

**LA PARK LA BREA A LLC V. AIRBNB, INC.**  
— F.3d —, 2017 WL 6799241 (Dec. 29, 2017)

*Gee, District Judge:*

**I.**

**PROCEDURAL BACKGROUND**

Currently before the Court is Defendants Airbnb, Inc.'s motion to dismiss [Plaintiffs'] (collectively, "Aimco") first amended putative class action complaint ("FAC") [which] raises several state law causes of action related to short-term rentals of Aimco properties on Airbnb's website that purportedly violate Aimco's lease agreement with its tenants. ...

For the reasons set forth below, the motion to dismiss is **GRANTED**. ...

**II.**

**FACTUAL BACKGROUND**

**A. Aimco**

Aimco owns and operates apartment buildings in Los Angeles County. It qualifies each prospective tenant through a lease application process and requires each approved tenant to execute a standard form lease. Every tenant's lease includes an anti-subleasing clause. Aimco's standard form lease provides:

**ASSIGNMENT.** Resident shall not sublet the Apartment or assign this Lease for any length of time, including, but not limited to, renting out the Apartment using a short term rental service such as Airbnb.com, VRBO.com or homeaway.com. Any purported assignment or sublet of this Lease or the Apartment Home without the prior written consent of Landlord is null and void.

**B. Airbnb**

Airbnb provides an online marketplace for both short-term and long-term housing accommodations wherein "hosts" lease or sublease their living space to "guests." Prospective hosts must "sign up" with Airbnb and create a listing for the available space that then becomes publicly viewable to prospective guests. The listings usually do not disclose hosts' real names or apartment numbers, which makes it hard for Aimco to enforce lessees' anti-assignment clause.

Rather than charge fees for publishing hosts' listings, Airbnb collects commissions from both hosts and guests for booked accommodations. To encourage and facilitate booking, Airbnb verifies personal profiles and listings; maintains a messaging system for hosts and guests; collects and transfers booking payments; offers free professional photography to hosts; calculates, collects, and remits local occupancy taxes on hosts' behalf in some jurisdictions; offers a "smart pricing" tool that automatically adjusts prices to match demand; provides a \$1,000,000 "host guarantee" in the event of property damage; provides "Host Protection Insurance" for third-party claims against hosts and landlords for both property damage and bodily injury; and reimburses guests in the event of a "travel issue" such as hosts' failure to provide guests reasonable access to the accommodation.

Airbnb generally refuses property owners' requests that Airbnb cease engaging in rental transactions with tenants whom Airbnb learns are violating their leases by engaging in short-term rentals. "Aware of growing concerns among property owners and residential communities regarding illegal subleasing activity and disruptive guest behavior," Airbnb launched the "Friendly Buildings Program," which is directed at homeowner's associations ("HOAs") and owners of multi-unit resi-

dential buildings. In exchange for being “friendly,” *i.e.*, allowing rentals through Airbnb, the program provides participating HOAs and multi-unit property owners a commission on Airbnb activity within their communities, as well as tools to oversee and manage those rentals, none of which is available to non-participants.

### C. Subleasing Activities and Their Effects

Short-term subleasing activities “brokered by Airbnb” have increased at Aimco’s properties. Aimco alleges that “Airbnb has brokered hundreds of unlawful subleas es at [its properties] during the past several years.”

Aimco’s tenants complain about unwanted noise, disturbances, property damage, and unspecified “other concerns” stemming from Airbnb guests, in breach of the Aimco lease. As a result, Aimco incurs costs related to increased security patrols; evicting Airbnb guests, as well as tenants violating their leases by hosting through Airbnb; repairing property damage caused by Airbnb guests; providing customer service resolutions to tenants disturbed by Airbnb guests; and legal proceedings involving both Airbnb guests and tenants violating their leases by hosting through Airbnb. Tenants frustrated with the Airbnb activity have left Aimco properties, and Aimco also alleges that Airbnb activities have caused Aimco and its properties “reputational harm.”

Because Airbnb listings provide host anonymity, Aimco contacted Airbnb to obtain information about how, through Airbnb’s booking or payment processing services, it could prevent “unlawful subleasing” at Aimco’s properties. “Recognizing that policing buildings and evicting tenants for violating their leases by subletting through Airbnb ‘is an expensive proposition,’ ” Airbnb responded with information about the Friendly Buildings Program. Airbnb also advised that, even outside the Friendly Buildings Program, it could “definitely” help Aimco remove unwanted listings for Aimco properties.

