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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUSTIN HART,

Plaintiff,

v.

FACEBOOK, INC. et al.,

Defendants.

Case No. 3:22-cv-00737-CRB

DEFENDANT FACEBOOK, INC.'S MOTION TO DISMISS PURSUANT TO RULE 12(B)(6), ANTI-SLAPP MOTION TO STRIKE, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: May 6, 2022
Time: 10:00 a.m.
Courtroom: 6 - 17th Floor
Judge: Hon. Charles R. Breyer

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NOTICE OF MOTION AND RELIEF SOUGHT

PLEASE TAKE NOTICE that on May 6, 2022, or as soon thereafter as may be heard, in Courtroom 6 on the 17th Floor of the above-captioned Court, Defendant Facebook, Inc., will and hereby does move to dismiss Plaintiff's Complaint, Dkt. 1. Facebook seeks an order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing with prejudice all of Plaintiff's claims in their entirety.

PLEASE TAKE FURTHER NOTICE that at the same date, time, and place, Defendant Facebook, Inc. also will and hereby does move to strike Plaintiff's Complaint, Dkt. 1. Plaintiff seeks an order pursuant to California Code of Civil Procedures § 425.16 striking all of Plaintiff's claims in their entirety.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Justin Hart has sued Facebook, Inc.,[1] Twitter, Inc., President Joe Biden, the Surgeon General, and various federal agencies, claiming a vast government conspiracy exists to censor him for his views on COVID-19. Not only does Plaintiff believe this purported conspiracy reaches the highest levels of the Biden administration, he claims that Facebook participated in this conspiracy by removing Plaintiff's post and suspending his account for three days. Plaintiff alleges that Facebook therefore violated his free speech rights under both the First Amendment and California Constitution. Plaintiff also asserts claims for promissory estoppel, intentional interference with contract, and negligent interference with prospective economic advantage.

These claims find no support either in the facts Plaintiff pleads or in the law he cites. According to his own Complaint, Plaintiff—who admits to having his content repeatedly removed in the past—posted COVID-related content that Facebook determined to violate its Terms of Service and Community Standards, which Plaintiff acknowledges that he was "require[d] . . . to follow" as a Facebook user. Compl. 10 ¶ 26. And Plaintiff's only attempt to connect Facebook's decisions about his account and his post to the federal government consists of a series of allegations that various government officials made broad, generalized statements about combating misinformation on social media—none of them mentioning Plaintiff, and all of them made *after* Plaintiff's post was taken down by Facebook.

Plaintiff's claims should be dismissed without leave to amend for the following reasons:

First, Plaintiff has failed to allege facts sufficient to state his claims. His general assertions about the government's purported involvement in Facebook's decision to remove his post and suspend his account cannot sustain his federal and state constitutional claims against Facebook, a private entity. And he has similarly failed to allege facts sufficient to state his state law claims, including promissory estoppel, intentional interference with contract, and negligent interference with prospective economic advantage.

[1] On October 28, 2021, Facebook, Inc. changed its name to Meta Platforms, Inc. Because Plaintiff's Complaint refers to Meta as "Facebook," for ease of reference this motion does likewise.

Second, Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c), stands as a separate bar to relief. Courts have repeatedly and consistently applied Section 230 to dismiss claims premised on a website's removal of third-party content, and each of Plaintiff's claims squarely fits that description.

Third, Plaintiff's state law claims should be struck under California's anti-SLAPP statute, which permits early dismissal of lawsuits aimed at acts in furtherance of the right to speech. Facebook's decision to remove Plaintiff's misleading content was a quintessential act in furtherance of the right to speak. Accordingly, this Court should dismiss or strike Plaintiff's entire Complaint with prejudice.

II. BACKGROUND

Facebook is a platform that provides users with social networking services that allow them to connect, communicate and share, promote and view content with other users. Facebook's relationship with its users is governed by its Terms of Service, to which all users must agree in order to create a Facebook account. *See* Compl. 10 ¶ 26. The Terms of Service require users to follow Facebook's Community Standards and bar users from sharing "anything . . . [t]hat is unlawful, misleading, discriminatory, or fraudulent."[2]

Plaintiff purports to be the "executive" and Chief Data Analyst of RationalGround.com, a company he claims gauges the impact of COVID-19 across the country. Compl. 11 ¶ 29. Plaintiff also purports to have a "valid employment contract" with and to serve as "Administrator" of Donorbureau, LLC, a Virginia company. *Id.* at 19 ¶¶ 91–92. Plaintiff does not allege any facts—even the most basic terms—regarding the terms of his purported "employment contract" with Donorbureau.

