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EXHIBIT PAGE ONLY

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**EXHIBIT B**

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12  
13 UNITED STATES DISTRICT COURT  
14 DISTRICT OF NEVADA  
15

16 JONATHAN B. GOLDSMITH,  
17 Plaintiff,

18 v.

19 JORDAN R. COOPER, an Individual;  
20 CHERYL COOPER DRISCOLL, an  
Individual; FACEBOOK, INC., a foreign  
21 corporation,  
22 Defendants.

Case No. 2:10-cv-01845-RLH-PAL

**FACEBOOK, INC.'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF ITS  
MOTION TO DISMISS AMENDED  
COMPLAINT PURSUANT TO FED.  
R. CIV. P. 12(B)(6) AND 12(B)(3)**

**ORAL ARGUMENT REQUESTED**

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1 **I. INTRODUCTION**

2 Facebook hereby submits its Motion to Dismiss pursuant to Federal Rules of Civil  
3 Procedure 12(b)(6) and 12(b)(3).

4 Goldsmith's amended complaint fails to state a claim for which relief may be granted  
5 against Facebook. With respect to Claims 1 through 4, Facebook did not "publish" the allegedly  
6 defamatory statements about Goldsmith. Rather, as alleged in the amended complaint, the  
7 individual defendants created and posted the comments about Goldsmith. Facebook, as an  
8 interactive computer service, was merely the conduit that the individual defendants used to post  
9 their comments. As such, the Communications Decency Act, 47 U.S.C. § 230, provides complete  
10 immunity for Facebook for these state law claims. Thus, Claims 1 through 4 must be dismissed  
11 pursuant to Rule 12(b)(6).

12 Goldsmith's allegations that Facebook violated the wiretapping statute are equally  
13 unavailing. Goldsmith does not allege, as he must, that Facebook "intercepted" any of  
14 Goldsmith's communications. Rather, he repeats, without any factual support, the same  
15 conclusory allegation throughout his amended complaint that Facebook "facilitated, published or  
16 neglected to mitigate the wiretapping violations" by the other defendants. This meager allegation  
17 cannot support Goldsmith's wiretapping claims against Facebook and, thus, they must be  
18 dismissed.

19 Finally, this is the wrong venue to hear Goldsmith's claims against Facebook. As a  
20 Facebook user, Goldsmith agreed to litigate his disputes with Facebook in California. The  
21 parties' forum selection clause should be enforced, and this case dismissed pursuant to Rule  
22 12(b)(3).

23 **II. BACKGROUND**

24 **A. Relevant Facts**

25 Facebook, Inc. operates the free and popular online network available at facebook.com,  
26 and provides its service to over 500 million monthly active users. Among other features, the  
27 Facebook website allows users to communicate among themselves through various messaging  
28 tools, including functionality that allows users to post messages on their friends' "Walls." An

1 example of a “Wall” is depicted in Exhibit 2 to Goldsmith’s Motion for Preliminary Injunction  
2 (*see* Dkt. No. 11).

3 Goldsmith alleges that Defendants Cooper and Cooper Driscoll posted “defamatory and  
4 demeaning statements” on one or more Facebook users’ “Wall.” FAC ¶ 8. Based on this  
5 allegation, he concludes that “Facebook facilitated, published or neglected to mitigate the  
6 defamatory and harassing statements and comments published by Defendant Cooper and  
7 Defendant Cooper Driscoll” (FAC ¶ 14) and that Facebook, thus, is liable for slander and libel.<sup>1</sup>  
8 FAC ¶¶ 26-57. Goldsmith does not allege that Facebook created or otherwise assisted in the  
9 creation of the “statements and comments.”

10 Goldsmith also alleges, albeit cryptically, that Defendant Cooper Driscoll created a false  
11 Facebook account and “friended” Goldsmith “in order to gain access to Plaintiff’s personal and  
12 private information.”<sup>2</sup> FAC ¶ 27; *see also* FAC. ¶ 28. Goldsmith does not allege that Facebook,  
13 itself, retrieved his picture or disclosed it.

14 **B. Facebook’s Terms of Service**

15 Facebook’s business records show that Goldsmith was a Facebook member from  
16 January 2, 2005 until October 7, 2010. Declaration of Theresa A. Sutton in Support of Motion to  
17 Dismiss (“Sutton Decl.”), ¶ 2. Goldsmith, as a Facebook member, agreed to Facebook’s Terms  
18 of Use, which contains clear forum-selection, choice of law, and personal jurisdiction clauses that  
19 control the resolution of any claims by a registered Facebook user, including Goldsmith’s claims.  
20 Specifically, the section entitled “Disputes” provides:

21 You will resolve any claim, cause of action or dispute (“claim”)  
22 you have with us arising out of or relating to this Statement or  
23 Facebook exclusively in a state or federal court located in Santa  
24 Clara County. The laws of the State of California will govern this  
Statement, as well as any claim that might arise between you and  
us, without regard to conflict of law provisions.

25 <sup>1</sup> Goldsmith’s claims for slander are a mystery. He apparently recognizes that actionable slander  
requires an audible statement (*see* FAC ¶¶ 30, 39) yet nowhere in his papers does he reference  
26 anything other than written content.

27 <sup>2</sup> Goldsmith alleges that Ms. Driscoll “created a false profile on Defendant Facebook’s website  
using a false name and false picture.” FAC ¶ 27. Based on this allegation, the most likely  
28 scenario is that Goldsmith “friended” Ms. Driscoll and that is how she gained access to his  
pictures. Alternatively, Goldsmith simply made the photos available to the general public. In  
either event, Goldsmith voluntarily provided access to the photos.

1 Sutton Decl., ¶ 2, Ex. A at § 15. This clause survives account termination. *Id.* at § 14.

2 **III. ARGUMENT**

3 **A. Goldsmith Cannot State A Claim For Relief Against Facebook**

4 In his amended complaint, Goldsmith simply fails to state a claim against Facebook.  
5 Courts routinely dismiss cases like this, where the complaint evinces either a lack of a cognizable  
6 legal theory or the absence of sufficient facts supporting one. *Ashcroft v. Iqbal*, 129 S. Ct. 1937,  
7 1954, 173 L. Ed. 2d 868 (2009); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.  
8 1988). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
9 statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949. Here, dismissal without leave to amend is  
10 proper because no amendment could possibly cure Goldsmith’s pleading deficiencies. *Steckman*  
11 *v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998).

12 **1. The Communications Decency Act Provides Full Immunity To**  
13 **Facebook for Goldsmith’s State Law Claims**

14 The Federal Communications Decency Act (“CDA”) protects Facebook from the state tort  
15 claims asserted by Goldsmith. *See* 47 U.S.C. § 230. The CDA provides that “[n]o provider or  
16 user of an interactive computer service shall be treated as the publisher or speaker of any  
17 information provided by another information content provider.” 47 U.S.C. § 230(c)(1). The  
18 CDA defines an “interactive computer service” as “any information service, system, or access  
19 software provider that provides or enables computer access by multiple users to a computer server  
20 . . . .” 47 U.S.C. § 230(f)(2). “Through this provision, Congress granted most Internet services  
21 immunity from liability for publishing false or defamatory material so long as the information  
22 was provided by another party.” *Two Plus Two Publ’g, LLC v. Jacknames.com*, No. 2:09-CV-  
23 002318-KJD-LRL, 2010 WL 4281791, \* 3 (D. Nev. Sept. 30, 2010) quoting *Carafano v.*  
24 *Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003). Facebook, as the operator of the  
25 facebook.com website, is protected. *See* Sutton Decl., Ex. B at 3 (*Finkel v. Facebook, Inc., et al*,  
26 No. 102578/09 (N.Y. Sup. Ct) September 16, 2009 Order); *see also, Batzel v. Smith*, 333 F.3d  
27 1018, 1030 (9th Cir. 2003) (stating “a website is an ‘interactive computer service.’”); *Carafano*,  
28 339 F.3d at 1123 (“online newsletter qualified as an “interactive computer service” under the

1 statutory definition”); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-50 (D.D.C. 1998) (“AOL is a  
2 ‘provider . . . of an interactive computer service’”). The statute explicitly immunizes covered  
3 entities, such as Facebook, against state tort claims by mandating that “[n]o cause of action may  
4 be brought and no liability may be imposed under any State or local law that is inconsistent with  
5 this section.” 47 U.S.C. § 230(e)(3). Simply put, Facebook did not create the statements and  
6 cannot be liable for them.

