. If
9 the mere alleged failure to quickly diagnose complex technological issues could
10 support an inference of bad faith, then Section 230(c)(2)(A) would be meaningless.

11 Moreover, the A/B testing described in both the original complaint and the
12 Amended Complaint undermines the RNC’s discrimination theory. If Google was truly
13 “suppress[ing] ... emails because it was the RNC sending them,” FAC ¶ 51, then
14 Google would have sent *all* the RNC’s test emails to spam—as this Court has observed.
15 Order 11. But that is admittedly not what happened. FAC ¶¶ 56, 57. Thus, as the
16 RNC’s counsel “conceded” at oral argument on the prior motion to dismiss, the “A/B
17 test[ing] does not support a finding that emails are being filtered because the RNC is
18 sending them or because the emails contain political content.” Order 12. That test
19 instead bolsters the obvious alternative explanation that “it was not the substantive
20 content or sender of the email, but rather some other factor, such as the different links
21 contained with the email or some other technical feature of the email, that was
22 triggering application of the spam filter.” Order 11-12.

23 It is also telling that the RNC’s discrimination theory is inherently contradictory

24
25 ⁴ The RNC’s insinuation that Google’s efforts to help the RNC were a mere pretext for
26 intentional discrimination is a classic heads-I-win-tails-you-lose argument. If Google had *not*
27 communicated and worked with the RNC for months, then the RNC would surely have argued that
28 Google’s *refusal* to communicate showed bad faith. Cf. *Holomaxx Techs. v. Microsoft Corp.*, 783 F.
Supp. 2d 1097, 1105 (N.D. Cal. 2011) (holding that defendant’s “refus[al] to discuss in detail its reasons
for filtering ... e-mails or to provide an acceptable remedy” were insufficient to show a lack of good
faith, and rejecting plaintiff’s argument to the contrary). Indeed, the RNC does just that elsewhere in its
Amended Complaint. See, e.g., FAC ¶ 52 (“Google fell silent ...”).

1 and implausible. If Google really was trying to disrupt the RNC’s operations, then why
2 send its emails to spam only one or a few days per month? In an attempt to explain
3 away that huge hole in its case, the RNC says the end of month is “historically when
4 the RNC’s fundraising is most successful.” FAC ¶ 2. But in the very next sentence, the
5 RNC acknowledges that “[i]t d[id]n’t matter whether the email[s] [sent to spam were]
6 about donating, voting, or community outreach.” *Id.* Moreover, the Amended
7 Complaint reveals that the alleged drops in the RNC’s inboxing rate did not truly
8 happen only at the end of the month: The alleged drops in June, July, and August
9 were each only a single day and were followed by recovery for the final days of the
10 month that the RNC considers are the most important. FAC ¶ 103. The post-drop
11 recoveries in February and March gave the RNC high inboxing for almost the entire
12 final week of those months. FAC ¶¶ 103-104. And in February 2022, the RNC alleges
13 that its inboxing rates decreased below 40% at least three times at the beginning and
14 middle of the month (February 1-4, 8-15, and 20-22), while its inboxing rate allegedly
15 stayed above 80% at the end of the month. FAC ¶ 4.⁵

16 The RNC’s own allegations thus undermine any inference that Google targeted
17 the RNC’s end-of-month emails, let alone did so for political reasons.

18 **b. The RNC’s remaining allegations do nothing to support its**
19 **discrimination theory.**

20 Nothing in the RNC’s remaining series of allegations makes its discrimination
21 theory any more plausible than when this Court previously rejected it.

