Filed 7/22/04 (Opn on rehearing)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROGER M. GRACE, Plaintiff and Appellant, v. EBAY INC., Defendant and Respondent.	B168765 (Los Angeles County Super. Ct. No. BS288836)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas L. Willhite, Jr., Judge. Affirmed.

Roger M. Grace, in pro. per., and Lisa Grace-Kellogg for Plaintiff and Appellant.

Cooley Godward, Michael G. Rhodes and Andrea S. Bitar for Defendant and Respondent.

Samir Jain for Amazon.com, Inc., America Online, Inc., Google Inc. and Yahoo! Inc. as Amici Curiae on behalf of Respondent.

Roger M. Grace appeals a judgment of dismissal after the court sustained a demurrer to his complaint against eBay Inc. (eBay). The superior court concluded that title 47 United States Code section 230 (section 230), part of the Communications Decency Act of 1996 (Pub.L. No. 104-104, §§ 501, 509 (Feb. 8, 1996) 110 Stat. 133, 137),[1] immunizes eBay against liability for libel and violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) as a publisher of information provided by another person. Grace challenges that conclusion.

Section 230 states that federal policy is to promote the continued development of the Internet and other interactive computer services, to encourage the development of technologies that enable user control over information received through the Internet, and to remove disincentives to the development and use of technologies that restrict children's access to objectionable Internet content. (47 U.S.C. § 230(b).) Section 230 provides immunity against civil liability for certain conduct in furtherance of those policies. (47 U.S.C. § 230(c)(1), (2).)

We conclude that section 230 provides no immunity against liability for a distributor of information who knew or had reason to know that the information was defamatory. We conclude further, however, that the written release in eBay's User

---

[1] The Communications Decency Act of 1996 is part of the Telecommunications Act of 1996 (Pub.L. No. 104-104 (Feb. 8, 1996) 110 Stat. 56), the primary purpose of which was to promote competition, reduce regulation, and "encourage the rapid deployment of new telecommunications technologies." (*Ibid*.) The Communications Decency Act generally restricts or provides for the restriction of obscene or violent communications including television programming, among other provisions.

Agreement relieves eBay of the liability alleged in the complaint. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

eBay maintains an Internet website that describes goods for sale by third party sellers. Potential buyers bid on the goods by sending e-mail to eBay. After a sale is consummated, the buyer and seller may provide comments on each other and the transaction, or "feedback," which is displayed on the website. The website displays a "feedback profile" on each user, including the comments and a numerical rating. eBay discourages inflammatory language and libel and requires buyers and sellers to agree to a User Agreement that prohibits defamation, but eBay's stated policy is not to remove objectionable comments.

The User Agreement also states:

"Because we are a venue, in the event that you have a dispute with one or more users, you release eBay (and our officers, directors, . . .) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with such disputes.

"If you are a California resident, you waive California Civil Code §1542, which says: 'A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.' "

Grace purchased several items from another individual and then posted negative comments on the seller pertaining to some of the transactions. The seller responded by commenting on Grace as to each transaction, "Complaint: SHOULD BE BANNED FROM EBAY!!!! DISHONEST ALL THE WAY!!!!" Grace notified eBay that the seller's comments were defamatory, but eBay refused to remove them.

Grace sued eBay and the seller, alleging counts against eBay for libel, specific performance of eBay's User Agreement with the seller, and violation of the unfair competition law. Grace withdrew the second count after eBay removed the challenged comments from its website.

eBay demurred to the complaint based on section 230 and the release provision in the User Agreement. eBay requested judicial notice of the User Agreement, and the superior court granted the request. The court concluded that section 230 immunizes eBay against liability for libel and violation of the unfair competition law as alleged in the complaint. Grace requested leave to amend the libel count to allege that section 230, so construed, is unconstitutional. The court denied the request, sustained the demurrer to each count without leave to amend, and dismissed the complaint.