Plaintiff claims he has used Facebook since 2007 as a networking tool for his consulting business and for RationalGround.com, which purportedly sells subscriptions to articles and research on COVID-19. *Id.* at 11 ¶¶ 30–34. On several occasions Plaintiff's posts triggered

[2] *See* Terms of Service, Facebook, https://web.archive.org/web/20210718231018/https://www.facebook.com/legal/terms/plain_text_terms (July 18, 2021). The Terms of Service are "extensively" cited in the Complaint, *see, e.g.*, Compl. 9–10 ¶¶ 25–26; *id.* at 9–10, nn. 17–19, and "form[] the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903 (9th Cir. 2003). Thus, they are "considered part of the pleading." *Id.*

"warning[s]" from Facebook that they "violated its Community Standard[s]." *Id.* at 11–12 ¶¶ 35–37. These violations resulted in a 30-day ban from Facebook in September 2020 and a 24-hour restriction on Plaintiff's ability to post or comment in April 2021. *See Id.* at 11–12 ¶¶ 36–37. Then, on July 13, 2021, Plaintiff posted an infographic on his personal Facebook page that argued masking children was ineffective and could "cause a wide variety of . . . health issues." Compl. 5 ¶ 1–3. Plaintiff claims Facebook flagged that post and banned him from posting or commenting for three days on his personal Facebook webpage. *Id.* at 5 ¶ 4. Plaintiff further alleges that on July 15, 2021—two days *after* his suspension from Facebook—the Biden Administration unveiled a new COVID-19 strategy that included a focus on misinformation on social media. *See Id.* at 6 ¶¶ 7–8.

On August 31, 2021, Plaintiff sued Facebook, Twitter, the United States Surgeon General (Vivek Murthy), the Office of Management and Budget, the Department of Health and Human Services, and the President of the United States. *See* Compl. 3–4 ¶¶ 12–18. He alleges that Defendants violated his free speech rights under the First Amendment of the U.S. Constitution and the California Constitution because, "[o]n information and belief, [the government] directed Defendants Facebook and Twitter to remove [Plaintiff's] social media posts." *Id.* at 8 ¶ 20; *see also id.* at 14–16, ¶¶ 51–65, 17–18 ¶¶ 75–79. Plaintiff also asserts claims against Facebook for promissory estoppel, intentional interference with contractual relationship, and negligent interference with prospective business relationship. *See id.* at 18–21 ¶¶ 80–110. Plaintiff seeks forward-looking injunctive and declaratory relief to prevent Facebook from "removing [his] posts or suspending his ability to post because [Facebook] disagree[s] with the content of his posts." *Id.* at 22. And he seeks monetary damages for the purported lost income resulting from Facebook's interference with his alleged relationship with Donorbureau, for his spending on Facebook advertisements, for the time he has "wasted" building a following on Facebook, and for the harm to his reputation. *Id.* at 22–23.

III. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S.

662, 678 (2009) (citation omitted). Dismissal is appropriate "where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir.2008). In conducting a Rule 12(b)(6) analysis, the court may consider the complaint, material relied upon in the complaint, and material subject to judicial notice. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001). The court must accept "well-pleaded factual allegations" as true, but need not "accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 664, 678.

IV. ARGUMENT

A. Plaintiff Cannot State a Claim that Facebook Violated His First Amendment Right of Free Speech.

Plaintiff's claim against Facebook for violating his First Amendment right to free speech fails because (1) Facebook is a private entity and not a state actor; (2) Plaintiff has no cause of action to seek damages; and (3) Plaintiff lacks standing to seek an injunction or declaratory relief.

1. Facebook is not a state actor, which forecloses all relief under the First Amendment.

The First Amendment "prohibits only *governmental* abridgment of speech" and not "*private* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Plaintiff admits that Facebook is a "private" company, Compl. 2 ¶ 2, but alleges that Facebook's conduct constituted "state action" because Facebook allegedly engaged in "joint action" with the federal government when Facebook removed Plaintiff's post. *Id.* at 15 ¶¶ 56–57. Plaintiff's argument lacks merit because he does not allege any specific action that the federal government took with respect to his particular post, and because he relies only on government statements made *after* Facebook took down his post.

Plaintiff's joint action argument fails because he must show that the federal government somehow *compelled* Facebook to take down his *particular* post. "[A] bare allegation of . . . joint action will not overcome a motion to dismiss." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900 (9th Cir. 2008). "[G]eneral statements" about "working together," even if "in close cooperation," do not suffice; Plaintiff must point to a statement from the government "direct[ing] Facebook to adopt [a] *specific* standard to follow" or "mandat[ing] the particular actions that

Facebook took with regard to [Plaintiff's] Facebook page." *Children's Health Defense v. Facebook, Inc.*, 546 F. Supp. 3d 909, 929–30 (N.D. Cal. 2021); *see also Atkinson v. Meta Platforms, Inc.*, No. 20-17489, 2021 WL 5447022, at *1 (9th Cir. 2021) (plaintiff must "allege plausibly that the federal government compelled [Facebook] to take a particular action" (alteration and citation omitted)); *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1114, 1125–26 (N.D. Cal. 2020) (allegations are "unconnected" if they "do not mention [the plaintiff] at all"). Here, Plaintiff alleges that government officials were purportedly in "regular touch" with Facebook, generally "flagg[ed] problematic posts for Facebook" and pressured Facebook "publicly" to do more to regulate misinformation. Compl. 7–8 ¶¶ 10–20. But he does not allege a single government statement directing Facebook to take down Plaintiff's *particular* post. *See Children's Health Defense*, 546 F. Supp. 3d at 930. Accordingly, Plaintiff's joint action claim fails.