22 ⁵ In a similar vein, the Amended Complaint undermines the RNC’s attempt to support an
23 inference of discrimination based on the notion that the RNC “los[t] its ability to communicate voting
24 information and other political messaging to its supporters during the critical [November 2022]
25 midterm elections.” FAC ¶ 3. In fact, according to the Amended Complaint, the RNC enjoyed more than
26 five weeks of uninterrupted high inboxing from October 3 through the November 8 midterm election.
27 See FAC ¶ 103. If in fact Google meant to impede the RNC’s donation and get-out-the-vote efforts,
28 wouldn’t Google have continued to impede those efforts “in November 2022” when “the RNC
increased its email send volume and frequency to Gmail users”? FAC ¶ 4. But Google concededly did
not; “no *en masse* diversion occurred.” FAC ¶ 4. The RNC also fails to reconcile its discrimination theory
with its own allegations that Google did not divert the RNC’s emails during the 2020 presidential
election when the RNC allegedly sent emails almost “hourly” and sent more than four times as many
emails as in 2022. FAC ¶¶ 50, 51.

1 **First**, the RNC’s many allegations about the “highly sophisticated” measures it
2 takes to avoid having its emails flagged as spam do not help the RNC’s cause. FAC
3 ¶ 30; see FAC ¶¶ 24-26, 28-34, 39-45. As explained above, the RNC admittedly did
4 not follow Gmail’s and its own vendor’s instructions to keep its spam rate below 0.1%.
5 See FAC ¶ 42 and pages 3, 17, *supra*. That alone is reason enough to reject the RNC’s
6 other, far less plausible explanation for the alleged dips in its inboxing rate.

7 The RNC makes much of the assertion that its emails are sent only to recipients
8 who “requested” them and/or who have “shown recent active engagement with RNC
9 content.” FAC ¶ 1; see *also* FAC ¶¶ 27-32. But as this Court has observed, the mere
10 fact that “a user interacts with a company at one point in time does not mean that the
11 user ‘solicits’ each and every email sent by the entity.” Order 8. For that reason and
12 others, Google could reasonably consider the RNC’s bulk emails to be spam based on
13 users’ flags and other signals—“just as it can for other email senders”—even if the
14 intended recipients “‘elected voluntarily to receive such correspondence or
15 [otherwise] ‘opted-in’” at some point earlier. Order 9 (quoting *Holomaxx*, 783 F. Supp.
16 2d at 1104); *cf. e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 609 (N.D. Ill.
17 2008) (“[C]ompliance with CAN-SPAM, Congress decreed, does not evict the right of
18 the provider to make its own good faith judgment to block mailings.”).

19 **Second**, the RNC continues to rely on a study from researchers at North
20 Carolina State University purportedly showing that Gmail sends to spam more emails
21 from Republicans than Democrats. FAC ¶ 107. As this Court already held, however,
22 “this study is insufficient ... to meet the pleading requirements.” Order 10. “[T]he study
23 itself does not attribute any motive to Google”; “the study indicates that all three email
24 programs considered—Google, Outlook, and Yahoo—had a political bias”; and “a more
25 plausible reason for the left-leaning bias was user input, not bad faith efforts on the
26 part of Google.” Order 10-11.

27
28

1 **Third**, the RNC’s allegation that “Google has a history of telling its employees
2 not to put in writing certain statements that might show an appearance of
3 impropriety” is a non sequitur. FAC ¶ 110. Even assuming that to be true at this stage,
4 instructions to employees about memorializing unrelated issues have nothing to do
5 with whether Google filtered the RNC’s emails based on political viewpoint.

6 **Fourth**, the RNC alleges that “Google has also exhibited bias against
7 individuals and entities that affiliate with the RNC or its viewpoints” through “other
8 services,” including YouTube. FAC ¶ 109. That too is a non sequitur. YouTube is not
9 Google; it is a separate entity “owned by Google.” FAC ¶ 109. And the supposed
10 conduct of a distinct entity that offers video services is not remotely plausible
11 evidence of Google’s motives and actions in offering email services. See *United States*
12 *v. Bestfoods*, 524 U.S. 51, 61 (1998) (describing the “general principle of corporate law
13 deeply ‘ingrained in our economic and legal systems’ that a parent corporation ... is
14 not liable for the acts of its subsidiaries”) (citation omitted).