7 For nearly 15 years, state and federal courts have straightforwardly applied this law to  
8 shield providers of interactive computer services against “publisher” tort liability for content  
9 posted by the users of their services and websites. *See e.g., Two Plus Two Publ’g*, 2010 WL  
10 4281791, \* 3; *Raggi v. Las Vegas Metro. Police Dep’t*, No. 2:08CV943 JCM (PAL), 2009 WL  
11 653000, \*1 (D. Nev. Mar. 10, 2009) citing *Carafano*, 339 F.3d at 1123-25 and *Batzel*, 333 F.3d at  
12 1031; *see also Barrett v. Rosenthal*, 40 Cal. 4th 33, 62 (2006); *Ben Ezra, Weinstein, and Co., Inc.*  
13 *v. Am. Online Inc.*, 206 F.3d 980 (10th Cir. 2000).

14 Goldsmith’s sole allegation as to Facebook is that Facebook somehow “facilitated,  
15 published, or neglected to mitigate the defamatory and harassing statements and comments  
16 published by Defendant Cooper and Defendant Cooper Driscoll.” FAC ¶ 14. According to the  
17 amended complaint, Defendants Cooper and Cooper Driscoll “published statements about  
18 Plaintiff, including that Plaintiff is a ‘faggot’ and a ‘pedophile.’” FAC ¶ 12. Based on these  
19 allegations, Defendants Cooper and Cooper Driscoll, not Facebook, created the allegedly  
20 defamatory statements. FAC. ¶ 12. Thus, the CDA provides complete immunity to Facebook for  
21 Claims 1 through 4.

22 *Batzel* is instructive here and should be followed. In *Batzel*, defendant Smith sent an  
23 email to the operator of an electronic bulletin board service (“BBS”), Mosler, which contained  
24 allegedly defamatory statements about the plaintiff. The BBS operator posted the email, after  
25 making minor edits, and hundreds of BBS viewers had access to and viewed the defamatory  
26 email. The Ninth Circuit Court of Appeals found that the BBS was immunized under the CDA as  
27 an interactive computer service, with respect to defamatory content provided by a third party.  
28 *Batzel*, 333 F.3d at 1026, 1031. Courts faced with similar facts have consistently reached the

1 same conclusion. *See Two Plus Two Publ'g*, 2010 WL 4281791 at \*3; *Raggi*, 2009 WL 653000  
 2 at \*1; *Carafano*, 339 F.3d at 1124; *Blumenthal*, 992 F. Supp. at 51 quoting *Zeran v. Am. Online,*  
 3 *Inc.*, 129 F.3d 327, 330-331 (4th Cir. 1997); *Doe v. SexSearch*, 502 F. Supp. 2d 719, 725 (N.D.  
 4 Ohio 2007) (“[n]ear-unanimous case law holds that Section 230(c) affords immunity to  
 5 [interactive computer services (ICSs)] against suits that seek to hold an ICS liable for third-party  
 6 content”) quoting *Eckert v. Microsoft*, Case No. 06-11888, 2007 U.S. Dist. LEXIS 15295, at \*6  
 7 (E.D. Mich. Jan. 8, 2007) and *Chi. Lawyers’ Comm. for Civ. Rights Under the Law, Inc. v.*  
 8 *Craigslist, Inc.*, 461 F. Supp. 2d 681, 688 (N.D. Ill. 2006).

9 Goldsmith also contends, without any support, that Facebook “neglected to mitigate the  
 10 defamatory and harassing statements and comments.” FAC ¶ 14. Under the CDA, however,  
 11 Facebook is not required to “mitigate” any such postings. *See Zeran*, 129 F.3d at 330 (rejecting  
 12 contention that defendant AOL “had a duty to remove [a] defamatory posting,” holding that  
 13 “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional  
 14 editorial functions - such as deciding whether to publish, withdraw, postpone or alter content - are  
 15 barred”); *see also, Green v. Am. Online (AOL)*, 318 F.3d 465, 468 (3rd Cir. 2003). Goldsmith’s  
 16 state law claims against Facebook should be dismissed.

17 **2. Goldsmith Fails To State A Claim Against Facebook Under The**  
 18 **Wiretap Act**

19 In Claims 10 and 11, Goldsmith alleges that Facebook violated Sections 2511(a) and (c)  
 20 of the Wiretap Act. But Goldsmith fails to allege sufficient facts to support either claim against  
 21 Facebook, and both should be dismissed.

22 **a. Goldsmith Fails To Allege Facts Establishing Interceptor**  
 23 **Liability Under Section 2511(a)**

24 Section 2511(a) makes it illegal to “intentionally intercept, endeavor to intercept, or  
 25 procure another person to intercept” a communication. “Intercept” is defined in the Wiretap Act  
 26 as the “aural or other acquisition of the contents of any wire, electronic, or oral communication  
 27 through the use of any electronic, mechanical, or other device.” 18 U.S.C. § 2510(4).  
 28 “Interception” requires “acquisition contemporaneous with transmission.” *Konop v. Hawaiian*  
*Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002); *see U.S. v. Steiger*, 318 F.3d 1039, 1047 (11th Cir.

1 2003).

2 *Steiger* is instructive. In *Steiger*, an anonymous source accessed Steiger's computer hard  
3 drive through a computer virus (which the source uploaded to an online news group) and "stole"  
4 Steiger's pictures. The source transmitted the photos to law enforcement, which then used the  
5 "stolen" photographs to indict Steiger for violating a series of federal statutes. In denying  
6 Steiger's motion to suppress the evidence, the court held

7 there is nothing to suggest that any of the information provided in  
8 the source's emails to [law enforcement] was obtained through  
9 contemporaneous acquisition of electronic communications while  
10 in flight. Rather, the evidence shows that the source used a Trojan  
11 Horse virus that enabled him to access and download information  
12 stored on Steiger's personal computer. This conduct, while  
13 possibly tortious, does not constitute an interception of electronic  
14 communications in violation of the Wiretap Act.

15 *Steiger*, 318 F.3d at 1050.

16 Like Steiger, Goldsmith has failed to state a plausible claim for violation of Section  
17 2511(a) against Facebook, or anyone for that matter, by failing to allege the threshold fact – that  
18 someone "intercepted" his pictures while they were being transmitted. At best, the amended  
19 complaint alleges that Ms. Driscoll, not Facebook, retrieved stored photos that Goldsmith  
20 uploaded to his Facebook account or elsewhere on the Internet, after Goldsmith, himself,  
21 provided her access to his Facebook photo album or made them available on the Web. FAC  
22 ¶¶ 10, 27. This same theory was rejected in *Steiger*.

23 Furthermore, Goldsmith's sole basis for asserting this claim against Facebook is that it  
24 purportedly "facilitated, published or neglected to mitigate the wiretapping violations by  
25 Defendant Cooper and Defendant Cooper Driscoll via Defendant Facebook's internet servers."<sup>3</sup>  
26 FAC ¶ 102. Goldsmith's "naked assertions devoid of further factual enhancement" are precisely  
27 the types of claims rejected by the Supreme Court in *Iqbal*. 129 S. Ct. at 1949. Goldsmith's  
28 2511(a) claim must be dismissed.

