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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FACEBOOK, INC. a Delaware corporation, and)
FACEBOOK IRELAND LIMITED, an Irish)
company,)
Plaintiffs,)
v.)
PROFILE TECHNOLOGY, LTD, a New)
Zealand company, and CHRISTOPHER)
CLAYDON, an individual,)
Defendants.)

Case No.: 5:13-cv-00459-PSG
**ORDER DENYING DEFENDANTS’
MOTION TO DISMISS**
(Re: Docket No. 11)

Defendants Profile Technology, Ltd. (“PTL”) and Christopher Claydon (“Claydon”) (collectively “Defendants”) present a motion to dismiss for the court’s consideration. The central question is straightforward: accepting as true all the allegations of the complaint, did Defendants ever enter into a contract with Plaintiff Facebook Ireland Limited (“Facebook Ireland”)? Because the equally straightforward answer to the question is yes, the court DENIES Defendants’ motion.

I. BACKGROUND

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2 As noted, the court accepts as true for the purposes of this motion the various factual allegations
3 in the complaint. Plaintiff Facebook, Inc. is a Delaware corporation with its principal place of
4 business in Menlo Park, California.¹ Facebook Ireland is an Irish company with its principal place
5 of business in Dublin, Ireland.² The Facebook online social networking service enables people to
6 connect and share with their friends, family and coworkers.³ All Facebook users agree to comply
7 with the Site Terms of Use (“Statement”) when they create a Facebook account or access the
8 Facebook website.⁴ Facebook hosts content that its users post, and makes that content available
9 (subject to limitations set by the content owners) to third-party application developers (“Facebook
10 Developers.”)⁵ These developers can access and interact with user-generated content hosted on
11 Facebook’s website through the Facebook Platform, subject to and restricted by Facebook’s
12 Developer Terms.⁶ The Platform includes a set of application programming interfaces and other
13 services that enable these developers’ applications to interact with Facebook’s services.⁷
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16 Claydon was a registered Facebook user, who like all registered users, agreed to be bound
17 by Facebook’s Statement.⁸ Claydon also was a Facebook Developer, and operated a developer
18 account on behalf of, and for the purposes of, operating his business, PTL, and the
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21 ¹ See Docket No. 1 ¶ 5.

22 ² See *id.* ¶ 6.

23 ³ See *id.* ¶ 14.

24 ⁴ See *id.* ¶ 12, 16.

25 ⁵ See *id.* ¶ 15.

26 ⁶ See *id.* ¶ 20.

27 ⁷ See *id.*

28 ⁸ See *id.* ¶ 12.

1 ProfileEngine.com website.⁹ In exchange for permission to use the Facebook Platform, Claydon
2 and PTL agreed to be bound by Facebook's Developer Terms.¹⁰

3 In March 2008, Claydon approached Facebook, seeking permission to use Facebook APIs
4 to retrieve user data and index it for use by PTL.¹¹ Facebook agreed, and between March 2008 and
5 October 2010, Defendants retrieved, copied and indexed user data.¹²

6 The Developer Terms in effect when Defendants began using the Facebook Platform to
7 develop applications were the Developer Terms dated June 1, 2007 (“June 2007 Developer
8 TOS”).¹³ The June 2007 Developer TOS, stated that if Facebook modified the Developer Terms,
9 and the modifications were unacceptable to the developer, then the developer's “ONLY
10 RECOURSE IS TO STOP USING THE FACEBOOK PLATFORM,” and that “CONTINUED
11 USE OF THE F ACEBOOK PLATFORM FOLLOWING OUR POSTING OF A CHANGE
12 NOTICE OR NEW AGREEMENT ON OUR SITE WILL CONSTITUTE YOUR BINDING
13 ACCEPTANCE OF THE CHANGE.”¹⁴

14 Since 2008, the Developer Terms have changed on several occasions. At some point,
15 Facebook Ireland became a party to at least the Statement, and was charged with enforcing the
16 terms against users and developers outside North America.¹⁵ On another occasion, in April 2010, a
17 requirement was added that Developers keep so-called “cached data.”¹⁶ A few months after this
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21 ⁹ See *id.* ¶ 32.

22 ¹⁰ See *id.* ¶ 35.

23 ¹¹ See *id.*

24 ¹² See *id.* ¶ 36.

25 ¹³ See *id.* ¶ 27.

26 ¹⁴ See *id.* ¶ 29.

27 ¹⁵ See Docket No. 1, Ex. A at 19.

28 ¹⁶ See *id.* ¶ 30.