Moreover, Plaintiff's allegations are independently flawed because they rely solely on government statements made *after* Facebook took down his post. The court in *Children's Health Defense*—in a situation nearly identical to the one at issue here—rejected a joint action argument because the plaintiff "allege[d] that Facebook began censoring [plaintiff's] speech … prior to [the government statements]." 546 F. Supp. 3d at 930. Similarly, the court in *Federal Agency of News LLC* dismissed a claim against Facebook premised on joint action because "most of [the] allegations post-date[d] the relevant conduct that allegedly injured" the plaintiffs, which "do little to demonstrate joint action." 432 F. Supp. 3d at 1125. Here, Plaintiff admits that all of the government's statements occurred *after* Facebook took down his post. *See* Compl. 6 ¶ 7. That admission alone means that Plaintiff's allegations "are unconnected with Facebook's . . . decision" and thus "do not establish joint action." 432 F. Supp. 3d at 1126.

Despite these fatal defects, Plaintiff suggests that "joint action" can be found because the government "knowingly accepted the benefits" of Facebook's removal of Plaintiff's post. Compl. 15 ¶ 57. But it does not suffice to plead that the government benefited from Facebook's actions; Plaintiff must "offer other facts that would make a joint action claim plausible," such as "state participation in [Facebook's] corporate governance," "financial ties between [the] government[]

and [Facebook]," or Facebook's "regulation of state activities." *Atkinson*, 2021 WL 5447022, at *1. Plaintiff alleges none of these facts. What is more, Plaintiff ignores that any "benefits" that accrue to the government are irrelevant unless the government "profit[s] *financially*" from the private person's conduct. *Pasadena Republican Club v. Western Justice Center*, 985 F.3d 1161, 1168–70 (9th Cir. 2021); *see Kinderstart.com LLC v. Google, Inc.*, No. 06-CV-2057, 2006 WL 3246596, at *6 (N.D. Cal. Nov. 7, 2006) (holding that Google was not a state actor because it did not "confer[] significant financial benefits indispensable to the government's financial success" (internal quotation marks and citation omitted)). Here, the only government "benefit" alleged is that Facebook removed a post "based on a viewpoint with which [Surgeon General] Murthy and [President] Biden disagreed." Compl. 16 ¶ 62. That is not a "financial benefit" of any sort. *Pasadena*, 985 F.3d at 1170. And the allegation that the government might have "*intangibly*"—rather than "*financially*"—benefited is legally irrelevant to the "joint action" test. *Id.* Plaintiff's allegations are therefore wholly deficient.

2. Plaintiff lacks a cause of action to seek monetary damages from Facebook for any First Amendment violation.

"There is no private right of action for damages against private entities that are alleged to have engaged in constitutional deprivations." *Children's Health Defense*, 546 F. Supp. 3d at 924 (holding that plaintiff "cannot bring a [First Amendment] action against Facebook" because Facebook is a "private entit[y]"). Plaintiffs "asserting a claim for a federal violation of constitutional rights must seek relief under *Bivens v. Six Unknown Named Agents*," *Daniels v. Alphabet Inc.*, No. 20-CV-4687, 2021 WL 1222166, at *5 (N.D. Cal. 2021), and the Supreme Court has foreclosed *Bivens* liability for private corporations — even if they have "engage[d] in federal action. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 n.2, 71 (2001). Plaintiff therefore lacks a cause of action to seek damages against Facebook.[3]

3. Plaintiff lacks standing to seek an injunction or declaratory relief because he has not pleaded any facts about his future conduct.

In addition to monetary damages, Plaintiff seeks injunctive and declaratory relief. *See*

[3] Nor can plaintiff rely on 42 U.S.C. § 1983, because that provision applies only to state—as opposed to federal—officers, and Plaintiff alleges that Facebook is acting as an arm of the federal government. *See Lewis v. Google LLC*, 461 F. Supp. 3d. 938, 956 (N.D. Cal. 2020).

Compl. 16 ¶¶ 64–65. Plaintiff lacks Article III standing to obtain such relief. To establish standing, a plaintiff seeking injunctive or declaratory relief must plead a "threatened injury" that is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401–02 (2013) (holding that the plaintiffs lacked standing to obtain an injunction against government surveillance absent a showing that they were likely to be surveilled in the future). At minimum, a plaintiff must plead some "intention to engage in a course of conduct." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (requiring a "description of concrete plans" for the future).

Plaintiff, however, has pleaded *nothing* about his future conduct. The Complaint contains no allegations about what Plaintiff plans to post to his Facebook page, or whether he even intends to use Facebook in the future. Accordingly, his Complaint has not established any "likelihood" of future injury—much less a likelihood that the injury is "certainly impending." *Clapper*, 568 U.S. at 401–02. He therefore lacks standing to seek forward-looking relief of any kind.[4]

B. Plaintiff's State Law Claims Should Be Dismissed.

Plaintiff's state law claims also fail. His claim under the California Constitution should be dismissed for want of state action, and he has failed to allege facts sufficient to state claims for promissory estoppel, intentional interference with contract, and negligent interference with prospective business advantage.

