

1 GARY E. WEISS (SBN 122962)  
 gweiss@orrick.com  
 2 JULIO C. AVALOS (SBN 255350)  
 javalos@orrick.com  
 3 MORVARID METANAT (SBN 268228)  
 mmetanat@orrick.com  
 4 ORRICK, HERRINGTON & SUTCLIFFE LLP  
 1000 Marsh Road  
 5 Menlo Park, CA 94025  
 Telephone: 650-614-7400  
 6 Facsimile: 650-614-7401  
 7 Attorneys for Defendant  
 FACEBOOK, INC.  
 8

9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA  
 11 SAN JOSE DIVISION  
 12

13 KAREN BETH YOUNG, an individual,  
 14 Plaintiff,  
 15 v.  
 16 FACEBOOK, INC.,  
 17 Defendant.  
 18  
 19

Case No. C 10-03579 JF

**DEFENDANT FACEBOOK, INC.'S  
 REPLY IN SUPPORT OF MOTION  
 TO DISMISS PURSUANT TO FED. R.  
 CIV. P. 12(b)(6)**

Date: October 15, 2010  
 Time: 9:00 a.m.  
 Judge: Honorable Judge Fogel  
 Courtroom: 3

20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

1 **I. INTRODUCTION**

2 Plaintiff's case should be dismissed for failure to state a claim. Plaintiff's Motion in  
3 Opposition to Facebook's Motion to Dismiss ("Plaintiff's Opposition," cited as "Opp. Br.")  
4 confirms that Plaintiff has no cognizable claims against Facebook. Accordingly, and because  
5 amendment would be futile, Facebook respectfully requests that Plaintiff's case be dismissed in  
6 its entirety and with prejudice.

7 **II. FACTS**

8 A full recitation of the facts relevant to this motion to dismiss is provided in Facebook's  
9 opening brief. *See* Defendant Facebook's Motion to Dismiss Plaintiff's Complaint ("Motion to  
10 Dismiss") (Dkt. No. 19). In short, Plaintiff created a number of pages on the Facebook website,  
11 including a personal account and at least two "group pages" allegedly "relating to cancer for  
12 communication and discussion." Plaintiff's Complaint ("Compl.") at ¶ 10. According to her  
13 Complaint, "Plaintiff sent 'friendvites' to others who she believed to be sincere in the cancer  
14 cause." *Id.* Judging from the Complaint, Plaintiff appears to have sent many thousands of these  
15 "friendvites" to Facebook users that she did not know, a violation of Facebook's terms of service.  
16 *Id.* Plaintiff's account was thus disabled. *Id.* When Plaintiff e-mailed Facebook regarding her  
17 account, a member of the Facebook support team informed her that her "account was disabled  
18 because [her] behavior on the site was identified as harassing or threatening to other people on  
19 Facebook." Opp. Br. at Ex. A-1. Plaintiff was informed on multiple occasions that Facebook  
20 prohibited, among other things, "[s]ending friend requests to people you don't know" and  
21 "regularly contacting strangers through unsolicited Inbox messages." *Id.*

22 After exchanging multiple e-mails with Facebook's support team, Plaintiff drove from  
23 Maryland to Facebook's headquarters in Palo Alto, where she demanded to have her account  
24 reinstated. Compl. at ¶ 9. Because her account remained terminated, Plaintiff set up temporary  
25 residence in the Bay Area and instituted the current litigation. *Id.* Plaintiff believes that  
26 Facebook's refusal to reinstate her account gives rise to multiple violations of the United States  
27 Constitution. *Id.* at ¶¶ 16-29.

28

1 Unrelatedly, Plaintiff claims that while still on Facebook, she was made fun of by, and  
2 suffered “personal attacks” from, unknown third-parties and that she was exposed to a webpage  
3 that she considered offensive. *Id.* ¶ 11. This third-party content is the purported basis for a  
4 number of Plaintiff’s additional claims, including breach of contract claims, negligence, and  
5 fraud.

6 This Court recently noted that Plaintiff’s “complaint appears to be without merit in that it  
7 fails to set forth a cognizable claim.” Dkt. No. 26 at 2:21-22. Plaintiff’s Opposition confirms this  
8 observation.