1 change, in October 2010, Defendants claim to have stopped accessing the Facebook Platform for
2 indexing purposes.¹⁷ Despite this claim, Defendants continued to access the Facebook Platform by
3 automated means and retrieved Facebook user information after October 2010.¹⁸ As of the date of
4 filing of the complaint, ProfileEngine.com displays information that was posted to Facebook after
5 the October 2010 date on which Defendants claim to have stopped retrieving data.¹⁹ At no time
6 have Defendants kept their storage of user data current.²⁰ Further, Defendants did not delete user
7 data after they claim to have stopped accessing the Facebook Platform.²¹ Instead, Defendants have
8 expressly and repeatedly refused Facebook's demands that they return or delete user data.
9 Facebook alleges that Defendants continue to use and display out-of-date user data to this day.²²

11 In November 2011, after determining that Defendants had breached and were continuing to
12 breach their agreements with Facebook, Facebook revoked Defendants' license to access Facebook
13 and the Facebook Platform, demanded that Defendants stop displaying outdated user data, and
14 demanded that Defendants delete all of Facebook user information in its possession.²³ Rather than
15 complying with their agreements with Facebook, Defendants refused to stop displaying user data
16 on ProfileEngine.com, and Defendants refused to delete or return to Facebook any user data.
17 Defendants continued to access Facebook until at least May 19, 2012.²⁴

19 II. LEGAL STANDARDS

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21 ¹⁷ See *id.* ¶ 37.

22 ¹⁸ See *id.*

23 ¹⁹ See *id.*

24 ²⁰ See *id.* ¶ 38.

25 ²¹ See *id.*

26 ²² See *id.*

27 ²³ See *id.* ¶ 41.

28 ²⁴ See *id.* ¶ 42, 43.

1 A complaint may be dismissed under Rule 12(b)(6) “where the complaint lacks a
2 cognizable legal theory or sufficient facts to support a cognizable legal theory.”²⁵ The court must
3 generally accept as true all “well-pleaded factual allegations,”²⁶ and must construe the alleged facts
4 in the light most favorable to the plaintiff.²⁷ But any factual allegations “must be enough to raise a
5 right to relief above the speculative level” such that the claim “is plausible on its face.”²⁸ Thus, a
6 complaint should only be dismissed where it “appears beyond doubt the plaintiff can prove no set
7 of facts in support of his claim that would entitle him to relief.”²⁹

8
9 Leave to amend shall be freely given when justice so requires.³⁰ But a motion for leave to
10 amend may be denied if it would be futile or legally insufficient.³¹ A proposed amendment is futile
11 if no set of facts can be proved under the amendment to the pleadings that would constitute a valid
12 and sufficient claim or defense.³²

13 III. DISCUSSION

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15 Defendants’ challenge to the complaint is a narrow one³³: they never entered into any
16 agreement with Facebook Ireland, and so Facebook Ireland’s claims should be dismissed. In
17 support of their challenge, Defendants highlight the fact that there are no allegations of any

18 ²⁵ *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

19 ²⁶ *Ashcroft v. Iqbal*, 566 U.S. 662, 664 (2009).

20 ²⁷ *See Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1988).

21 ²⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007).

22 ²⁹ *Clegg v. Cult of Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994).

23 ³⁰ Fed R. Civ. P. 15(a).

24 ³¹ *See Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

25 ³² *See id.*

26 ³³ Defendants make a vague reference to an arbitration clause that they obliquely suggest applies to
27 this case. *See* Docket No. 11. They have not moved to dismiss on those grounds nor have they
28 moved to compel arbitration. The court therefore does not address the merits of the arbitration
clause or its applicability in this case.


1 communications between them and Facebook Ireland, that any addition of Facebook Ireland by
2 amendment of the Developer Terms was an improper novation,³⁴ and that if Facebook Ireland is an
3 appropriate party to the breach of contract claim it would suggest that Facebook, Inc. is not.

4 While the court would agree that the complaint is not a model of clarity as to Facebook
5 Ireland's standing to pursue the asserted contract breach claim,³⁵ it cannot agree that no such
6 standing is established. It is true that nowhere in the complaint is Facebook Ireland's substitution
7 into the Developer Agreement mentioned. Facebook Ireland in fact only appears in Exhibit A to
8 the complaint, Facebook's current Statement, last revised in December 2011. But as alleged in the
9 complaint, when Defendants agreed to the Statement and Developer Terms in 2008, they agreed
10 that the conditions of those agreements could change and that if they did not wish to be bound by
11 the changes, their remedy was to stop using the site and accessing the Platform. The complaint
12 alleges that Defendants continue still to use the site and are in breach of the current Statement. If
13 these allegations are to be believed, as they must when considering a Rule 12(b)(6) motion, this is
14 sufficient for Facebook Ireland to pursue remedies for the alleged breach. In light of the discovery
15 that is to come, Defendants may have an argument that these allegations are somehow
16 unmeritorious, but as a matter of pleading they have not shown that this is so. As for Defendants'
17 final point, it may be that Facebook Inc. has no claim, but Defendants chose only to challenge
18 Facebook Ireland's standing as a proper plaintiff.

19 Because the allegations provide a plausible cause of action by Facebook Ireland against
20 Defendants, the motion to dismiss is DENIED.

21 **IT IS SO ORDERED.**

22 Dated: July 22, 2013

23 
24 PAUL S. GREWAL
25 United States Magistrate Judge

26 _____
27 ³⁴ See Cal. Civ. Code §§ 1530-1532.

28 ³⁵ The court must take note that Defendants chose to allege a failure to state of claim pursuant to
Rule 12(b)(6), not a more definite statement pursuant to Fed. R. Civ. P. 12(e).