<sup>3</sup> Goldsmith repeats this allegation throughout his complaint. In the context of Section 2511,  
however, it is nonsensical. Nothing in the Wiretap Act prohibits facilitating, publishing or  
neglecting to mitigate another's "wiretapping violations." Goldsmith's use of this allegation  
highlights the frivolity of his case against Facebook and demonstrates that Goldsmith has no  
factual basis for his claims against Facebook.



1                                   **b. Goldsmith Fails To Allege Facts Establishing Facebook**  
2                                   **Disclosed Intercepted Communications Pursuant To Section**  
3                                   **2511(c)**

4                   Goldsmith also alleges that the disclosure of his photograph on Facebook violates Section  
5                   2511(1)(c). FAC ¶ 107 (“Defendant intentionally disclosed, or endeavored to disclose, to other  
6                   persons the contents of electronic communication [sic]”).<sup>4</sup> Section 2511(1)(c) prohibits:

7                                   intentionally disclos[ing] or endeavor[ing] to disclose to any other  
8                                   person the contents of any wire, oral, or electronic communication,  
9                                   knowing or having reason to know that the information was  
10                                  obtained through the interception of a wire, oral, or electronic  
11                                  communication in violation of this subsection

12                   18 U.S.C. § 2511(1)(c). Goldsmith fails to allege any of the elements requisite to stating a claim  
13                   under this Section. As set forth above, Goldsmith has not alleged that anyone “intercepted” his  
14                   electronic communication. In addition, Goldsmith does not allege any facts establishing that  
15                   *Facebook* disclosed any of Goldsmith’s supposedly intercepted information. And, the amended  
16                   complaint does not allege that Facebook was aware of Ms. Driscoll’s activities at all. These  
17                   failings are fatal. *See U.S. v. Wulinger*, 981 F.2d 1497, 1501 (6th Cir. 1992) (knowledge or  
18                   reason to know that the interception itself violated the Wiretap Act in essential element of  
19                   § 2511(1)(d) criminal offense). Claim 11 must be dismissed.

20                                   **3. Facebook Cannot Be Secondarily Liable Under The Act**

21                   Because Goldsmith has failed to allege a direct violation of the Wiretap Act by anyone, he  
22                   cannot state a claim for secondary liability and, thus, his allegations that Facebook “facilitated” or  
23                   “neglected to mitigate [the other defendants’] wiretapping violations,” are irrelevant. FAC ¶¶  
24                   102, 108. Furthermore, the Wiretap Act does not provide for secondary liability for statutory  
25                   violations. *See Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1005 (9th Cir. 2006) (declining to  
26                   expand civil liability under §§ 2702 and 2707 of the ECPA to include conspirators as well as  
27                   aiders and abettors); *Doe v. GTE Corp.*, 347 F.3d 655, 658-59 (7th Cir. 2003) (Easterbrook, J.)  
28                   (citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114

<sup>4</sup> Goldsmith’s attempt to circumvent the CDA immunity for the publication of his picture is transparent and improper. The amended complaint establishes that Goldsmith has no factual basis to assert a claim under the Wiretap Act for the disclosure of his photo. His claims should be dismissed. *Iqbal*, 129 S. Ct. at 1949.

1 S.Ct. 1439, 128 L.Ed.2d 119 (1994)); *Motise v. Am. Online, Inc.*, No. 04-1494, 2005 WL  
2 1667658, \*4 (E.D. Va. 2005). Goldsmith's wiretap claims against Facebook must be dismissed.

3 **B. Goldsmith Agreed To The Exclusive Jurisdiction of California Courts**

4 This Court has the discretion to dismiss a case pursuant to Rule 12(b)(3) when a forum  
5 selection clause provides the exclusive venue for disputes, and a plaintiff, like Goldsmith, files its  
6 suit in the incorrect forum. *Levesque v. Trans Union, LLC*, No. 2:09-cv-01393-RLH-LRL, 2010  
7 WL 3522264, \*2 (D. Nev. Sept. 1, 2010) ("Forum selection clauses with mandatory forum  
8 selection language are routinely enforced in the Ninth Circuit") citing *Docksider, Ltd. v. Sea*  
9 *Technology, Ltd.*, 875 F.2d 762, 763 (9th Cir. 1989).

10 This Court recently echoed the well-established principle that "forum selection clauses are  
11 presumptively valid." *Levesque*, 2010 WL 3522264 at \*2 quoting *Bremen v. Zapata Off-Shore*  
12 *Co.*, 407 U.S. 1, 10-12 (1972). Absent a strong showing by Goldsmith that the clause: (1) "is the  
13 product of fraud or overreaching"; (2) "would deprive [Goldsmith] of his day in court"; or (3)  
14 "would contravene a strong public policy" of Nevada, Facebook's forum selection clause should  
15 be enforced. *Levesque*, 2010 WL 3522264 at \*2. Goldsmith cannot make any such showing for  
16 disregarding the forum selection clause. Indeed, Facebook's forum selection clause recently  
17 withstood scrutiny in the District of Georgia. *See Sutton Decl., Ex. C (Miller v. Facebook, Inc.,*  
18 *et al.*, Case No. 1:09-CV-2810-RLV (D. Ga.), Docket No. 17). The *Miller* court's decision is  
19 consistent with holdings in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991); and  
20 *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004), finding that "public policy  
21 favors such clauses, because the nature of the . . . business necessarily opened the company to the  
22 possibility of litigation in several fora and [the company] had a justifiable 'interest in limiting the  
23 fora in which it potentially could be subject to suit'"). *Sutton Decl., Ex. C* at 2-3.

24 Goldsmith entered into a contract with Facebook and agreed to "resolve any claim, cause  
25 of action or dispute ... exclusively in a state or federal court located in Santa Clara County"  
26 California. *Sutton Decl., Ex. A.* Nothing in Goldsmith's amended complaint suggests that the  
27 forum selection clause should not be enforced here. His complaint should be dismissed.

28

1           **C.     Facebook Is Entitled To Its Attorneys' Fees And Costs**

2           Goldsmith's claims against Facebook are frivolous. This Court has broad inherent power  
3 to police litigants and manage its docket through monetary sanctions (including costs and  
4 attorneys' fees) "for willful abuse of the judicial process or bad faith conduct." *Mark Indus., Ltd.*  
5 *v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 732 (9th Cir. 1995) citing *In re Intel Securities*  
6 *Litigation*, 791 F.2d 672, 675 (9th Cir. 1986) (where court exercised its inherent powers to  
7 sanction attorney for bad faith conduct in seeking to "exact fee concession").

8           Sanctions under the Court's inherent powers are appropriate here, because Goldsmith has  
9 willfully abused the judicial process and acted in bad faith. Prior to preparing this motion and  
10 engaging local counsel, Facebook contacted Goldsmith and requested that he dismiss Facebook in  
11 light of the CDA immunity. Sutton Decl., Ex. D. Facebook's counsel forwarded a copy of  
12 several relevant CDA immunity cases, and encouraged Goldsmith to consider them. *Id.* Before  
13 even reading the cases, Goldsmith, an unlawful detainer and bankruptcy attorney (who has been  
14 licensed to practice in Nevada for five months), noted that he "disagreed" with the cases cited  
15 above and then demanded \$25,000. *Id.*

16           Goldsmith's refusal to even consider the CDA and binding precedent along with his  
17 unsupported demand for "go away" money demonstrate his lack of good faith. To make matters  
18 worse, Goldsmith decided to improperly allege additional, unsupportable Wiretap Act claims  
19 against Facebook. Goldsmith's abuses are further demonstrated in his effort to surreptitiously  
20 obtain a preliminary injunction on an *ex parte* basis (*see* Dkt. No. 5) and file a third motion for  
21 preliminary injunction based on his meritless claims (*see* Dkt. No. 11). Goldsmith should not be  
22 rewarded for his behavior. Facebook respectfully seeks an award of the fees and costs  
23 necessitated in this case.