CONTENTIONS

Grace contends (1) eBay as the proprietor of an Internet website is not a "provider or user of an interactive computer service" within the meaning of section 230; (2) even if eBay were a "provider or user," section 230 does not immunize against liability for libel as a distributor of information if the defendant knew or had reason to know that the information was defamatory; (3) the release in the User Agreement does not relieve eBay

of liability for failure to remove defamatory material after receiving notice that the material is defamatory; and (4) the denial of leave to amend the complaint was error. Grace challenges the demurrer on the unfair competition count only insofar as that count is based on the alleged libel.

DISCUSSION

1. *Standard of Review*

On appeal from a judgment dismissing a complaint after a demurrer is sustained without leave to amend, we assume the truth of the properly pleaded factual allegations of the complaint, facts that can be inferred from those expressly pleaded, and facts of which judicial notice can be taken, and determine de novo whether the complaint alleges facts sufficient to state a cause of action. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We construe the complaint in a reasonable manner and read the allegations in context. (*Ibid*.) We affirm the judgment if the complaint or matters that are judicially noticeable disclose a complete defense. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 324; *Cochran v. Cochran* (1997) 56 Cal.App.4th 1115, 1120; see Code Civ. Proc., § 430.30, subd. (a).) We affirm the judgment if is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16.)

It is an abuse of discretion to sustain a demurrer if there is a reasonable probability that the defect can be cured by amendment. (*Schifando v. City of Los Angeles*, *supra*, 31

Cal.4th at p. 1081.) The burden is on the plaintiff to show that an amendment would cure the defect. (*Ibid*.)

2. *eBay Is a User of an Interactive Computer Service*

Section 230 states that federal policy is to promote the continued development of the Internet and other interactive computer services, to encourage the development of technologies that enable user control over information received through the Internet, and to remove disincentives to the development and use of technologies that block and filter access to objectionable Internet content. (47 U.S.C. § 230(b).) Section 230 states that no provider or user of an interactive computer service can be held liable for an action taken in good faith to restrict access to material that the provider or user considers obscene or otherwise objectionable, or for an action taken to enable or make available the technical means to restrict access to such material. (47 U.S.C. § 230(c)(2).)

Section 230 also states, "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." (42 U.S.C. § 230(c)(1).)

"Interactive computer service" is defined as, "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." (42 U.S.C. § 230(f)(2).)

"Information content provider" is 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."

Section 230 states further, "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (42 U.S.C. § 230(e)(3).)

"Internet service provider" or "ISP" is the term commonly used to describe a company that provides computer users access to the Internet. An ISP is a "provider" of an interactive computer service within the meaning of section 230(c)(1) because the service provided is, in the language of section 230(f)(2), "a service or system that provides access to the Internet." eBay is not an ISP.

Some courts have held or stated that the operator of a website is a provider of an interactive computer service under section 230(c)(1). (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 831, fn. 7; *Carafano v. Metrosplash.com, Inc.* (C.D.Cal. 2002) 207 F.Supp.2d 1055, 1066, affd. on other grounds (2003) 339 F.3d 1119; *Schneider v. Amazon.com, Inc*. (Wash.App. 2001) 108 Wash.App. 454 [31 P.3d 37, 40-41].) We need not decide that question because section 230(c)(1) also expressly applies to a "user" of an interactive computer service. We conclude based on the plain meaning of the statutory language that the term "user" as used in the statute encompasses all persons who gain access to the Internet through an ISP or other service or system (see 42 U.S.C. § 230(f)(2)), including both individual computer users and website operators. (*Batzel v.*

Smith (9th Cir. 2003) 333 F.3d 1018, 1030-1031 [held that an operator of an online newsletter was a "user" of an interactive computer service].)

3. *Section 230(c)(1) Provides No Immunity Against Liability for Libel as a Distributor*

a. *Construction of Section 230(c)(1) in Light of the Common Law Background*

Section 230(c)(1) states that a provider or user of an interactive computer service may not "be treated as the publisher or speaker" of information provided by another person. To understand the intended effect of this provision on the common law of libel requires an understanding of the common law of libel. We presume that Congress was aware of common law principles and intended those principles to apply absent some indication to the contrary. (*Astoria Federal S. & L. Assn. v. Solimino* (1991) 501 U.S. 104, 108.) "It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed repealed unless the language of a statute be clear and explicit for this purpose.' [Citation.]" (*Norfolk Redev. & Housing Auth. v. C. & P. Tel.* (1983) 464 U.S. 30, 35.) " '[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is clearly evident.' [Citations.] In such cases, Congress does not write upon a clean slate. [Citation.] In order to abrogate a

common-law principle, the statute must 'speak directly' to the question addressed by the common law. [Citations.]"[2] (*United States v. Texas* (1993) 507 U.S. 529, 534.)