1. Plaintiff's California constitutional free speech claim should be dismissed for lack of state action and for otherwise failing to state a claim or cause of action.

Plaintiff's claim for violation of the California Constitution also fails because: (1) Facebook is not a state actor; (2) Facebook's Community Standards are consistent with the California Constitution; and (3) the California Constitution's free speech clause does not provide for monetary damages.

[4] For essentially identical reasons, Plaintiff's forward-looking claims are also unripe. *See Renne v. Geary*, 501 U.S. 312, 321–22 (1991) ("We also discern no ripe controversy in the allegations" because they supply "no factual record of an actual or imminent application of [the challenged law] sufficient to present the constitutional issues in 'clean-cut and concrete form.' We do not know the nature of [the speech], how it would be publicized, or the precise language [the government] might delete." (citations omitted)).

First, Plaintiff's claim must fail because Facebook is a private actor. The Ninth Circuit has "conclude[d] that the California Supreme Court would impose a state action requirement on [California's free speech clause]," with only a narrow exception for real property that has been made "freely and openly accessible to the public." *Bolbol v. Feld Ent., Inc.*, 613 F. App'x 623, 625 (9th Cir. 2015) (citation omitted). Consistent with that rule, at least one court in this district has held that claims for violations of California's free speech clause cannot be brought against Facebook. *Zimmerman v. Facebook, Inc.*, No. 19-CV-4591, 2020 WL 5877863, at *2 (N.D. Cal. Oct. 2, 2020). "Facebook is not a state actor," which dooms "claims brought under the California . . . constitution[]." *Id.*

Crucially, California's narrow exception to the state action requirement—which was established in *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910–11 (1979), in the context of a private shopping mall—does not extend to websites like Facebook. Indeed, courts have consistently and repeatedly refused to extend *Pruneyard* outside the context of real property, and have expressly declined to apply it to virtual spaces in particular. *See Prager Univ. v. Google LLC*, No. 19-CV-340667, 2019 WL 8640569, at *6 (Cal. Super. Ct. Nov. 19, 2019) (refusing to apply *Pruneyard* to certain YouTube services, recognizing that applying the free speech clause there "would be a dramatic expansion of [*Pruneyard*]"); *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 607 (S.D.N.Y. 2020) (the video sharing service Vimeo is not subject to California's free speech clause); *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1116 (N.D. Cal. 2017) (neither is LinkedIn); *Kinderstart.com LLC v. Google, Inc.*, No. 06-CV-2057, 2007 WL 831806, at *16 (N.D. Cal. Mar. 16, 2007) (neither is Google).[5] This Court should likewise reject Plaintiff's invitation to extend the state action exception to include websites.

Second, even if the *Pruneyard* exception extended to Facebook, Plaintiff has not pleaded a violation of California's free speech clause. *Pruneyard* itself endorsed all manner of "time, place,

[5] There are good reasons that "[n]o court has expressly extended [California's free speech clause] to the Internet": the "analogy between a shopping mall and the Internet is imperfect," and the consequences might be drastic. *hiQ*, 273 F. Supp. 3d at 1116. Indeed, if *Pruneyard* were to apply to the internet, websites could arguably be prohibited from removing content from violent extremist groups, hateful, harassing, or violent content, or cyberbullying. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011).

and manner rules" in order "to assure that [free speech] activities do not interfere with normal business operations" of private entities. *Pruneyard*, 23 Cal. 3d at 910–11 (explaining that "[b]y no means do . . . those who wish to disseminate ideas have free reign" to speak however they want). And California courts have made clear that businesses may limit on-site expressive activities to ensure the "safety of persons and property." *Lushbaugh v. Home Depot U.S.A., Inc.*, 93 Cal. App. 4th 1159, 1169 (2001). Facebook's Community Standards are precisely the kind of "reasonable regulation[]" that *Pruneyard* endorsed. To hold otherwise would be to ignore the California Supreme Court's repeated refusal to use the State's free speech clause to authorize "intrusive and persistent judicial second-guessing" of private decision making. *Beeman v. Anthem Prescription Mgmt. LLC*, 58 Cal. 4th 329, 363 (2013). Thus, there is no basis to think that Facebook's Community Standards violate the California Constitution.

Third, California's free speech clause does not permit money damages for claims that require scrutiny of social and political judgments. *See Degrassi v. Cook*, 29 Cal. 4th 333, 342 (2002). In *Degrassi*, the court refused to allow money damages for a claim arising out of an acrimonious city council dispute because it would require "post hoc judicial scrutiny" of "political differences, squabbles, and perceived slights." *Id.* at 344. The same is true here. To subject Facebook to money damages for its content moderation decisions would require precisely the same kind of scrutiny of social and political judgments, which means that money damages "simply are not an appropriate remedy." *Id.* And because Plaintiff still lacks standing for an injunction or declaratory relief (*see supra* IV.A.3), Plaintiff has pleaded himself out of any remedy whatsoever for his asserted state constitutional claim.

2. Plaintiff's promissory estoppel claim should be dismissed for failing to plead a clear promise and reasonable reliance.