15 **Fifth**, the RNC seems to suggest that Google must have discriminated against it
16 because, since “October 21, 2022, when the RNC filed this suit,” Google has stopped
17 the “mass relegation” of RNC emails to spam. FAC ¶ 4; see *also, e.g.*, FAC ¶¶ 49-51,
18 102, 104. But even if the Amended Complaint actually establishes the RNC’s timeline,
19 its reasoning *post hoc ergo propter hoc*—after the lawsuit, therefore because of it—is a
20 logical fallacy, not a plausible inference. See, *e.g.*, *Dreamstime.com, LLC v. Google*
21 *LLC*, No. 20-16472, 2022 WL 17427039, at *2 n.4 (9th Cir. Dec. 6, 2022) (mem.)
22 (“[plaintiff]’s assertion that [Google’s] algorithmic revision caused [plaintiff] harm boils
23 down to ... a common logical fallacy that states that if event x followed event y, then y
24 must have been caused by x”). In other words, the sole fact that the RNC’s inboxing
25 rate purportedly increased after the filing of the lawsuit and after the November 2022
26 election does not suggest, much less plausibly show, that Gmail stopped sending the
27 RNC’s emails to spam *because* of those events. Equally important, nothing in the
28

1 Amended Complaint establishes when the change occurred between October 3 and
2 31, making it equally plausible that the inboxing issue was resolved *before* this case
3 was filed on October 21.

4 * * *

5 In sum, while the RNC's allegations must be taken as true at this stage, they do
6 not raise the RNC's discrimination theory above the speculative level. And they
7 certainly do not show a complete absence of good faith by Google sufficient to
8 overcome statutory immunity. *See Daniels v. Alphabet, Inc.*, No. 20-cv-04687, 2021
9 WL 1222166, at *12 (N.D. Cal. Mar. 31, 2021) (plaintiff failed to allege lack of good
10 faith where the complaint "contain[ed] no plausible factual allegations suggesting that
11 [defendant] did not consider the [plaintiff's] content ... objectionable and/or contrary
12 to its stated policies and guidelines"). If plaintiffs could evade Section 230(c)(2)(A)
13 simply by pointing to filtering results with which they disagree and then speculating
14 that those results were caused by impure motives—as the RNC does here—then Section
15 230(c)(2)(A) would be eviscerated. *See Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th
16 Cir. 2016) (refusing "to open the door to ... artful skirting" of Section 230, and
17 affirming district court's dismissal of a complaint that sought to "circumvent the CDA's
18 protections through 'creative' pleading"). Accordingly, courts have recognized that
19 "[t]o force a provider ... to litigate the question of whether what it blocked was or was
20 not spam would render § 230(c)(2) nearly meaningless." *e360Insight*, 546 F Supp. 2d
21 at 609.) In addition, allowing plaintiffs to end-run around Section 230(c)(2)(A) in that
22 manner would force providers to routinely reveal proprietary information about their
23 filtering technologies, jeopardizing users' safety and undermining Congress's intent to
24 encourage the development of such technologies. *See Holomaxx*, 783 F. Supp. 2d at
25 1105 (forcing providers to explain "in detail" their filtering decisions "would be
26 inconsistent with the intent of Congress to 'remove disincentives for the development
27 and utilization of blocking and filtering technologies'" (quoting 47 U.S.C. § 230(b)(4)).

28

1 And as this Court has observed, it would also “place courts in the business of
2 micromanaging ... filtering systems,” contrary to Congress’s intent. Order 13.

3 Fortunately, this Court need not invite those results. Even after multiple tries,
4 the RNC’s allegations do not come close to alleging an “absence of good faith.” Order
5 10. To the contrary, the RNC’s allegations remain entirely “inconsistent with such a
6 conclusion.” Order 12. Section 230(c)(2)(A) therefore bars the RNC’s claims.