Aimco subsequently informed Airbnb that it was aware of several Airbnb listings violating its standard lease agreement and asked how to initiate the process for removing those listings and further precluding subleases breaching its lease agreements. Airbnb requested, and Aimco provided, a copy of Aimco’s lease agreement as well as copies of the pertinent listings and identification numbers. Airbnb then “reversed course” and advised Aimco that it does not review lease agreements or mediate disputes between hosts and property owners regarding leases.

Thereafter, Aimco notified Airbnb that any listings for its properties were in violation of Aimco’s standard lease, requested that Airbnb cease and desist its “unlawful activities” and “tortious interference” with Aimco’s lease agreements, and provided a list of every street address associated with Aimco’s properties so that Airbnb could cease engaging in such rental transactions. Airbnb reiterated that “[a]lthough [it is] unable to evaluate private contract terms and cannot arbitrate these disputes, [it] will share [Aimco’s] letter with the user[s] responsible for the listing[s],” and stated that Airbnb is merely an “online platform” that “does not own, operate, manage or control accommodations” but “requires hosts to represent that they have all the rights to list their accommodations.”

Airbnb allegedly “continues to actively promote, participate in, and receive compensation for” subleasing of apartments at Aimco’s properties despite “know [ing] that all hosts who rent [Aimco’s] apartments are not authorized to sublet their apartments to Airbnb guests and do not have [Aimco’s] permission to do so.” *Id.* at ¶¶ 52, 54; *see also id.* at ¶ 59 (“[W]hen it learns that a host is not the property owner and does not have the property owner’s permission to rent or sublet the

property,” Airbnb “continues to allow the rental listing to persist” and “continues to contract with hosts they know to be in violation of the host’s lease agreement.”).

## IV.

### DISCUSSION

#### A. Motion to Dismiss

Under Section 230(c)(1) of the CDA, “No 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.” 47 U.S.C. § 230(c)(1). Section 230’s preemption provision further states that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3). For the CDA to shield a party from liability, the party must be “(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009).

Notably, “section 230(c)(1) precludes liability that treats a website as the publisher or speaker of information users provide on the website.” *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016). “This grant of immunity applies only if the interactive computer service provider is not also an ‘information content provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the creation or development of’ the offending content.” *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (*en banc*) (quoting 47 U.S.C. § 230(f)(3)). ...

#### 2. Information Content Provider

Aimco argues that Airbnb is an “information content provider” that “contributes materially to the alleged illegality of the conduct”—lease-violating short-term rentals—and thus falls outside of the CDA’s grant of immunity. In support, Aimco asserts that Airbnb’s “conduct includes more than posting listings.”

First, the mere fact that Airbnb’s conduct “includes more than posting listings” does not *per se* mean that section 230 immunity is unavailable. Immunity is not foreclosed simply because a website offers more than a “bulletin board” service, or an online site on which Internet subscribers post comments and respond to comments posted by others. *See, e.g., Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (“[S]o long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.”). “While the majority of cases addressing CDA immunity may fit the bulletin board description, nothing in those cases or in the statutory language so limits the CDA’s application.” *Stoner v. eBay, Inc.*, No. 305666, 2000 WL 1705637, at \*3 (Cal. Super. Ct. Nov. 1, 2000).

The conduct alleged in the FAC, to which Aimco points in support of its content provider argument, consists of (1) requiring prospective hosts to include specific information about the property and themselves; (2) collecting payments and commissions; and (3) offering ancillary services, such as user information verification, messaging systems, photography, local occupancy tax collection and remittance, a pricing tool, host insurance, and a guest refund policy. The FAC also alleges conduct that includes operation of the “Friendly Buildings Program” and continued rental transactions with tenants whom Airbnb learns are violating their lease agreements by engaging in short-term rentals. Finally, the FAC alleges that

Airbnb offers an autocomplete search function and complains to Aimco properties when Airbnb guests are denied access to such reserved properties.

This conduct does not make Airbnb an information content provider. As stated above, an information content provider is statutorily defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3). The Ninth Circuit has narrowly interpreted this definition of “development” to provide “immunity for passive conduits” and preclude such immunity for “co-developers” who do “not merely ... augment[ ] the content generally, but ... materially contribut[e] to [the website’s] alleged unlawfulness.” *Roommates.Com*, 521 F.3d at 1167–68; *see id.* at 1167 (“It’s true that the broadest sense of the term ‘develop’ could include ... just about any function performed by a website. But to read the term so broadly would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides.”).