The common law of libel distinguishes between liability as a primary publisher and liability as a distributor. A primary publisher, such as an author or a publishing company, is presumed to know the content of the published material, has the ability to control the content of the publication, and therefore generally is held liable for a defamatory statement, provided that constitutional requirements imposed by the First Amendment are satisfied. (Rest.2d Torts, § 581, subd. (1), com. c, p. 232; Prosser & Keeton, Torts (5th ed. 1984) § 113, p. 810; Smolla, The Law of Defamation (2d ed. 1999) § 4:87, pp. 4-136.3 to 4-136.4, § 4:92, pp. 4-140 to 4-140.1.) A distributor, such as a book seller, news vendor, or library, may or may not know the content of the published matter and therefore can be held liable only if the distributor knew or had reason to know that the material was defamatory.[3] (Rest.2d Torts, § 581, subd. (1), coms. b, c, d & e,

---

[2] We construe a federal statute under the principles of statutory construction applied by federal courts. (*RCJ Medical Services, Inc. v. Bonta* (2001) 91 Cal.App.4th 986, 1006; accord, *Webster Bank v. Oakley* (Conn. 2003) 265 Conn. 539 [830 A.2d 139, 149-150]; *Hogan v. Gemstate Mfg., Inc.* (Or. 1999) 328 Or. 535 [982 P.2d 1108, 1114]; but see *Most v. First Nat. Bank of San Diego* (1966) 246 Cal.App.2d 425, 428-429 [stated that California courts should construe a federal statute as they would construe a California statute on a related subject].) This approach is consistent with the principle of comity, promotes uniformity in the application of federal law, and affords Congress a greater degree of predictability as to how the laws that it enacts will be applied by state courts. We therefore cite United States Supreme Court opinions concerning statutory construction.

[3] Distributors are sometimes called secondary publishers, transmitters, or disseminators. (Prosser & Keeton, Torts, *supra*, § 113, p. 803; Smolla, The Law of Defamation, *supra*, § 4:92, p. 4-140.)

pp. 232-234; Prosser & Keeton, Torts, *supra*, § 113, pp. 810-811; 2 Harper et al., The Law of Torts (2d ed. 1986) Defamation, § 5.18, pp. 144-145; Smolla, The Law of Defamation, *supra*, § 4:92, pp. 4-140 to 4-140.1.) The Restatement Second of Torts distinguishes the liability of "one who only delivers or transmits defamatory matter published by a third person" (*id*., § 581, subd. (1), p. 231), such as a book seller, news dealer, or library (*id*., § 581, coms. b, d & e, pp. 232-234), from the liability of the "original publisher," such as an author or publishing company (*id*., §§ 578, com. b, p. 212, 581, com. c, p. 232). Similarly, Prosser and Keeton distinguish "secondary publishers or disseminators" from "primary publishers" and explain, "those who have commonly been regarded as disseminators or transmitters of defamatory matter who simply assist primary publishers in distributing information" are afforded greater protection from liability. (Prosser & Keeton, Torts, *supra*, § 113, pp. 803, 811.)

Thus, although a distributor can be held liable for libel in certain circumstances, a distributor is subject to a different standard of liability from that of a primary publisher, and liability as a distributor ordinarily requires a greater showing of culpability.[4] Section 230(c)(1) does not state that a provider or user of an interactive computer service may not be treated as a "distributor" or "transmitter" of information provided by another person,

[4] "The importance of the special common law 'scienter' requirement for secondary publishers such as distributors, vendors, or libraries has been obviated to some degree by modern constitutional fault standards, which would normally require some notice of the defamatory character of the statement to impose liability in any event, and have also been blunted by the recognition in some jurisdictions of the 'neutral reportage' privilege." (Smolla, The Law of Defamation, *supra*, § 4:92, p. 4-140.1.)