24           **IV.   CONCLUSION**

25           Facebook respectfully requests that the Court dismiss Facebook from this action and  
26 award Facebook its fees and costs for the reasons set forth above.

27           ///

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Dated: November 15, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

*/s/ Theresa A. Sutton*

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FACEBOOK, INC.

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**CERTIFICATE OF SERVICE**

On the 15th day of November 2010, I electronically submitted the foregoing document with the Clerk of the Court for the U.S. District Court, District of Nevada, using the electronic case filing system of the Court. I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

*/s/ Theresa A. Sutton*  
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FACEBOOK, INC.

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13 UNITED STATES DISTRICT COURT  
14 DISTRICT OF NEVADA  
15

16 JONATHAN B. GOLDSMITH,

17 Plaintiff,

18 v.

19 JORDAN R. COOPER, an Individual;  
20 CHERYL COOPER DRISCOLL, an  
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22

Case No. 2:10-cv-01845-RLH-PAL

**FACEBOOK, INC.'S MOTION TO  
DISMISS AMENDED COMPLAINT  
PURSUANT TO FED. R. CIV. P.  
12(B)(6) AND 12(B)(3)**

**ORAL ARGUMENT REQUESTED**

1 Comes now Defendant Facebook, Inc., and, before the filing of any other plea, pleading or  
2 motion, files this its Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) and 12(b)(3), and  
3 would respectfully show the Court as follows:

4 **Motion to Dismiss Under Rule 12(b)(6)**

5 Facebook moves this Court to dismiss this case against it as Goldsmith has failed to state a  
6 claim upon which relief can be granted. Specifically, Facebook is immune from liability for  
7 Goldsmith's State tort claims (slander and libel). In addition, Goldsmith failed to plead the  
8 requisite facts to state a Wiretap Claim pursuant to Sections 2511(a) and (c). As such,  
9 Goldsmith's Amended Complaint must be dismissed.

10 **Motion to Dismiss Under Rule 12(b)(3)**

11 Facebook further moves this Court to dismiss this case on the ground that it is an improper  
12 forum. Goldsmith was a Facebook member for six years and agreed to resolve all claims against  
13 Facebook in the County of Santa Clara, California. The parties' forum selection clause is  
14 presumptively valid and should be enforced.

15 **Evidence in Support of this Motion**

16 Facebook attaches as evidence in support of this Motion the Declaration of Theresa A.  
17 Sutton, as well as Exhibits A through D, filed concurrently herewith.

18 Dated: November 15, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

19  
20 /s/ Theresa A. Sutton

21 THERESA A. SUTTON  
22 Attorneys for Defendant  
23 FACEBOOK, INC.  
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**CERTIFICATE OF SERVICE**

On the 15th day of November 2010, I electronically submitted the foregoing document with the Clerk of the Court for the U.S. District Court, District of Nevada, using the electronic case filing system of the Court. I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

*/s/ Theresa A. Sutton*  
\_\_\_\_\_  
THERESA A. SUTTON



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7 THERESA A. SUTTON (admitted *Pro Hac Vice*)  
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8 ORRICK, HERRINGTON & SUTCLIFFE LLP  
1000 Marsh Road  
9 Menlo Park, CA 94025  
Telephone: 650-614-7400  
10 Facsimile: 650-614-7401

11 Attorneys for Defendant  
12 FACEBOOK, INC.

13 UNITED STATES DISTRICT COURT  
14 DISTRICT OF NEVADA  
15

16 JONATHAN B. GOLDSMITH,

17 Plaintiff,

18 v.

19 JORDAN R. COOPER, an Individual;  
20 CHERYL COOPER DRISCOLL, an  
Individual; FACEBOOK, INC., a foreign  
21 corporation,

22 Defendants.  
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Case No. 2:10-cv-01845-RLH-PAL

**DECLARATION OF THERESA A.  
SUTTON IN SUPPORT OF  
FACEBOOK, INC.'S MOTION TO  
DISMISS AMENDED COMPLAINT  
PURSUANT TO FED. R. CIV. P.  
12(B)(6) AND 12(B)(3)**

1 I, Theresa A. Sutton, declare as follows:

2 1. I am an associate with Orrick, Herrington & Sutcliffe LLP, counsel of record to  
3 Facebook, Inc. I make this declaration in support of Facebook's Motion to Dismiss pursuant to  
4 Federal Rules of Civil Procedure Sections 12(b)(6) and 12(b)(3). I have personal knowledge of  
5 the facts stated herein, unless otherwise noted. If called as a witness, I could and would testify  
6 competently to these facts.

7 2. I am informed and believe that Facebook's business records show that  
8 Mr. Goldsmith was a Facebook member from January 2, 2005 until October 7, 2010.  
9 Mr. Goldsmith, as a Facebook member, agreed to Facebook's Terms of Use, a true and correct  
10 copy of which is attached hereto as **Exhibit A**.

11 3. Attached hereto as **Exhibit B** is a true and correct copy of the September 16, 2009  
12 Order in *Finkel v. Facebook, Inc., et al*, No. 102578/09, Supreme Court of the State of New York  
13 – New York County.

14 4. Attached hereto as **Exhibit C** is a true and correct copy of the January 15, 2009  
15 Order in *Miller v. Facebook, Inc., et al*, Case No. 1:09-CV-2810-RLV, Docket No. 17, United  
16 States District Court, Northern District of Georgia, Atlanta Division.

17 5. On October 15, 2010, I spoke to Mr. Goldsmith by telephone. At the time I spoke  
18 with him, only the slander and libel claims had been asserted against Facebook. I asked  
19 Mr. Goldsmith to consider dismissing Facebook from this action because it is immune from  
20 liability under the Communications Decency Act ("CDA"). Mr. Goldsmith said he was "aware of  
21 those cases" and "disagreed with them." I offered to send the cases to him for his consideration.  
22 I sent several cases to him, including *Zeran v. AOL*, *Batzel v. Smith*, *Blumenthal v. Drudge*, and  
23 *Carafano v. Metrosplash*. I also attached the New York Supreme Court order attached hereto  
24 as Exhibit B. Within 30 minutes, Mr. Goldsmith responded to my email demanding a payment of  
25 \$25,000. He offered no explanation as to why the CDA did not provide complete immunity to  
26 Facebook for the state law claims. Attached hereto as **Exhibit D** is a true and correct copy of a  
27 string of emails between Mr. Goldsmith and me, dated October 15 through October 18, 2010.  
28 After defendants removed this action, Mr. Goldsmith amended his complaint and added Facebook

1 as a defendant to the already existing Wiretap Act claims.

2 I declare under penalty of perjury under the law of the State of Nevada that the foregoing  
3 is true and correct. Executed this 15th day of November 2010, at Menlo Park, California.

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*/s/ Theresa A. Sutton*  
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THERESA A. SUTTON

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**CERTIFICATE OF SERVICE**

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*/s/ Theresa A. Sutton*  
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THERESA A. SUTTON

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# **EXHIBIT A**

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|--|---------------------------------------|--------------|
| Email                                      | Password                              | <b>Login</b> |
| <input type="text"/>                       | <input type="text"/>                  |              |
| <input type="checkbox"/> Keep me logged in | <a href="#">Forgot your password?</a> |              |

This agreement was written in English (US). To the extent any translated version of this agreement conflicts with the English version, the English version controls. Please note that Section 16 contains certain changes to the general terms for users outside the United States.

Date of Last Revision: October 4, 2010.