To plead promissory estoppel, a plaintiff must allege "(1) a clear and unambiguous promise by the promisor, and (2) reasonable, foreseeable and detrimental reliance by the promise." *Bushell v. JPMorgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 929 (2013). Plaintiff fails to plead either.

First, Plaintiff does not plead that Facebook extended a "clear and unambiguous promise" to him. The Complaint alleges only that (1) Facebook's "terms of service invites businesses to

use its services to 'connect with [other people], build communities, and grow businesses;'" (2) "[a]t no point in the terms of service or Community Standards does Facebook prohibit viewpoints that oppose making children wear masks;" (3) the Community Standards "state[] that 'we do not remove false news.'" Compl. 9–10 ¶¶ 25–28. But none of these allegations reflect a "*specific* representation" made "*directly* to" the Plaintiff that Facebook "would not remove [*his*] content." *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 38–39 (2021) (dismissing a promissory estoppel claim because Twitter's statement of "general monitoring polic[ies]," like that it would "not censor user content," did not "suffice for contract liability"). This alone dooms his promissory estoppel claim.

Second, even if Facebook's Terms of Service included a clear and unambiguous promise that Plaintiff "could use [its] services to communicate and network with other Facebook [users]," Compl. 18 ¶ 81—which they do not—Plaintiff's reliance on that promise to post whatever he wished would have been unreasonable. Reliance on "general" statements in a terms of service is unreasonable if "the very terms of service that [the plaintiff] relies on … expressly reserved the right to remove content." *Murphy*, 60 Cal. App. 5th at 39. As Plaintiff himself acknowledges, Facebook's Terms of Service expressly impose "limits on . . . [his] speech." Compl. 10 ¶¶ 26–27. Users are instructed not to "share anything . . . [t]hat is unlawful, misleading, discriminatory, or fraudulent," and Facebook reserves the right to "remove or restrict access to content that is in violation of these provisions."[6] Similarly, Facebook's Community Standards impose limits on (as Plaintiff characterizes it) "abstract categories" like "Objectionable Content," "Hate Speech," and "Integrity and Authenticity." *Id.* And Plaintiff was well aware of these restrictions on his speech, as he had already been suspended several times for posting material in violation of Facebook's Terms of Service and Community Standards. *See id.* at 5 ¶ 4, 11–12 ¶¶ 35–37. He certainly cannot allege that he did not know about Facebook's content moderation policy. Thus, given the existence of express "prohibition[s]" in Facebook's policies, and Plaintiff's own prior experience with them, any reliance here was unreasonable. *Murphy*, 60 Cal. App. 5th at 39.

[6] *See* Terms of Service, Facebook, https://web.archive.org/web/20210718231018/https://www.facebook.com/legal/terms/plain_text_terms (July 18, 2021). The Terms of Service are incorporated into the Complaint. *See supra* note 2.

3. Plaintiff's intentional interference with contract claim should be dismissed for failing to plead a valid contract, Facebook's knowledge of it, or intent to interfere.

To state a claim for intentional interference with contract, a plaintiff must plead "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *I-CA Enters., Inc. v. Palram Americas, Inc.*, 235 Cal. App. 4th 257, 289 (2015). Plaintiff has failed to plead, at minimum, the first three elements of this claim.

First, Plaintiff has failed to allege the existence of a "valid contract." To plead this element, the Complaint must contain sufficient factual allegations about the contract to allow a court to "determine what contractual rights [the plaintiff] possessed." *United Nat'l Maint., Inc. v. San Diego Convention Ctr., Inc.*, 766 F.3d 1002, 1009 (9th Cir. 2014) ("whether [plaintiff's] performance [of a contractual duty] was disrupted require[s] . . . a legal interpretation of the contract"); *Bechard v. Broidy*, No. B293997, 2020 WL 3459390, at *5 (Cal. Ct. App. June 24, 2020) (similar). Plaintiff's complaint lacks any such facts. He pleads only that he "maintains a valid employment contract with Donorbureau, LLC" and that his "duties included serving as an Administrator" on Donorbureau's Facebook account. Compl. 19 ¶¶ 91–92. Plaintiff pleads no details about this contract, making it impossible for the Court to determine what (if any) contractual rights he possessed. Thus, Plaintiff's bare assertion that he was subject to a "valid" contractual obligation is a quintessential "conclusory allegation of agreement" that cannot survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

Second, Plaintiff's claims also fails because he has not shown that Facebook had "knowledge of this contract." To establish knowledge, Plaintiff must allege "facts to show that [the defendant] was sufficiently aware of the details of the [contract] to form an intent to harm it. *Davis v. Nadrich*, 174 Cal. App. 4th 1, 10–11 (2009); *see Royal Holdings Techs. Corp. v. FLIR Sys., Inc.*, No. 20-CV-9015, 2021 WL 945246, at *5 (C.D. Cal. Jan. 8, 2021) (holding that "generally alleg[ing] that Defendant knew about Plaintiff's contracts" did not establish this element of the claim and that plaintiff must allege "facts to show that [Defendant] was aware of

the details of [the contract]"). Here, again, Plaintiff pleads only that Facebook "ha[d] actual notice that Hart serves as an Administrator for the Donorbureau [Facebook] account." Compl. 19 ¶ 93. There is no allegation that Facebook had any knowledge of a *contractual* relationship between Plaintiff and Donorbureau, much less that Facebook had knowledge of its specific terms. Thus, Plaintiff has failed to plead Facebook's knowledge of a contract.