9 **III. ARGUMENT**

10 **A. Plaintiff Has Failed To State Claims For Civil Violations Under The U.S.**  
11 **Constitution.**

12 Plaintiff has failed to state a claim for violation of the First and Fourteenth Amendments.  
13 In her Opposition, Plaintiff appears to set forth four reasons why Facebook should be considered  
14 a governmental entity: (i) “Facebook hypocritically deteriorates and undermines the secured  
15 rights of all United States citizens through both their actions and inactions”; (ii) “Facebook  
16 promotes things that they say they discourage”; (iii) Facebook partakes in “Commercial  
17 Advertising fill[ing] the nations [sic] economy in and on every level all the while benefiting from  
18 government affiliations” and (iv) government agencies use Facebook. *See* Opp. Br. at 29.

19 Even if these theories had been raised in the Complaint, which they were not, they would  
20 not establish state action. Under well-established federal law, a private entity acts under the color  
21 of state authority only when “he or she has ‘exercised power possessed by virtue of state law and  
22 made possible only because the wrongdoer is clothed with authority of state law.’” *West v.*  
23 *Atkins*, 487 U.S. 42, 49 (1988) (citations omitted). Moreover, the only time that “a § 1983 action  
24 can lie against a private entity [is] when the private entity is a willful participant in joint action  
25 with the State or its agents.” *Liao v. Ashcroft*, No. C 08-2776 PJH, 2009 WL 636116, at \*4 (N.D.  
26 Cal. Mar. 11, 2009) (citations omitted). Plaintiff concludes that Facebook is “a state actor” and  
27 “a willful participant in joint action with the State and its agents,” but has failed to plead facts to  
28 support that conclusion. And according to Plaintiff’s own legal citations, agreements with the

1 government, by themselves, are insufficient to create state action. *Forbes v. City of New York*,  
2 No. 05 Civ. 7331 NRB, 2008 U.S. Dist. LEXIS 63021, at \*17-18 (S.D.N.Y. Aug. 12, 2008)  
3 (citing *Lansing v. City of Memphis*, 202 F. 3d 821, 832 (6th Cir. 2000)).

4 Plaintiff's reliance on *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961),  
5 where defendant, a private restaurant, was found to have acted under the color of state law in  
6 discriminating against African Americans, is easily distinguishable. The *Burton* restaurant leased  
7 space from the city, was an integral part of a public building, benefitted from the public  
8 building's tax exempt status, and relied on public funds for its upkeep. *Id.* at 723-24. Here,  
9 Plaintiff does not and cannot allege that Facebook's free website is government-funded or that  
10 Facebook uses government property. Plaintiff's remaining cases are similarly off-point.

11 Accordingly, and because Plaintiff cannot amend to allege facts showing state authority,  
12 Plaintiff's claims of constitutional violations against Facebook should be dismissed without leave  
13 to amend.

14 **B. Plaintiff Has Failed To State A Claim For Breach Of Contract.**

15 To maintain her breach of contact claim, Plaintiff is required, at a minimum, to identify  
16 the contract at issue as well as the terms of that contract that Facebook is alleged to have  
17 breached. Plaintiff has failed to do so. As Plaintiff admits, "Plaintiffs [sic] claims are based on  
18 user content, page content, poor business practices and poor business procedures which have  
19 resulted in the indifferent rights of the plaintiff and irreparable harm." Opp. Br. at 33:14-16. No  
20 mention of particular contract terms is made. To the extent Plaintiff's claims are based on "user  
21 content" and "page content," such claims are barred by the Communications Decency Act  
22 ("CDA"). *See* Motion to Dismiss at 7:2-14. Plaintiff provides no authority to the contrary and  
23 does not adequately explain why the CDA should not apply.

24 The remainder of Plaintiff's breach of contract claim appears based on three alleged  
25 agreements: a newly-alleged agreement between a government agency and Facebook, Facebook's  
26 unilateral policy statements, and the only contract possibly at issue here, Facebook's Statement of  
27 Rights and Responsibilities ("SRR"). With respect to the government agency agreement, even if  
28 Facebook had entered into such a contract, Plaintiff did not (and could not) raise that agreement

1 in her Complaint and has not alleged that she is a party to it. She thus lacks standing to assert a  
2 breach of its terms.