but only that a provider or user may not "be treated as the publisher or speaker." In light of the common law distinction between liability as a primary publisher and liability as a distributor, we conclude that section 230(c)(1) does not clearly and directly address distributor liability and therefore does not preclude distributor liability.

b. *Legislative History of Section 230(c)(1)*

The legislative history of section 230 supports our conclusion. The conference committee report on the Telecommunications Act of 1996, of which the Communications Decency Act of 1996 is a part (Pub.L. No. 104-104, §§ 1, 501 (Feb. 8, 1996) 110 Stat. 56, 133), stated of section 230:

"This section provides 'Good Samaritan' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont* v. *Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services." (H.R.Rep. No. 104-458, 2d Sess., p. 194 (1996).)

Stratton Oakmont, Inc. v. Prodigy Services Co. (N.Y.Sup.Ct., May 24, 1995) 1995 WL 323710 involved an action against the operator of a computer bulletin board. The court in *Stratton Oakmont* stated that Prodigy could be held liable for libel only if it was a "publisher . . . because one who repeats or otherwise republishes a libel is subject to

liability as if he had originally published it. [Citations.]" (*Id*. at p. 3, citing *Cianci v. New Times Pub. Co.* (2d Cir. 1980) 639 F.2d 54, 61, Rest.2d Torts, § 578.) The court distinguished liability as a "publisher" from liability as a "distributor," stating, "In contrast, distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue. [Citations.]" (*Stratton Oakmont*, *supra*, at p. 3.) The court explained that a publisher such as a newspaper exercises control over the content of its publication and therefore is subject to broader liability than a distributor, and stated that the question presented was whether Prodigy "exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper." (*Ibid*.)

The *Stratton Oakmont* court found that Prodigy represented to its members that it controlled the content of its bulletin boards so as to eliminate offensive postings and found that Prodigy actually exercised control of content through a software screening program. (*Stratton Oakmont*, *supra*, 1995 WL 323710, at p. 3.) The court concluded that Prodigy assumed a duty to control the content of its bulletin boards and therefore concluded, "PRODIGY is a publisher rather than a distributor." (*Id*. at p. 4.) Thus, the court determined that Prodigy could be held liable for libel without regard to whether Prodigy knew or had reason to know that the postings were defamatory. The court stated that it agreed with other courts holding that computer bulletin boards ordinarily should be treated similarly to book stores and libraries (i.e., as distributors), but held that Prodigy's affirmative efforts to monitor and control the content of its bulletin boards made Prodigy

a publisher and subjected it to broader liability. (*Id*. at p. 5.) The court acknowledged that subjecting the operator of a computer bulletin board to broader liability because it attempted to control offensive content could discourage other operators from making similar efforts, but stated that an operator could conclude that those efforts would attract more customers and that the increased revenue would offset the broader liability. (*Ibid*.)

The conference committee report stated that one of the specific purposes of section 230 was to overrule *Stratton Oakmont*, *supra*, 1995 WL 323710 and any other decisions that treated providers and users of interactive computer services "as publishers or speakers" of information provided by another person "because they have restricted access to objectionable material." (H.R.Rep. No. 104-458, 2d Sess., p. 194.) This statement reflects a legislative intent to repudiate the holding in *Stratton Oakmont* that an operator of a computer bulletin board, or other provider or user of an interactive computer service, can be held liable for libel without regard to whether the operator knew or had reason to know that the matter was defamatory (i.e., liable as a primary publisher rather than a distributor) because of the operator's efforts to control content (i.e., act as a "Good Samaritan"). There is no indication, however, that Congress intended to preclude liability where the provider or user knew or had reason to know that the matter was defamatory, that is, common law distributor liability.

c. *Conclusion*

We conclude that section 230 provides no immunity against liability as a distributor. (See *Doe v. America Online, Inc.* (Fla. 2001) 783 So.2d 1010, 1018 (dis. opn. of Lewis, J.).) We decline to follow *Zeran v. America Online, Inc.* (4th Cir. 1997) 129