Third, Plaintiff cannot plead that Facebook's actions (the removal of Plaintiff's content) were intended "to induce a breach or disruption" of the contract. Ordinarily, a plaintiff can prove intent by relying on the defendant's "knowledge that the interference was certain or substantially certain to occur as a result of his or her action." *Rachford v. Air Line Pilots Ass'n*, No. 03-CV-3618, 2006 WL 1699578, at *7 (N.D. Cal. June 16, 2006). But here, Plaintiff's only relevant factual allegation is that Facebook took down his post because it "didn't follow [Facebook's] Community Standards," Compl. 5 ¶ 4, which indicates that Facebook was simply enforcing its own Terms of Service, with no intent to interfere with any other contract. Accordingly, Plaintiff has failed to plead that Facebook had the requisite intent.

4. Plaintiff's negligent interference with prospective economic advantage claim should be dismissed for failure to plead a prospective economic advantage.

In California, the tort of negligent interference with a prospective economic advantage requires, among other things, that "an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff." *See Venhaus v. Shultz*, 155 Cal. App. 4th 1072, 1078 (2007). The "prospective economic advantage" cannot itself be a valid contract, as "the California Supreme Court . . . has rejected a cause of action for negligent interference with contract." *Davis*, 174 Cal. App. 4th at 9 ("In California there is no cause of action for *negligent* interference with contractual relations.").

Plaintiff's claim fails because he pleads no "prospective economic advantage" of any kind. The Complaint pleads only the same alleged "valid employment contract with Donorbureau." Compl. 20 ¶ 101. In other words, "[w]hat [Plaintiff] actually complains of" is negligent "interference with *contractual* relations," a tort that does not exist. *Professional Business Bank v. FDIC*, No. 10-CV-4614, 2011 WL 13109254, at *12 (C.D. Cal. Oct. 4, 2011)

(rejecting an attempt to recharacterize a contract as "prospective economic advantage" because it would "blur, if not eliminate the line between the two causes of action, one of which California law has long refused to recognize"). Plaintiff has therefore pleaded a nonexistent cause of action.

C. Section 230 of the CDA Independently Bars All Liability.

Even if Plaintiff had pleaded facts to assert claims against Facebook—which he has not—his claims still fail for the independent reason that they are barred as a matter of law under Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230 *et seq*. Section 230 "protects certain internet-based actors from certain kinds of lawsuits." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009). The statute's twin purposes are "to promote the free exchange of information and ideas over the Internet" and "to encourage voluntary monitoring for offense or obscene material." *Id.* at 1109–10. Thus, it "establish[es] broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751, 767 (9th Cir. 2007) (internal quotations and citations omitted), o*pinion amended and superseded on denial of reh'g*, 488 F.3d 1102 (9th Cir. 2007); *accord Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 969 (N.D. Cal. 2016).

Crucially, Section 230 bars claims based on a service provider's decisions about "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content"—the exact claims Plaintiff alleges here. *Barnes*, 570 F.3d at 1102 (holding Section 230 immunized any "activity that can be boiled down to deciding whether to exclude material that third parties seek to post online"); *see e.g. Zimmerman.*, 2020 WL 5877863, at *1 (holding that Section 230 preempted California free speech clause); *King v. Facebook, Inc.*, No. 19-CV-1987, 2019 WL 4221768, at *3–4 (N.D. Cal. Sept. 5, 2019) (holding that Section 230 protected websites "regardless of their moderation process").

Under Section 230(c)(1), a claim should be dismissed if (1) the defendant is a "provider . . . of an interactive computer service[;]" (2) the allegedly offending content was "provided by another information content provider[;]" and (3) Plaintiffs' claims treat the defendant as the "publisher" of that content. 47 U.S.C. § 230(c)(1); *Sikhs for Justice, Inc. v.*

Facebook, Inc., 144 F. Supp. 3d 1088, 1093 (N.D. Cal. 2015). Plaintiff's claims meet all three of these elements.

Facebook is an interactive computer service provider. Section 230 defines an interactive computer service provider as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). California and federal courts have uniformly held that Facebook meets Section 230's "interactive computer service" definition. *See e.g. Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 206 (2017); *Fed. Agency of News LLC*, 432 F. Supp. 3d at 1117; *Ebeid v. Facebook, Inc.*, No. 18-CV-07030, 2019 WL 2059662, at *3 (N.D. Cal. May 9, 2019); *Sikhs for Justice*, 144 F. Supp. 3d at 1093.