3 Further, Plaintiff has still not identified any language or terms in Facebook’s policies or  
4 SRR that give rise to the obligations she seeks to enforce. None exists. To the contrary, the SRR  
5 expressly bars and disclaims such obligations and liability. *See* Motion to Dismiss at 8:8-19;  
6 Compl. at Ex. A, Section 15.3. Plaintiff concludes that the SRR’s disclaimer—as well as this  
7 Court’s prior decisions enforcing it—are inapplicable. Opp. Br. at 33. But Plaintiff cites to no  
8 support for this conclusion other than an argument that “Facebook ‘Law’ is not the governing  
9 body” and that if the disclaimer were enforceable, “there would be no need for all of the other  
10 Facebook documented sections and articles, or a United States government foundation.” *Id.*  
11 These arguments are unavailing.

12 Accordingly, and because amendment would be futile, Plaintiff’s breach of contract claim  
13 should be dismissed without leave to amend.

14 **C. Plaintiff Has Failed To State A Claim For Breach Of The Implied Covenant**  
15 **Of Good Faith And Fair Dealing.**

16 To sustain a claim for breach of implied covenant of good faith and fair dealing, a plaintiff  
17 must show that the parties had an agreement and the defendant interfered with the plaintiff’s right  
18 to receive the benefits of that agreement. *See Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317, 349-  
19 350 (2000). This covenant cannot import onto the parties’ contract terms or contractual  
20 provisions that were absent from the actual underlying agreement. *See, e.g., In Re Facebook PPC*  
21 *Adver. Lit.*, 2010 U.S. Dist. LEXIS 39776, at \*13-14. Plaintiff, however, attempts to do just  
22 that—impose onto Facebook obligations that Facebook never agreed to. Plaintiff’s claim rests  
23 entirely on her allegation that Facebook terminated her account. Plaintiff argues that her use of  
24 Facebook was unfettered and that by terminating her account, Facebook deprived her of some  
25 contractual benefit. This argument fails. The SRR contains no terms guaranteeing Plaintiff use  
26 of the Facebook website. To the contrary, the SRR allows Facebook to terminate any account at  
27 its discretion. Compl. at Ex. A, Section 14.  
28

1 Further, Plaintiff’s argument that Facebook “had an obligation to adhere to their terms of  
2 agreement rather than allow for the degradation of plaintiffs [sic] rights by means of hypocritical  
3 policies and practices and neglect” “[t]hus, preventing the subsequent frustration of rights of  
4 benefits the agreement was supposed to depict” is unfounded and conclusory. Opp. Br. at 34:7-  
5 10. It is unclear what contractual “obligations” Plaintiff’s theory is based on or how Facebook  
6 frustrated those “rights of benefits” of the agreement.

7 Accordingly, this claim should also be dismissed without leave to amend.

8 **D. Plaintiff Has Failed To State A Claim For Negligence.**

9 Plaintiff’s negligence claim also fails. The Opposition fails to point to any allegations that  
10 would give rise to Facebook’s duty of care. Rather, and without support, Plaintiff simply  
11 concludes that Facebook was negligent and “failed in its responsibility to condemn all acts or  
12 statements that inspire, imply, incite or directly threaten violence against anyone.” Opp. Br. at  
13 35. Facebook never assumed any such responsibility.

14 Plaintiff further argues that the CDA does not apply to her negligence claim because the  
15 alleged third-party messages “compromise the ‘decency’ general principles which the  
16 Communications Decency Act was originally designed to address.” Opp. Br. at 35. This  
17 proposition runs contrary to CDA precedent and would itself nullify Section 230’s overarching  
18 policy interests.

19 Accordingly, and because it is clear that amendment would be futile, Plaintiff’s  
20 negligence claim should be dismissed with prejudice.

21 **E. Plaintiff Has Failed To State A Claim For Fraud.**

22 Rather than pointing to facts sufficient to establish a claim of fraud, Plaintiff’s Opposition  
23 offers only unsupported conclusions.

24 Plaintiff argues that her fraud claim is based on the assertion that Facebook “mislead [sic]  
25 plaintiff in relation to its practices and procedures all the while intentionally and carelessly not  
26 providing assistance when needed” and “created an environment that was threatening and harmful  
27 by allowing for the ongoingly [sic] development of a cult like page with death threats.” Opp. Br.  
28 at 36. These allegations are conclusory and do not support a claim for fraud. Plaintiff also claims