F.3d 327 and its progeny, including *Gentry v. eBay, Inc*., *supra*, 99 Cal.App.4th at page 833, footnote 10, and *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 695, footnote 3. For the reasons we have stated, we disagree with the *Zeran* court's conclusion that because the term "publication" can encompass any repetition of a defamatory statement, use of the term "publisher" in section 230(c)(1) indicates a clear legislative intention to abrogate common law distributor liability. (*Zeran*, *supra*, 129 F.3d at pp. 332-334.) In light of the well-established common law distinction between liability as a primary publisher and liability as a distributor and Congress's expressed intention to overrule an opinion that held the operator of a computer bulletin board liable as a primary publisher rather than a distributor (*Stratton Oakmont*, *supra*, 1995 WL 323710), we cannot conclude that use of the term "publisher" in section 230(c)(1) discloses a clear legislative intention to abrogate distributor liability.

We also disagree with the *Zeran* court's conclusion that for providers and users of interactive computer services to be subject to distributor liability would defeat the purposes of the statute and therefore could not be what Congress intended. (*Zeran v. America Online, Inc.*, *supra*, 129 F.3d at pp. 333-334.) The *Zeran* court opined that the threat of distributor liability would encourage providers and users to remove potentially offensive material upon notice that the material is potentially offensive rather than risk liability for failure to do so. (*Id*. at p. 333.) The *Zeran* court opined further that a provider or user who undertakes efforts to block and filter objectionable material is more likely to know or have reason to know of potentially defamatory material and therefore more likely to be held liable as a distributor, so the threat of distributor liability would

discourage undertaking those efforts. (*Ibid*.) The broad immunity provided under *Zeran*, however, would eliminate potential liability for providers and users even if they made no effort to control objectionable content, and therefore would neither promote the development of technologies to accomplish that task nor remove disincentives to that development as Congress intended (47 U.S.C. § 230(b)). Rather, the total elimination of distributor liability under *Zeran* would eliminate a potential incentive to the development of those technologies, that incentive being the threat of distributor liability. (See Note, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?* (2002) 55 Vand. L.Rev. 647, 683-685; Freiwald, *Comparative Institutional Analysis in Cyberspace: the Case of Intermediary Liability for Defamation* (2001) 14 Harv. J.L. & Tech. 569, 616-623.) We conclude that Congress reasonably could have concluded that the threat of distributor liability together with the immunity provided for efforts to restrict access to objectionable material (47 U.S.C. § 230(c)(2)) would encourage the development and application of technologies to block and filter access to objectionable material, consistent with the expressed legislative purposes.

d. *Other Interpretive Arguments*

eBay and the amici curiae cite a congressional committee report pertaining to the Dot Kids Implementation and Efficiency Act of 2002 (Pub.L.No. 107-317 (Dec. 4, 2002) 116 Stat. 2766). The act enacted a new statute (47 U.S.C. § 941) that provides for the creation of an Internet domain limited to material appropriate for children. The statute states that the registry that operates the new domain, entities that contract with the

registry to ensure that the material on the domain complies with the content restrictions, and registrars for the registry "are deemed to be interactive computer services for purposes of section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c))." The committee report stated that the new provision "is intended to shield the '.kids.us' registry, registrars, and parties who contract with the registry, from liability based on self-policing efforts to intercept and take down material that is not 'suitable for minors' or is 'harmful to minors.' The Committee notes that ISPs have successfully defended many lawsuits using section 230(c). The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence (See, e.g., Doe v. America Online, 783 So.2d 1010 (Fla. 2001)) and defamation (Ben Ezra, Weinstein, and Co. v. America Online, 206 F.3d 980 (2000); Zeran v. America Online, 129 F.3d 327 (1997)). The Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by H.R. 3833." (H.R.Rep. No. 107-449, 2d Sess., p. 13 (2002), reprinted in 2002 U.S. Code Cong. & Admin. News, p. 1749.)

To the extent the House committee may have endorsed the specific holding of *Zeran v. America Online, Inc.*, *supra*, 129 F.3d 327 and its progeny that is at issue here, the committee report does not affect our construction of section 230. A statement in a legislative committee report as to the meaning of an existing statute is not a reliable indication of the intent of a prior Congress. (*United States v. Texas*, *supra*, 507 U.S. at p. 535, fn. 4 ["subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress"], quoting *Pension Benefit Guaranty Corp. v. The LTV Corp.* (1990) 496 U.S. 633, 650; *Consumer Product Safety Comm'n v. GTE Sylvania* (1980) 447 U.S.