The content at issue was provided by another information content provider. To satisfy this prong, the information for which the plaintiff seeks to hold Facebook liable must come from an "information content provider" that isn't Facebook. § 230(c)(1). This inquiry is simple if, as here, the "complaint admits that [the plaintiff] is the source of the information that Facebook removed" while "nowhere alleg[ing] that Facebook provided, created, or developed any portion" of the content. *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1305–06 (N.D. Cal. 2019) (holding that the allegation that plaintiff "operate[s] a Facebook page through which [plaintiff] has published its posts" was an "admi[ssion] that [it] is the source of the information that Facebook removed"). Because plaintiff concedes that he—*not Facebook*—provided the content at issue, and nowhere alleges that Facebook was involved in its creation or development, *see* Compl. 5 ¶¶ 1–4, the information at issue here was "provided by another information content provider." *See also Lewis*, 461 F. Supp. 3d at 953 (holding that the plaintiff's videos constituted "information provided by another information content provider" under Section 230); *Brittain v. Twitter, Inc.*, No. 10-CV-114, 2019 WL 2423375, at *4 (N.D. Cal. June 10, 2019) (holding that tweets posted on a Twitter account were "information provided by another information content provider").

Each of Hart's claims seek to treat Facebook as a "publisher." Under Section 230, a plaintiff's claim treats a defendant as a "publisher" when it seeks to hold a service provider liable

for its purported exercise of "editorial functions"—such as "deciding whether to publish, withdraw, postpone or alter content." *See Barnes*, 570 F.3d at 1102. *Lewis*, 461 F. Supp. 3d at 954 (holding that plaintiff's claims that the defendants "wrongfully … restricting and removing his videos" constituted publishing functions under Section 230). What matters here is not the "name of the cause of action," but "whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, Section 230(c)(1) precludes liability." *See Barnes*, 570 F.3d at 1101–02; *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (holding that "removing content is something publishers do" and that Section 230 barred a discrimination claim); *see also Fed. Agency of News LLC*, 395 F. Supp. 3d at 1303–04 (federal discrimination claims); *Caraccioli v. Facebook, Inc.*, 167 F. Supp.3d 1056, 1064-66 (N.D. Cal. 2016) (breach of contract, unfair practices); *Lancaster v. Alphabet Inc.*, No. 15-CV-05299, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016) (breach of covenant of good faith); *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1122–23 (E.D. Cal. 2010) (fraud).

Here, each of Plaintiff's claims—First Amendment free speech, California constitutional free speech, promissory estoppel, intentional interference with a contract, and negligent interference with a prospective economic advantage, *see* Compl. 14–21 ¶¶ 51–110—stems from Facebook's decision "whether or not to prevent [Plaintiff from] posting," which is "precisely the kind of activity for which Section 230 was meant to provide immunity." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170 (9th Cir. 2008). Numerous courts have dismissed these exact claims when they have been premised on a defendant's decision to remove user content from its website. *See, e.g.*, *Lewis*, 461 F. Supp. 3d at 955 (dismissing First Amendment claim); *Domen*, 433 F. Supp. 3d at 605 (dismissing California constitutional free speech claim); *Jurin*, 695 F. Supp. 2d at 1122 (dismissing claims of intentional interference with contract and negligent interference with prospective economic advantage); *Cross*, 14 Cal. App. 5th at 206 (dismissing claim of negligent interference with prospective economic advantage); *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th at 28–30 (dismissing promissory

estoppel claim).[7]

Ultimately, Plaintiff's claims are "the classic kind[s] of claim[s] that [have been] found to be preempted by section 230," and California and federal courts have "uniformly rejected" them. *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 835 (2002) (dismissing negligence and statutory claims under Section 230, which sought "to hold eBay … for electing not to take action" against third parties who posted harmful content on its site, "including by withdrawing or somehow altering the content placed by them"); *Murphy*, 60 Cal. App. 5th at 27 ("Courts have routinely rejected a wide variety of civil claims like [plaintiff's] that seek to hold interactive computer services liable for removing or blocking content…or failing to do so…on the grounds [that] they are barred by the CDA.").

D. The State Law Claims Should Independently Be Struck Under California's Anti-SLAPP Statute.

Facebook also moves to strike Plaintiff's state law claims under California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16(b). Under the statute, a plaintiff's state law claims are struck if (1) the defendant makes a *prima facie* showing that the claims arise from "protected activity" and (2) the plaintiff fails to demonstrate that her claims are legally sufficient. *See, e.g.*, *Sarver v. Chartier*, 813 F.3d 891, 901 (9th Cir. 2016). Both conditions are present here.

1. Facebook's content is protected activity because the enforcement of content moderation policies on a social media site facilitates free speech rights.

The anti-SLAPP statute protects, among other things, (1) "any . . . conduct in furtherance of the exercise of . . . the constitutional right of free speech" which is (2) "in connection with a public issue or an issue of public interest." § 425.16(e)(4). Here, Plaintiff targets Facebook's exercise of its editorial discretion, which resulted in the removal of Plaintiff's COVID-related

[7] While promissory estoppel claims based on specific promises to perform specific acts may survive Section 230, such claims are precluded if they are based on general promises to enforce content guidelines. *Compare Barnes*, 570 F.3d at 1107 (allowing promissory estoppel claim to go forward because it was based on a specific personal promise made directly to the plaintiff), *with Murphy*, 60 Cal. App. 5th at 28–30 (dismissing promissory estoppel claim because Twitter's only "promise" was its "general rules [about] what content it will publish"); *King*, 2019 WL 4221768, at *1–5 (dismissing promissory estoppel claim seeking to enforce Facebook's Terms of Service); *Brittain*, 2019 WL 2423375, at *3 (dismissing promissory estoppel claim that broadly sought to regulate Twitter's conduct on its site).

post. *See* Compl. 5 ¶ 4. The anti-SLAPP statute protects Facebook's alleged conduct because (1) exercising editorial discretion over speech posted to a website is a quintessential act that furthers the right to speak and (2) Facebook's decisions relate to COVID-19, which is manifestly an issue of public interest.