#### Statement of Rights and Responsibilities

This Statement of Rights and Responsibilities ("Statement") derives from the Facebook Principles, and governs our relationship with users and others who interact with Facebook. By using or accessing Facebook, you agree to this Statement.

##### 1. Privacy

Your privacy is very important to us. We designed our Privacy Policy to make important disclosures about how you can use Facebook to share with others and how we collect and can use your content and information. We encourage you to read the Privacy Policy, and to use it to help make informed decisions.

##### 2. Sharing Your Content and Information

You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

- For content that is covered by intellectual property rights, like photos and videos ("IP content"), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook ("IP License"). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.
- When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).
- When you use an application, your content and information is shared with the application. We require applications to respect your privacy, and your agreement with that application will control how the application can use, store, and transfer that content and information. (To learn more about Platform, read our Privacy Policy and About Platform page.)
- When you publish content or information using the "everyone" setting, it means that you are allowing everyone, including people off of Facebook, to access and use that information, and to associate it with you (i.e., your name and profile picture).
- We always appreciate your feedback or other suggestions about Facebook, but you understand that we may use them without any obligation to compensate you for them (just as you have no obligation to offer them).

##### 3. Safety

We do our best to keep Facebook safe, but we cannot guarantee it. We need your help to do that, which includes the following commitments:

- You will not send or otherwise post unauthorized commercial communications (such as spam) on Facebook.
- You will not collect users' content or information, or otherwise access Facebook, using automated means (such as harvesting bots, robots, spiders, or scrapers) without our permission.
- You will not engage in unlawful multi-level marketing, such as a pyramid scheme, on Facebook.
- You will not upload viruses or other malicious code.
- You will not solicit login information or access an account belonging to someone else.
- You will not bully, intimidate, or harass any user.
- You will not post content that is hateful, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence.
- You will not develop or operate a third-party application containing alcohol-related or other mature content (including advertisements) without appropriate age-based restrictions.
- You will not offer any contest, giveaway, or sweepstakes ("promotion") on Facebook without our prior written consent. If we consent, you take full responsibility for the promotion, and will follow our Promotions Guidelines and all applicable laws.
- You will not use Facebook to do anything unlawful, misleading, malicious, or discriminatory.
- You will not do anything that could disable, overburden, or impair the proper working of Facebook, such as a denial of service attack.
- You will not facilitate or encourage any violations of this Statement.

##### 4. Registration and Account Security

Facebook users provide their real names and information, and we need your help to keep it that way. Here are some commitments you make to us relating to registering and maintaining the security of your account:

- You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission.
- You will not create more than one personal profile.
- If we disable your account, you will not create another one without our permission.
- You will not use your personal profile for your own commercial gain (such as selling your status update to an advertiser).
- You will not use Facebook if you are under 13.
- You will not use Facebook if you are a convicted sex offender.
- You will keep your contact information accurate and up-to-date.
- You will not share your password, (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account.
- You will not transfer your account (including any page or application you administer) to anyone without first getting our written permission.
- If you select a username for your account we reserve the right to remove or reclaim it if we believe appropriate (such as when a trademark owner complains about a username that does not closely relate to a user's actual name).

##### 5. Protecting Other People's Rights

We respect other people's rights, and expect you to do the same.

- You will not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law.
- We can remove any content or information you post on Facebook if we believe that it violates this Statement.
- We will provide you with tools to help you protect your intellectual property rights. To learn more, visit our How to Report Claims of Intellectual Property Infringement page.
- If we remove your content for infringing someone else's copyright, and you believe we removed it by mistake, we will provide you with an opportunity to appeal.
- If you repeatedly infringe other people's intellectual property rights, we will disable your account when appropriate.
- You will not use our copyrights or trademarks (including Facebook, the Facebook and F Logos, FB, Face, Poke, Wall and 32665), or any confusingly similar marks, without our written permission.
- If you collect information from users, you will: obtain their consent, make it clear you (and not Facebook) are the one collecting their information, and post a privacy policy explaining what information you collect and how you will use it.
- You will not post anyone's identification documents or sensitive financial information on Facebook.
- You will not tag users or send email invitations to non-users without their consent.

##### 6. Mobile

- We currently provide our mobile services for free, but please be aware that your carrier's normal rates and fees, such as text messaging fees, will still apply.
- In the event you change or deactivate your mobile telephone number, you will update your account information on Facebook within 48 hours to ensure that your messages are not sent to the person who acquires your old number.
- You provide all rights necessary to enable users to sync (including through an application) their contact lists with any basic information and contact information that is visible to them on Facebook, as well as your name and profile picture.

##### 7. Payments

If you make a payment on Facebook or use Facebook Credits, you agree to our Payments Terms.

##### 8. Special Provisions Applicable to Share Links

If you include our Share Link button on your website, the following additional terms apply to you:

- We give you permission to use Facebook's Share Link button so that users can post links or content from your website on Facebook.

2. You give us permission to use and allow others to use such links and content on Facebook.
  3. You will not place a Share Link button on any page containing content that would violate this Statement if posted on Facebook.
9. **Special Provisions Applicable to Developers/Operators of Applications and Websites**

If you are a developer or operator of a Platform application or website, the following additional terms apply to you:

1. You are responsible for your application and its content and all uses you make of Platform. This includes ensuring your application or use of Platform meets our Developer Principles and Policies and our Advertising Guidelines.
  2. Your access to and use of data you receive from Facebook, will be limited as follows:
    1. You will only request data you need to operate your application.
    2. You will have a privacy policy that tells users what user data you are going to use and how you will use, display, share, or transfer that data and you will include your privacy policy URL in the Developer Application.
    3. You will not use, display, share, or transfer a user's data in a manner inconsistent with your privacy policy.
    4. You will delete all data you receive from us concerning a user if the user asks you to do so, and will provide a mechanism for users to make such a request.
    5. You will not include data you receive from us concerning a user in any advertising creative.
    6. You will not directly or indirectly transfer any data you receive from us to (or use such data in connection with) any ad network, ad exchange, data broker, or other advertising related toolset, even if a user consents to that transfer or use.
    7. You will not sell user data. If you are acquired by or merge with a third party, you can continue to use user data within your application, but you cannot transfer user data outside of your application.
    8. We can require you to delete user data if you use it in a way that we determine is inconsistent with users' expectations.
    9. We can limit your access to data.
    10. You will comply with all other restrictions contained in our Developer Principles and Policies.
  3. You will not give us information that you independently collect from a user or a user's content without that user's consent.
  4. You will make it easy for users to remove or disconnect from your application.
  5. You will make it easy for users to contact you. We can also share your email address with users and others claiming that you have infringed or otherwise violated their rights.
  6. You will provide customer support for your application.
  7. You will not show third party ads or web search boxes on Facebook.
  8. We give you all rights necessary to use the code, APIs, data, and tools you receive from us.
  9. You will not sell, transfer, or sublicense our code, APIs, or tools to anyone.
  10. You will not misrepresent your relationship with Facebook to others.
  11. You may use the logos we make available to developers or issue a press release or other public statement so long as you follow our Developer Principles and Policies.
  12. We can issue a press release describing our relationship with you.
  13. You will comply with all applicable laws. In particular you will (if applicable):
    1. have a policy for removing infringing content and terminating repeat infringers that complies with the Digital Millennium Copyright Act.
    2. comply with the Video Privacy Protection Act ("VPPA"), and obtain any opt-in consent necessary from users so that user data subject to the VPPA may be shared on Facebook. You represent that any disclosure to us will not be incidental to the ordinary course of your business.
  14. We do not guarantee that Platform will always be free.
  15. You give us all rights necessary to enable your application to work with Facebook, including the right to incorporate content and information you provide to us into streams, profiles, and user action stories.
  16. You give us the right to link to or frame your application, and place content, including ads, around your application.
  17. We can analyze your application, content, and data for any purpose, including commercial (such as for targeting the delivery of advertisements and indexing content for search).
  18. To ensure your application is safe for users, we can audit it.
  19. We can create applications that offer similar features and services to, or otherwise compete with, your application.
10. **About Advertisements and Other Commercial Content Served or Enhanced by Facebook**