102, 118, fn. 13.) The language of section 230 and its legislative history discussed *ante* are far more illuminating as to the legislative intent of the statute.

We also reject the argument that Congress's failure to amend section 230(c)(1) when it added a new section 230(d) to the statute (Pub.L. No. 105-277, § 1404(a) (Oct. 21, 1998) 112 Stat. 2681-739) indicates congressional approval of consistent judicial interpretation of the statute. "[W]hen, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, . . . 'It is "impossible to assert with any degree of assurance that congressional failure to act represents" affirmative approval of the Court's statutory interpretation.' [Citation.]" (*Alexander v. Sandoval* (2001) 532 U.S. 275, 292.)

4. *The Release Relieves eBay of Liability*

A written release ordinarily relieves a person of liability for all claims within the scope of the release, unless the release does not express the parties' mutual intention or was procured by fraud or other improper means. (*Jefferson v. Department of Youth Authority* (2002) 28 Cal.4th 299, 305; *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524-526; *Bardin v. Lockheed Aeronautical Systems Co.* (1999) 70 Cal.App.4th 494, 505.) Absent extrinsic evidence to the contrary, a broadly worded release, such as a release of "all claims," covers all claims within the broad scope of the language even if particular claims are not expressly enumerated or described more particularly in the release. (*Jefferson*, *supra*, at pp. 305-306.) We construe a release under the same rules of construction applicable to other contracts. (*Hess*, *supra*, at p. 524.)

Grace does not contend the release is unenforceable or seek its rescission. He does not argue that the release does not express the parties' mutual intention or that extrinsic evidence, which could not be considered in ruling on the demurrer, would affect our construction of the release. Rather, Grace's sole argument concerning the release is that the language of the release is "not sufficiently precise" to encompass a claim against eBay based on defamatory information provided by a third party. Grace argues further that his dispute is not merely "a dispute with one or more users" as stated in the release, quoted *ante*, but a dispute with eBay directly.

We interpret a contract so as to give effect to the parties' mutual intention. (Civ. Code, § 1636; *Hess v. Ford Motor Co.*, *supra*, 27 Cal.4th at p. 524.) We ascertain that intention solely from the written contract, if possible, but also consider the circumstances under which the contract was made and the matter to which it relates. (Civ. Code, §§ 1639, 1647; *Hess*, *supra*, at p. 524.) We consider the contract as a whole and construe the language in context, rather than interpret a provision in isolation. (Civ. Code, § 1641.) We interpret words in a contract in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. (*Id*., § 1644.) If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. (*Id*., § 1638.)

The release describes eBay as a "venue" and refers to a user's dispute with another user. The type of dispute referenced in the release clearly encompasses a dispute with another user relating to comments posted by another user on eBay's website. The provision states that the user releases eBay from claims and demands "of every kind and

nature, known and unknown, . . . arising out of or in any way connected with such disputes." This broad language encompasses a claim or demand against eBay based on its displaying of or failure to remove objectionable comments by another user posted on the website. Such a claim or demand against eBay arises out of or is connected with a dispute with another user. Thus, the plain meaning of the release encompasses Grace's claim for libel and his claim or demand for injunctive relief in connection with the alleged libel. No greater specificity is required of the release.

5. *Grace Is Not Entitled to Leave to Amend*

Grace seeks leave to amend his complaint to allege that section 230 is unconstitutional if the statute provides immunity to eBay in these circumstances. The appropriate place for such a legal argument would have been in Grace's opposition to the demurrer and in his opening brief on appeal, rather than in an amended complaint. In any event, in light of our conclusion that section 230 provides no immunity in these circumstances and that Grace released his claims and demands against eBay, the question of constitutionality does not arise.

DISPOSITION

The judgment is affirmed. eBay is entitled to costs on appeal.

CERTIFIED FOR PUBLICATION

CROSKEY, Acting P.J.

We Concur:

KITCHING, J. ALDRICH, J.