First, Facebook's content moderation decisions further the right to free speech. An act is "in furtherance of the right of free speech" if it "helps to advance that right or assists in the exercise of that right." *Hupp v. Freedom Commc'ns, Inc.*, 221 Cal. App. 4th 398, 404 (2013). And "[m]aintaining a forum for discussion of issues of public interest is a quintessential way to facilitate [speech] rights." *Id.* at 404–05 (holding that "maintenance of a [newspaper's] web site," including "allow[ing] user comments on such articles," was protected activity). Thus, courts have recognized that Facebook's editorial choices about content moderation are protected activity under the anti-SLAPP statute. *See Cross*, 14 Cal. App. 5th at 202 (holding that "Facebook's decision not to remove [a post was] an act 'in furtherance of the right of petition or free speech'"). Indeed, *any* choice about how "to deliver, present, or publish news content on matters of public interest . . . must withstand scrutiny under California's anti-SLAPP statute." *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 424–25 (9th Cir. 2014) (holding that CNN's "refusal to adopt closed captioning" "even if not itself an exercise of free speech" "constitute[d] conduct in furtherance of CNN's protected right to report the news"). Plaintiff's lawsuit "directly targets the way [Facebook] chooses to . . . publish . . . content." *Id.* Accordingly, it triggers scrutiny under the anti-SLAPP statute.

Second, the speech in question concerns COVID-19, which is self-evidently an issue of public interest, as Plaintiff's Complaint demonstrates. Plaintiff's post questioned the efficacy of masks to combat COVID. *See* Compl. 5 ¶ 4. Given the "broad interpretation" of "public interest" under California law, it "surely" includes "[c]ommentary on the efficacy of a product designed to help prevent the spread of a deadly infection during a global pandemic." *Royal Holdings Techs. Corp. v. IP Video Market Info Inc.*, No. 20-CV-4093, 2020 WL 8225666, at *4 (C.D. Cal. Dec. 18, 2020) (statements about the accuracy of a body temperature sensor were a matter of public interest because of COVID).

2. Plaintiff cannot show a probability of prevailing on his state law claims.

"The burden then shifts to [Plaintiff] to establish a reasonable probability that it will prevail on its claim[s]." *Makaeff v. Trump Univ. LLC*, 715 F.3d 254, 261 (9th Cir. 2013). If an anti-SLAPP motion is "based on alleged deficiencies in the plaintiff's complaint"—like this one is—then it "must be treated in the same manner as a motion under Rule 12(b)(6) except that the attorney's fee provision of § 425.16(c) applies." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018). This motion asserts the same deficiencies as those outlined in the motion to dismiss for failure to state a claim. *See supra* IV.A–C. Accordingly, Plaintiff cannot show a probability of prevailing on his claims, and the state law claims should be struck.

E. Plaintiff Should Not Be Granted Leave To Amend.

Plaintiff should not be given the opportunity to replead his claims. Leave to amend is inappropriate if "the pleading could not possibly be cured by the allegations of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). Here, leave to amend would be inappropriate for three reasons.

First, as established above (*see supra* IV.A–B), each of Plaintiff's claims suffer fatal deficiencies that he cannot overcome with further amendments.

Second, Plaintiff's claims will be barred by Section 230(c)(1) no matter what additional facts he pleads (*see supra* IV.C)— which is why courts generally deny leave to amend when "there is CDA immunity." *King*, 2021 WL 5279823, at *13 (dismissing claims barred by Section 230 with prejudice because "it would be futile for [Plaintiff] to try to amend the claim[s]"); *Brittain*, 2019 WL 2423375, at *4 (dismissing claims barred by Section 230 with prejudice "[b]ecause plaintiff cannot cure this defect").

And *third*, leave to amend is inappropriate after a successful anti-SLAPP motion. Because the purpose of the anti-SLAPP statute is "to provide for a speedy resolution of claims which impinge on speech protected by the First Amendment," "leave to amend is not necessary or appropriate." *Smith v. Santa Rosa Press Democrat*, No. 11-CV-2411, 2011 WL 5006463, at *7 (N.D. Cal. Oct. 20, 2011); see also *Flores v. Emerich & Fike*, No. 05-CV-291, 2006 WL

2536615, at *10 (E.D. Cal. Aug. 31, 2006) ("To allow amendment after an anti-SLAPP motion to strike has been granted eviscerates the purpose of the anti-SLAPP statute.").

V. CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court dismiss or strike the Complaint with prejudice.

Dated: March 17, 2022

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