Our goal is to deliver ads that are not only valuable to advertisers, but also valuable to you. In order to do that, you agree to the following:

1. You can use your privacy settings to limit how your name and profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. You give us permission to use your name and profile picture in connection with that content, subject to the limits you place.
  2. We do not give your content or information to advertisers without your consent.
  3. You understand that we may not always identify paid services and communications as such.
11. **Special Provisions Applicable to Advertisers**

You can target your specific audience by buying ads on Facebook or our publisher network. The following additional terms apply to you if you place an order through our online advertising portal ("Order"):

1. When you place an Order, you will tell us the type of advertising you want to buy, the amount you want to spend, and your bid. If we accept your Order, we will deliver your ads as inventory becomes available. When serving your ad, we do our best to deliver the ads to the audience you specify, although we cannot guarantee in every instance that your ad will reach its intended target.
  2. In instances where we believe doing so will enhance the effectiveness of your advertising campaign, we may broaden the targeting criteria you specify.
  3. You will pay for your Orders in accordance with our Payments Terms. The amount you owe will be calculated based on our tracking mechanisms.
  4. Your ads will comply with our Advertising Guidelines.
  5. We will determine the size, placement, and positioning of your ads.
  6. We do not guarantee the activity that your ads will receive, such as the number of clicks you will get.
  7. We cannot control how people interact with your ads, and are not responsible for click fraud or other improper actions that affect the cost of running ads. We do, however, have systems to detect and filter certain suspicious activity, learn more here.
  8. You can cancel your Order at any time through our online portal, but it may take up to 24 hours before the ad stops running. You are responsible for paying for those ads.
  9. Our license to run your ad will end when we have completed your Order. You understand, however, that if users have interacted with your ad, your ad may remain until the users delete it.
  10. We can use your ads and related content and information for marketing or promotional purposes.
  11. You will not issue any press release or make public statements about your relationship with Facebook without written permission.
  12. We may reject or remove any ad for any reason.
- If you are placing ads on someone else's behalf, we need to make sure you have permission to place those ads, including the following:
13. You warrant that you have the legal authority to bind the advertiser to this Statement.
  14. You agree that if the advertiser you represent violates this Statement, we may hold you responsible for that violation.

12. **Special Provisions Applicable to Pages**

If you create or administer a Page on Facebook, you agree to our Pages Terms.

13. **Amendments**

1. We can change this Statement if we provide you notice (by posting the change on the Facebook Site Governance Page) and an opportunity to comment. To get notice of any future changes to this Statement, visit our Facebook Site Governance Page and become a fan.
2. For changes to sections 7, 8, 9, and 11 (sections relating to payments, application developers, website operators, and advertisers), we will give you a minimum of three days notice. For all other changes we will give you a minimum of seven days notice. All such comments must be made on the Facebook Site Governance Page.
3. If more than 7,000 users comment on the proposed change, we will also give you the opportunity to participate in a vote in which you will be provided alternatives. The vote shall be binding on us if more than 30% of all active registered users as of the date of the notice vote.
4. We can make changes for legal or administrative reasons, or to correct an inaccurate statement, upon notice without opportunity to comment.

14. **Termination**

If you violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, we can stop providing all or part of Facebook to you. We will notify you by email or at the next time you attempt to access your account. You may also delete your account or disable your application at any time. In all such cases, this Statement shall terminate, but the following provisions will still apply: 2.2, 2.4, 3-5, 8.2, 9.1-9.3, 9.9, 9.10, 9.13, 9.15, 9.18, 10.3, 11.2, 11.5, 11.6, 11.9, 11.12, 11.13, and 14-18.

15. **Disputes**

1. You will resolve any claim, cause of action or dispute ("claim") you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.
2. If anyone brings a claim against us related to your actions, content or information on Facebook, you will indemnify and hold us harmless from and against all damages, losses, and expenses of any kind (including reasonable legal fees and costs) related to such claim.
3. WE TRY TO KEEP FACEBOOK UP, BUG-FREE, AND SAFE, BUT YOU USE IT AT YOUR OWN RISK. WE ARE PROVIDING FACEBOOK "AS IS" WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. WE DO NOT GUARANTEE THAT FACEBOOK WILL BE SAFE OR SECURE. FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OF THIRD PARTIES, AND YOU RELEASE US, OUR DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS FROM ANY CLAIMS AND DAMAGES, KNOWN AND UNKNOWN, ARISING OUT OF OR IN ANY WAY CONNECTED WITH ANY CLAIM YOU HAVE AGAINST ANY SUCH THIRD PARTIES. 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." WE WILL NOT BE LIABLE TO YOU FOR ANY LOST PROFITS OR OTHER CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS STATEMENT OR FACEBOOK, EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. OUR AGGREGATE LIABILITY ARISING OUT OF THIS STATEMENT OR FACEBOOK WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) OR THE AMOUNT YOU HAVE PAID US IN THE PAST TWELVE MONTHS. APPLICABLE LAW MAY NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. IN SUCH CASES, FACEBOOK'S LIABILITY WILL BE LIMITED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW.

**16. Special Provisions Applicable to Users Outside the United States**

We strive to create a global community with consistent standards for everyone, but we also strive to respect local laws. The following provisions apply to users outside the United States:

1. You consent to having your personal data transferred to and processed in the United States.
2. If you are located in a country embargoed by the United States, or are on the U.S. Treasury Department's list of Specially Designated Nationals you will not engage in commercial activities on Facebook (such as advertising or payments) or operate a Platform application or website.
3. Certain specific terms that apply only for German users are available here.

**17. Definitions**

1. By "Facebook" we mean the features and services we make available, including through (a) our website at [www.facebook.com](http://www.facebook.com) and any other Facebook branded or co-branded websites (including sub-domains, international versions, widgets, and mobile versions); (b) our Platform; (c) social plugins such as the like button, the share button and other similar offerings and (d) other media, software (such as a toolbar), devices, or networks now existing or later developed.
2. By "Platform" we mean a set of APIs and services that enable others, including application developers and website operators, to retrieve data from Facebook or provide data to us.
3. By "information" we mean facts and other information about you, including actions you take.
4. By "content" we mean anything you post on Facebook that would not be included in the definition of "information."
5. By "data" we mean content and information that third parties can retrieve from Facebook or provide to Facebook through Platform.
6. By "post" we mean post on Facebook or otherwise make available to us (such as by using an application).
7. By "use" we mean use, copy, publicly perform or display, distribute, modify, translate, and create derivative works of.
8. By "active registered user" we mean a user who has logged into Facebook at least once in the previous 30 days.
9. By "application" we mean any application or website that uses or accesses Platform, as well as anything else that receives or has received data from us. If you no longer access Platform but have not deleted all data from us, the term application will apply until you delete the data.

**18. Other**

1. If you are a resident of or have your principal place of business in the US or Canada, this Statement is an agreement between you and Facebook, Inc. Otherwise, this Statement is an agreement between you and Facebook Ireland Limited. References to "us," "we," and "our" mean either Facebook, Inc. or Facebook Ireland Limited, as appropriate.
2. This Statement makes up the entire agreement between the parties regarding Facebook, and supersedes any prior agreements.
3. If any portion of this Statement is found to be unenforceable, the remaining portion will remain in full force and effect.
4. If we fail to enforce any of this Statement, it will not be considered a waiver.
5. Any amendment to or waiver of this Statement must be made in writing and signed by us.
6. You will not transfer any of your rights or obligations under this Statement to anyone else without our consent.
7. All of our rights and obligations under this Statement are freely assignable by us in connection with a merger, acquisition, or sale of assets, or by operation of law or otherwise.
8. Nothing in this Statement shall prevent us from complying with the law.
9. This Statement does not confer any third party beneficiary rights.
10. You will comply with all applicable laws when using or accessing Facebook.