Accordingly, requiring prospective hosts to include information such as home type, room type, location, description, name, email address, and phone number when creating listings does not “materially contribut[e] to [the] alleged unlawfulness” of the listings because it does not “contribute[ ] materially to the alleged *illegality* of the conduct,” *i.e.*, the violation of the Aimco lease. *Roommates.Com*, 521 F.3d at 1168 (emphasis added). Similarly, offering ancillary services such as user information verification, messaging systems, photography, local occupancy tax collection and remittance, a pricing tool, host insurance, a guest refund policy, or an autocomplete search function does not materially contribute to the alleged unlawfulness. *See id.* at 1169 (“[P]roviding neutral tools to carry out what may be unlawful ... does not amount to ‘development’ for purposes of the immunity exception.”). Nor does operating the Friendly Buildings Program.

Here, what allegedly makes the listings “unlawful,” “illegal,” or “offending” is that they advertise rentals that violate Aimco’s lease agreements. Airbnb hosts—not Airbnb—are responsible for providing the actual listing information. Airbnb “merely provide[s] a framework that could be utilized for proper or improper purposes.” *Id.* at 1172. Thus, Airbnb “cannot be considered an ‘information content provider’ under the statute because no [listing] has any content until a user actively creates it.” *Carafano*, 339 F.3d at 1124. “[T]he critical information was provided by a third party,” and there is no indication that it was significantly developed or transformed by Airbnb. *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp.2d 1142, 1148 (D. Ariz. 2005). . . .

### 3. Treatment as Publisher or Speaker of User-Provided Information

The parties dispute the second and third elements of the test for CDA immunity. Airbnb argues that the FAC treats Airbnb as the publisher or speaker of information (Airbnb listings) that users (Airbnb hosts) provide on its website. Aimco counters that the FAC is not premised on the Airbnb listings, but on Airbnb’s own misconduct—contracting with Aimco’s tenants (or failing to refrain from contracting with Aimco’s tenants) and processing payments for rentals of Aimco-owned apartments. Opp’n at 32–33; *see also, e.g.*, FAC at ¶ 63 (“Information posted by prospective hosts on Airbnb’s website is not the basis for Airbnb’s liability here. Plaintiffs do not seek to hold Airbnb liable as a publisher or speaker of any such information generated by third parties.”). Aimco’s argument fails, and its creative pleading does not place this case outside the CDA’s purview.

Aimco bases its argument on Airbnb’s profit from listings that violate Aimco’s lease agreements. This does not foreclose CDA protection. Courts have granted

CDA protection to websites that process payments and transactions in connection with third-party listings, including Airbnb. In *Donaher, III v. Vannini*, for example, plaintiff property owners alleged that tenants violated their lease agreement by renting their property through Airbnb's website. No. CV-16-0213, 2017 WL 4518378 (Me. Super. Ct. Aug. 18, 2017). The plaintiffs' complaint alleged that co-defendant Airbnb "facilitate[d] the posting of rental opportunities at the host's property, by providing the means for guests to locate and book host properties, and by processing payments from guests to hosts, from which Airbnb derive[d] revenue." The Maine state court held that "the processing or receipt of payments associated with posts does not strip a provider or user of an interactive computer service of immunity under the CDA" and granted Airbnb's motion to dismiss. *Id.* at \*3, \*4.

In *Hill v. StubHub, Inc.*, upon which *Donaher* relied in part, purchasers brought an action against an online marketplace that acts as an intermediary between buyers and sellers of tickets to events. Just as Airbnb charges a commission when a rental occurs, StubHub charges a commission when a sale occurs. The *Hill* plaintiffs alleged that they purchased tickets sold unlawfully, in "excess of face value." ... [T]he appellate court held that the website's payment processing responsibilities were "irrelevant for purposes of determining the extent to which Defendant was entitled to immunity" because the ticket seller using the website had complete control over the content at issue—the ticket price. *Id.* at 245–46, 249, 727 S.E.2d 550. ...