7 **2. The RNC’s claims are also barred by the separate immunity provisions**
8 **of Section 230(c)(2)(B) and Section 230(c)(1).**

9 Because this Court held that Section 230(c)(2)(A) barred the RNC’s claims, it did
10 not need to consider whether Google was also entitled to immunity under Section
11 230(c)(2)(B) or Section 230(c)(1) of the Communications Decency Act. If the Court
12 were to decide that the RNC has now successfully alleged an absence of good faith
13 and therefore avoided Section 230(c)(2)(A) immunity at the pleading stage, it should
14 nevertheless hold that Google is immune under Section 230(c)(2)(B) and Section
15 230(c)(1), neither of which includes a good-faith limitation.

16 **First**, Section 230(c)(2)(B) immunizes Google against claims based on “any
17 action” taken to “enable” or “make available” the “technical means to restrict access
18 to” harassing or otherwise objectionable material, including spam. 47 U.S.C.
19 § 230(c)(2)(B). That language squarely applies to the RNC’s claims. The RNC admits
20 that Google’s spam filters are “technical means” of restricting access to content that
21 Gmail users may consider harassing or otherwise objectionable. FAC ¶ 46 (“Google
22 intercept[s] certain messages intended for its users that comprise unsolicited and
23 unwanted bulk-emailed messages and placed them in a separate folder, called the
24 spam folder.”). Nor could the RNC argue otherwise. See Dkt. 30-12 at 4 (judicially
25 noticed) (“[Google is] constantly developing new technologies and features to
26 improve our services. For example, we use artificial intelligence and machine learning
27 to ... better detect and block spam and malware.”).

28 Moreover, as Google explained previously, the RNC’s claims are based solely

1 on “action[s]” that Google allegedly took to “enable” and “make available” spam-
 2 filtering for its users’ benefit. 47 U.S.C. § 230(c)(2)(B). Specifically, the RNC seeks to
 3 impose liability for the actions that Google allegedly took that caused that its spam
 4 filters, informed especially by users’ spam designations, to filter the RNC’s emails. FAC
 5 ¶ 3. That is “exactly the type of self-regulation” that Congress sought to encourage
 6 and immunize when it enacted Section 230(c)(2)(B). *Divino Grp. LLC v. Google LLC*,
 7 No. 19-cv-04749, 2022 WL 4625076, at *18 (N.D. Cal. Sept. 30, 2022).

8 Nor is it legally relevant whether a user in fact submits feedback or whether that
 9 feedback is the asserted basis for the provider’s liability. Section 230(c)(2)(B) applies
 10 whenever a provider, like Google, “has ‘made available’ for its users the technical
 11 means to restrict access to” harassing or objectionable materials—even if that provider
 12 makes the filtering decisions. *Zango*, 568 F.3d at 1175, 1176. The RNC admits that
 13 Google provides this spam filtering “[a]s a service to its users.” FAC ¶ 46. That is
 14 sufficient to make Google immune to the RNC’s claims under Section 230(c)(2)(B).⁶

15 **Second**, Section 230(c)(1) states that “[n]o provider or user of an interactive
 16 computer service shall be treated as the publisher or speaker of any information
 17 provided by another information content provider.” 47 U.S.C. § 230(c)(1). And “[n]o
 18 cause of action may be brought and no liability may be imposed under any State or
 19 local law that is inconsistent with” that command. 47 U.S.C. § 230(e)(3). Section
 20 230(c)(1) “at its core” “bars ‘lawsuits seeking to hold a service provider liable for its
 21 exercise of a publisher’s traditional editorial functions—such as deciding whether to
 22
 23

24 ⁶ The RNC previously argued that the spam filtering at issue here falls outside the scope of
 25 Section 230(c)(2)(B) because it was politically motivated. *Cf. Enigma Software Group USA, LLC v.*
 26 *Malwarebytes, Inc.*, 946 F.3d 1040, 1047 (9th Cir. 2019) (“[F]iltering decisions that are driven by
 27 anticompetitive animus are not entitled to immunity under Section 230(c)(2)”). But nothing in the
 28 Amended Complaint establishes that Google’s spam-filtering decisions were motivated by political
 animus or any other illegitimate motive, as explained above in Part III.C.1. And in any event, the Ninth
 Circuit has not held that spam-filtering decisions motivated by “political” factors—an unadministrable
 standard if ever there was one—fall outside the scope of Section 230(c)(2)(B). *Cf. Order 13* (“[T]he RNC
 offers no limiting principle as to how much ‘bias’ is permissible, if any.”)