**You may also want to review the following documents:**

Privacy Policy: The Privacy Policy is designed to help you understand how we collect and use information.

Payment Terms: These additional terms apply to all payments made on or through Facebook.

About Platform: This page helps you better understand what happens when you add a third-party application or use Facebook Connect, including how they may access and use your data.

Developer Principles and Policies: These guidelines outline the policies that apply to applications, including Connect sites.

Advertising Guidelines: These guidelines outline the policies that apply to advertisements placed on Facebook.

Promotions Guidelines: These guidelines outline the policies that apply if you have obtained written pre-approval from us to offer contests, sweepstakes, and other types of promotions on Facebook.

How to Report Claims of Intellectual Property Infringement

How to Appeal Claims of Copyright Infringement

Pages Terms

To access the Statement of Rights and Responsibilities in several different languages, change the language setting for your Facebook session by clicking on the language link in the left corner of most pages. If the Statement is not available in the language you select, we will default to the English version.



# **EXHIBIT B**

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

DENISE E. FINKEL,  
Plaintiff,

Index No.: 102578/09

Motion Date: 06/02/09

- v -

Motion Seq. No.: 01

FACEBOOK, INC., MICHAEL DAUBER, JEFFREY  
SCHWARTZ, MELINDA DANOWITZ, LEAH HERZ,  
RICHARD DAUBER, AMY SCHWARTZ, ELLIOT  
SCHWARTZ, MARTIN DANOWITZ, BARI DANOWITZ,  
ALAN HERZ and ELLEN HERZ,  
Defendants.

Motion Cal. No.: 7

The following papers, numbered 1 to 5 were read on this motion to dismiss.

- Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_
- Answering Affidavits - Exhibits \_\_\_\_\_
- Replying Affidavits - Exhibits \_\_\_\_\_

| PAPERS NUMBERED |       |
|-----------------|-------|
| 1, 2            | _____ |
| 3               | _____ |
| 4, 5            | _____ |

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Cross-Motion:  Yes  No

Upon the foregoing papers,

**FILED**  
SEP 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

The court shall grant defendant Facebook's motion to dismiss this defamation action against it because Facebook is immune from liability under the Communications Decency Act of 1996 as an interactive computer service.

According to the movant, Facebook is a "social networking" internet website that is open to the public. The website allows members to communicate with each other via "group pages" and to set up and post content to profiles and groups.

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

Plaintiff in opposition to the motion states that she was a member of the Facebook website while attending high school in January 2007. Four of the defendants in this suit, Michael Dauber, Jeffrey Schwartz, Melinda Danowitz and Leah Herz, were classmates of plaintiff and also members of the Facebook website. The complaint alleges that the four classmates-defendants created a group on the website and posted defamatory statements with negative sexual and medical connotations.

Facebook seeks dismissal based upon the Communications Decency Act of 1996 (47 USC 230 et seq) that provides immunity to interactive computer services from civil liability for defamatory content.

Section 230 provides that "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," id. §230 (c) (1), and that "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," id. §230 (e) (3). Section 230(c) thus immunizes internet service providers from defamation and other, non-intellectual property, state law claims arising from third-party content. See Gucci Am., Inc. v Hall & Assocs., 135 F Supp 2d 409, 417 (SD NY 2001) (citing legislative history of the CDA); see also Zeran v Am. Online, Inc., 129 F 3d 327, 330 (4th Cir 1997) (holding that 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content-are barred' by the CDA); Barrett v Rosenthal, 40 Cal 4th 33, 51 Cal Rptr 3d 55, 146 P 3d 510, 518 n 9 (2006) (collecting cases)."

Murawski v Pataki, 514 F Supp 2d 577, 591 (SD NY 2007).

Plaintiff's opposition to the motion does not dispute that Facebook qualifies as an interactive computer service under 47 USC 230 (f) (2) but plaintiff argues that because it is alleged that Facebook's Terms of Use grant the movant an ownership interest in the alleged defamatory content, the immunity granted by 47 USC 230 (c) is unavailable. Plaintiff's argument is meritless.

"By its plain language, §230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, §230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred. . . . Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." Zeran v America Online, Inc., 129 F 3d 327, 330 (4<sup>th</sup> Cir 1997).

"Ownership" of content plays no role in the Act's statutory scheme. The only issue is whether the party sought to be held liable is an "interactive computer service" and if that hurdle is

surmounted the immunity granted by 42 USC 230 (c) (1) is triggered if the content was provided by another party.

"Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted." Blumenthal v Drudge, 992 F Supp 44, 52 (D DC 1998).

The allegations in the complaint establish that Facebook is entitled to the liability shield conferred by the Communications Decency Act and therefore the court shall dismiss this action against the movant as there is no claim Facebook had any hand in creating the content. The court shall deny movant's application for sanctions as the plaintiff's argument as to liability based upon the ownership of defamatory content court is not contrary to any prior precedent nor does the movant cite any precedent that renders such an argument frivolous.

Accordingly, it is

ORDERED that the motion of FACEBOOK, INC., seeking to dismiss the complaint against it is GRANTED; and it is further

ORDERED that the Clerk is directed to enter judgment DISMISSING the action against FACEBOOK, INC., and upon service of this Order with notice of entry upon all parties and the Clerk of the County and the Clerk of the Trial Support Office (Room 158, 60 Centre Street), the Clerks are directed to amend their records by amending the caption in this action to reflect the dismissal against FACEBOOK, INC., by removing said defendant from the amended caption; and it is further

ORDERED that the remaining parties shall appear at a preliminary conference on October 6, 2009, at 9:30 A.M, in Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: September 15, 2009

ENTER:

~~DEBRA A. JAMES~~  
DEBRA A. JAMES  
J.S.C.  
J.S.C.

**FILED**  
SEP 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

# **EXHIBIT C**

FILED IN CHAMBERS  
U.S.D.C. Romo

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

JAN 15 2010

JAMES N. HATTEN, Clerk  
By: *[Signature]* Deputy Clerk

DANIEL M. MILLER,

Plaintiff,

v.

FACEBOOK, INC., et al.,

Defendants.

CIVIL ACTION

NO. 1:09-CV-2810-RLV

O R D E R

In a three-count complaint alleging copyright infringement, violations of the Lanham Act, and unfair competition under the Georgia Deceptive Trade Practices Act, the plaintiff seeks damages against Facebook, Inc. and Yao Wei Yeo. This matter comes before the court on a motion to transfer venue [Doc. No. 13] filed by Facebook.

In the motion to transfer, Facebook argues that the plaintiff, a registered user of its social-networking website, agreed to Facebook's Terms of Use ("TOU"). The forum selection clause contained in the TOU states in relevant part:

If there is any dispute about or involving the Web site and/or the Service, you agree that the dispute will be governed by the laws of the State of California without regard to its conflict of law provisions. You also agree to the exclusive jurisdiction and venue of the courts of the state and federal courts of Santa Clara County, California and waive all defenses of lack of personal jurisdiction and forum non conveniens.



The plaintiff does not dispute that he agreed to the terms of the TOU. Instead, he argues that the TOU constituted a contract of adhesion, rendering the clause unenforceable. Alternatively, the plaintiff argues that this clause is either vague or that his causes of action do not fall within the scope of the TOU's forum selection clause.