Several other courts considering the issue at bar have come out the same way with respect to the CDA's coverage on analogous facts. See, e.g., *Inman v. Technicolor USA, Inc.*, No. 11-666, 2011 WL 5829024 at \*6–7 (W.D. Pa. Nov. 18, 2011) (CDA barred plaintiff's suit against defendant eBay relating to the purchase of defective vacuum tube products and parts from a third-party, despite plaintiff's attempt to hold eBay responsible for its "conduct" not its online "communications") *Stoner*, 2000 WL 1705637, at \*2 (rejecting plaintiff's argument that eBay's facilitation of third-party sales of sound recordings—which may not be lawfully sold—was independent conduct subject to the CDA's immunity exception, and noting specifically that eBay's advertising and commissions do not strip eBay of section 230 immunity).

Here, as in the above-cited cases, Airbnb hosts who use Airbnb's website have complete control over the content at issue—listing rentals in violation of Aimco's leases. Thus, it is with Airbnb's publication of this content that Aimco takes issue.<sup>8</sup>

...

#### **4. *Airbnb, Inc. v. City and County of San Francisco***

One last point deserves discussion. Aimco relies almost entirely on *Airbnb, Inc. v. City and County of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016), in urging the Court to find that section 230 immunity does not apply here. That case is readily distinguishable.

There, Airbnb challenged San Francisco's ordinance that made it a misdemeanor to "provide, and collect a fee for, [b]ooking [s]ervices in connection with short-term rentals for [r]esidential [u]nits" within San Francisco city and county

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<sup>8</sup> Tellingly, in Aimco's original complaint it was the "listings that appeared on Airbnb's platform" that were in violation of Aimco's lease agreement. Only when Aimco became aware of the CDA did it amend its complaint to shift its focus to payment and transaction processing.

when those residential units were not registered with the San Francisco Office of Short-Term Residential Rental Administration.<sup>9</sup> Airbnb sought to enjoin the ordinance and argued in part that section 230 of the CDA preempted the law because, according to Airbnb, the ordinance “inherently require[s] the court to treat [it] as the publisher or speaker of content provided by another.” *Id.* at 1072 (“In [Airbnb’s] view, the threat of a criminal penalty for providing and receiving a fee for [b]ooking [s]ervices for an unregistered unit requires that [it] actively monitor and police listings by third parties to verify registration,” which “is tantamount to treating [Airbnb] as a publisher because it involves the traditional publication functions of reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.”

The Court rejected Airbnb’s argument, concluding that the ordinance “does not regulate what can or cannot be said or posted in the listings,” “creates no obligation on [Airbnb’s] part to monitor, edit, withdraw or block the content supplied by hosts,” and “holds [Airbnb] liable only for [its] own conduct, namely for providing, and collecting a fee for, [b]ooking [s]ervices in connection with an unregistered unit.” *Id.* at 1072–73; *see also id.* at 1073–74 (“[Airbnb] [is] perfectly free to publish any listing [it] get[s] from a host and to collect fees for doing so—whether the listing is lawfully registered or not—without threat of prosecution or penalty under the Ordinance. ... The challenged Ordinance regulates [Airbnb’s] own conduct as [a] [b]ooking [s]ervice provider[ ] and cares not a whit about what is or is not featured on [its] website[ ].”).

Here, by contrast, Airbnb’s website features are central to Aimco’s claims, as this Order makes clear. *See also* FAC at ¶¶ 48–51 (To prevent unauthorized subleases, Aimco contacted Airbnb about *removing listings* for Aimco-owned properties, and when Aimco did not do so, Aimco sued to prevent the unauthorized subleases.), 59 (alleging that when Airbnb learns a host is not a property owner, Airbnb, *inter alia*, “continues to allow the listing to persist”). As the *Airbnb* Court explained, the correct test under section 230 “is not whether a challenged activity merely bears some connection to online content” but whether the claim “‘inherently requires the court to treat’ the ‘interactive computer service’ as a publisher or speaker of information provided by another.” 217 F. Supp. 3d at 1074. Here, Aimco’s claims do so require.

Given this analysis, as well as Congress’ goal of “promot[ing] the development of e-commerce,” the Court concludes that the CDA’s section 230 immunity preempts Aimco’s claims as a matter of law. *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). ...

## QUESTIONS

1. Why does Airbnb offer a Friendly Buildings Program, given the outcome in *La Park La Brea* and similar cases?
2. Does *La Park La Brea* convincingly distinguish *City and County of San Francisco*?
3. Do landlords have any other reasonable options for identifying tenants who are illegally listing their units on Airbnb? What about government regulators?

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<sup>9</sup> San Francisco enacted the ordinance out of concerns over the loss of affordable permanent housing due, in part, to increased tourist or transient rentals.