1 publish, withdraw, postpone or alter content.” *Jones v. Dirty World Ent. Recordings*
2 *LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (citation omitted).

3 The Court has already held that Gmail is an “interactive computer service,”
4 Order 6, and the RNC admits (as it must) that the emails allegedly sorted into users’
5 spam folders were authored by the RNC, not Google. FAC ¶ 22. Thus, the only
6 remaining question under Section 230(c)(1) is whether the RNC seeks to hold Google
7 liable for its “exercise of a publisher’s traditional editorial functions.” *Jones*, 755 F.3d
8 at 407. The answer is “yes.” Simply stated, the RNC seeks to hold Google liable for
9 how Google arranged and displayed the RNC’s emails within Gmail. Order 20 (“There
10 is no allegation that Google declines to deliver emails, but rather that it chooses how
11 to characterize them, e.g., as ‘spam.’”). But as Google explained in its first motion to
12 dismiss, making choices about how to “arrang[e] and display[] others’ content” to
13 make it more “usable” is an essential editorial function protected by Section
14 230(c)(1). *Force*, 934 F.3d at 70; see *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d
15 1093, 1098 (9th Cir. 2019) (Section 230(c)(1) barred claims based on use of
16 automated “features and functions” to organize and display content). Section
17 230(c)(1) therefore squarely applies to this case, and the RNC’s claims should be
18 dismissed on that ground as well. See *Sikhs for Just. “SFJ,” Inc. v. Facebook, Inc.*, 144
19 F. Supp. 3d 1088, 1095-96 (N.D. Cal. 2015) (Section 230(c)(1) barred claims based on
20 Facebook’s alleged “discrim[ination] in “blocking Plaintiff’s [political] content”), *aff’d*,
21 697 Fed. App’x 526 (9th Cir. 2017); *Divino Group*, 2022 WL 4625076, at *15-17
22 (section 230(c)(1) barred claims based on the defendant’s alleged “decisions to
23 remove, restrict, or demonetize” plaintiffs’ content).

24 **IV. Conclusion**

25 For the foregoing reasons, Google respectfully requests that this Court grant
26 this motion and dismiss with prejudice the RNC’s Verified First Amended Complaint.

27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: November 16, 2023

PERKINS COIE LLP

By: *Michael R. Huston*

Michael R. Huston (*pro hac vice*)

Sunita Bali, Bar No. 274108

Ryan Spear (*pro hac vice*)

Danielle Sivalingam, Bar No. 294369

Matthew Koerner (*pro hac vice pending*)

Tyler Fergusson, Bar No. 345065

Attorneys for Defendant Google LLC

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been served upon all counsel of record, via the Court's CM/ECF system on November 16, 2023, as follows:

Harmeet K. Dhillon (harmeet@dhillonlaw.com)
Michael A. Columbo (mcolumbo@dhillonlaw.com)
Jeremiah D. Graham (jgraham@dhillonlaw.com)
Anthony J. Fusaro, Jr. (afusaro@dhillonlaw.com)
DHILLON LAW GROUP INC.
177 Post Street, Suite 700
San Francisco, California 94108
Telephone: (415) 433-1700

Thomas R. McCarthy (tom@consovoymccarthy.com)
Thomas S. Vaseliou (tvaseliou@consovoymccarthy.com)
Conor D. Woodfin (conor@consovoymccarthy.com)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
Telephone: (703) 243-9423

Counsel for Plaintiff
Republican National Committee

/s/ Michael R. Huston

Michael R. Huston