The first issue the court must address is whether the forum selection clause is enforceable even if the clause was contained in a contract of adhesion. In Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 590-95 (1991), the United States Supreme Court enforced a forum selection clause printed in small print on the back of a cruise ship ticket which the passengers had to "take the contract, or leave." The Supreme Court noted that public policy favors such clauses, because the nature of the cruise ship business necessarily opened the company to the possibility of litigation in several fora and that the cruise line had a justifiable "interest in limiting the fora in which it potentially could be subject to suit." Id. at 593. The Court reasoned that without such clauses, businesses would likely have to increase prices for their customers to account for the higher cost of litigation. Id.

In addressing a forum selection clause in the internet context, the Second Circuit Court of Appeals held:

While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract. It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.

Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004).

The court finds that the United States Supreme Court's precedent of Carnival Cruises and the persuasive authority of Register.com should be followed in this case. Thus, the court concludes that the forum selection clause contained in Facebook's TOU should be enforced. Even if the court were to assume without deciding that the TOU was a contract of adhesion, striking the forum selection clause could wreak havoc on the entire social-networking internet industry. If this court were to determine that the forum selection clause contained in Facebook's TOU was unenforceable, the company could face litigation in every state in this country and in nations around the globe which would have potential adverse consequences for the users of Facebook's social-networking site and for other internet companies.

Next, the court turns to the plaintiff's argument that the forum selection is vague or that his claims fall outside of the forum selection clause. Having reviewed the forum selection clause, the court concludes that it is not vague and it is broad enough to include the plaintiff's current claims against Facebook. Specifically, the forum selection clause states that "any dispute about or involving the Web site and/or the Service . . ." should be submitted to the state or federal courts in Santa Clara, County in California. In Counts I and II, the plaintiff alleges that Facebook and another defendant infringed the plaintiff's copyright and patent and that this infringement occurred either on Facebook's website or in the use of Facebook's site. Moreover, the plaintiff alleges that he uses the Facebook website to promote his claimed work, his "K2xL" company and its website, and at least one other game. Furthermore, the plaintiff alleges that defendant Yeo "[a]t least as early as April, 2009 . . . published the game ChainRxn on a website hosted by Defendant Facebook [[www.facebook.com](http://www.facebook.com)]." Complaint, ¶ 18. The court concludes that the forum selection's use of the term "any dispute" is broad enough to include the plaintiff's current allegations contained in Counts I and II.

Next, the court turns to an evaluation of the 28 U.S.C. § 1404(a) factors. According to P & S Business Machines, Inc. v.

Canon USA, Inc., 331 F.3d 804, 807 (11th Cir. 2003), the following principles "have been established for consideration of whether a case should be removed to another jurisdiction pursuant to a forum selection clause."

3. The burden is on the party opposing the enforcement of the forum selection clause to show that the contractual forum is sufficiently inconvenient to justify retention of the dispute. See In re Ricoh Corp., 870 F.2d 570, 573 (11th Cir. 1989).

4. The validity of a forum selection clause is determined under the usual rules governing the enforcement of contracts in general. See In re Ricoh Corp., 870 F.2d at 573-74 (considering whether the clause was "freely and fairly negotiated by experienced business professionals" and whether there was any fraud, duress, misrepresentations, or other misconduct in connection with the agreement to the forum selection clause).

5. Under Section 1404(a), the court should consider "the convenience of parties and witnesses" and "the interest of justice," with a choice of forum clause "a significant factor that figures centrally in the district court's calculus." Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988) (emphasis added). "Thus, while other factors might 'conceivably' militate against a transfer . . . the venue mandated by a choice of clause rarely will be outweighed by other 1404(a) factors." In re Ricoh Corp., 870 F.2d at 573.

6. By enforcing the contractual forum, the Court is not attempting to limit the plaintiff's usual right to choose its forum, but is enforcing the forum that the plaintiff

has already chosen. In re Ricoh Corp., 870 F.2d at 573.

7. The financial difficulty that a party might have in litigating in the selected forum is not a sufficient ground by itself for refusal to enforce a valid forum selection clause. See Bonny v. Society of Lloyd's, 3 F.3d 156, 160 n. 11 (7<sup>th</sup> Cir. 1993).

8. No case has been cited indicating that congestion of the selected forum's court docket should be grounds to avoid enforcement of a forum selection clause.

Therefore, in order to overcome the *prima facie* validity and the enforcement of a forum selection clause, the plaintiffs must establish that judicial enforcement of the clause would be improper due to an "exceptional situation." See In re Ricoh, 870 F.2d at 574.

The evaluation of these factors is made relatively easy by the plaintiff's own admissions in his response to Facebook's motion to transfer. Specifically, the plaintiff states, "The majority of the factors do not favor the defendant or the plaintiff. The convenience of the witnesses and parties does not favor either the Plaintiff or the Defendant." (Plaintiff's Response to Motion to Transfer, at 5). Likewise, the plaintiff states, "In the same manner, the locus of operative facts, location of documents, and the forum's familiarity with governing law do not favor either

party. The operative facts occurred both in California (Defendants' actions) and Georgia (Plaintiff's actions) and documents related to these facts exist in both jurisdictions." (Plaintiff's Response to Motion to Transfer, at 6). By these admissions, the court concludes that the plaintiff has not demonstrated the "exceptional situations" necessary to overcome the presumption that the forum selection clause should be enforced.

In addition to the plaintiff's own admissions contained in its response to the motion to transfer, the court conducted an independent review of the § 1404(a) factors, and it concludes that these factors weigh in favor of transfer. In reaching this conclusion, the court notes that the plaintiff and Facebook agreed to California as the forum for "any dispute" that arose regarding the use and service in the TOU, that both defendants and several potential witnesses reside in California, that substantial documents, records, and systems are located in California, and that there appears to be no witnesses or documents, other than the plaintiff, located in Georgia. And, most importantly, the complaint alleges that the events giving rise to the plaintiff's causes of action occurred in California, not in Georgia. Therefore, the court concludes that the plaintiff has failed to demonstrate either "exceptional circumstances" that would require

relief from their contractual burdens of the TOU or that the § 1404(a) factors weigh in favor of this court's retention of this case.

In his response, the plaintiff argues that three specific factors favor retention of this case. In particular, the plaintiff argues that Facebook has overwhelming resources, that the plaintiff's choice of forum must be taken into account, and that Georgia has an interest in protecting its residents. Of course, these are all valid arguments; however, these factors even when considered in combination do not constitute the sort of "exceptional circumstances" warranting the non-enforcement of a valid forum selection clause.

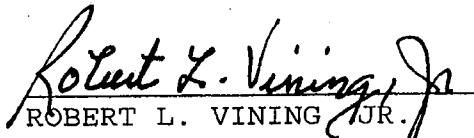
Having found that the forum selection clause was broad enough to include Counts I and II of the plaintiff's complaint, i.e., allegations of copyright infringement and Lanham Act violations, the court finds that it is also within its discretion pursuant to 28 U.S.C. § 1404(a) to transfer all of the claims against all defendants to United States District Court for the Northern District of California in order to avoid piecemeal litigation as well as to conserve judicial resources.<sup>1</sup>

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<sup>1</sup> Count III of the complaint alleges violations of unfair competition under the Georgia Deceptive Trade Practices Act. Even

For the reasons set forth above, defendant Facebook's motion to transfer [Doc. No. 13] this matter to the United States District Court for the Northern District of California is hereby GRANTED. The Clerk of the Court is directed to transfer this case to the United States District Court for Northern District of California.

SO ORDERED, this 15<sup>th</sup> day of January, 2010.

  
ROBERT L. VINING JR.  
Senior United States District Judge

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if this claim did not fall within the forum selection clause's broad scope, the court would exercise its discretion to transfer this claim as well to avoid piecemeal litigation and to conserve judicial resources.