UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAREE LA'TIEJIRA,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**CIVIL ACTION NO. 4:16-CV-02574**
	§	
FACEBOOK, INC., *et al*.,	§	
	§	
Defendants.	§	

FACEBOOK, INC.'S AND MARK ZUCKERBERG'S MOTION TO DISMISS UNDER RULES 12(B)(1), 12(B)(2), AND 12(B)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE OR, IN THE ALTERNATIVE, MOTION TO TRANSFER VENUE UNDER 28 U.S.C. § 1404

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Facebook, Inc. ("Facebook") and Mark Zuckerberg ("Zuckerberg") (collectively, the "Facebook Defendants") move to dismiss the claims of plaintiff Paree La'Tiejira ("La'Tiejira") under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). Alternatively, the Facebook Defendants respectfully request that this case be transferred to the U.S. District Court for the Northern District of California under 28 U.S.C. § 1404.

I. SUMMARY OF THE MOTION

La'Tiejira alleges four state-law torts and a violation of California's Unfair Competition Law against Facebook and Zuckerberg, the CEO of Facebook, because the Facebook Defendants failed to prevent people who use Facebook's services from posting allegedly defamatory statements about La'Tiejira and/or failed to remove those unidentified statements. While La'Tiejira may have valid claims against the people who authored the allegedly defamatory statements, her claims against the Facebook Defendants are misguided and should be dismissed for the following four reasons.

First, La'Tiejira fails to adequately allege subject matter jurisdiction. La'Tiejira invokes this Court's diversity jurisdiction under 28 U.S.C. § 1332(a)(1), but she has not alleged the complete diversity required by that provision. Her claims should therefore be dismissed under Federal Rule of Civil Procedure ("Rule") 12(b)(1).

Second, La'Tiejira has not adequately alleged personal jurisdiction. Nor could she. The Facebook Defendants are not subject to general jurisdiction in Texas because they are not "at home" in Texas. And the Facebook Defendants are not subject to this Court's specific jurisdiction for purposes of this case because La'Tiejira has not alleged and cannot allege that her claims arise from the Facebook Defendants' contacts with Texas. Thus, La'Tiejira's claims should be dismissed under Rule 12(b)(2).

Third, federal law bars La'Tiejira's claims. As confirmed by multiple courts, the federal Communications Decency Act, 47 U.S.C. § 230(c), immunizes service providers (like the Facebook Defendants) against claims based on user-generated content (like La'Tiejira's claims). As a result, La'Tiejira's claims should be dismissed under Rule 12(b)(6).

Fourth, even if this Court has jurisdiction to hear this case, and even if La'Tiejira could overcome the broad immunity conferred on the Facebook Defendants by the Communications Decency Act, La'Tiejira has not alleged the essential elements of her claims. Her claims should therefore be dismissed under Rule 12(b)(6) for that reason as well.

Lastly, if this Court declines to dismiss La'Tiejira's claims, it should transfer this case to California under 28 U.S.C. § 1404. La'Tiejira is subject to Facebook's mandatory forum-selection clause, and that forum-selection clause requires her to litigate her claims in California.

II. BACKGROUND

Defendant Facebook is a public company incorporated in Delaware with its principal place of business in Menlo Park, California. *See* Compl. ¶ 2. Facebook operates a free social networking service that enables more than 1.7 billion users worldwide to connect and share information that is important to them with their family, coworkers, and friends. Zuckerberg is the CEO of Facebook and a resident of California. *See id*. ¶ 3.

Plaintiff La'Tiejira is a "41-year-old biological female" who, in 1993, "moved to Los Angeles, CA to pursue a career as an actress in the adult entertainment field." *Id*. ¶ 7. She alleges that, "[s]ometime prior to December, 2009," she sued Mark C. Carriere and Leisure Time Entertainment (neither of whom are defendants in this case) "for publishing false and defamatory statements . . . to the effect that La'Tiejira was born as a male and not a female." *Id*. ¶ 8. According to La'Tiejira, "certain members of the general public believed [those statements] to be true," and La'Tiejira has since been "battered and assaulted by fans" and "at risk for violent

reactions" as a result. *Id*. ¶ 9. Based on documents attached to La'Tiejira's Complaint, it appears that in 2010 she obtained a default judgment against Carriere and Leisure Time Entertainment in the amount of $2,550,000. *See id*. ¶ 11.

La'Tiejira now seeks to impose liability on the Facebook Defendants because the same or similar statements regarding her gender identity purportedly appeared somewhere on Facebook at some point after 2010. *See id*. ¶ 12. La'Tiejira does not specifically allege that the Facebook Defendants authored any statements regarding her gender identity or that the Facebook Defendants were responsible in any way for the creation of that content. Nor does she allege that the Facebook Defendants encouraged, adopted, or even knew about any allegedly defamatory statements about her gender identity.

Instead, she seems to allege that the other defendants (Kyle Anders and "fictitious Defendants A, B, [and] C") authored allegedly defamatory statements and then published the statements using "the [Facebook] online platform operated and managed by [Facebook] and Zuckerberg." *Id*. ¶ 12. Based on that theory, La'Tiejira asserts that all defendants, including the Facebook Defendants, are liable for defamation, intentional interference with actual and prospective economic advantage, negligent interference with actual and prospective economic advantage, unfair competition under California law, and intentional infliction of emotional distress. She seeks damages of $1 billion. *See id*. ¶¶ 26, 30.

III. ARGUMENT AND AUTHORITIES

A. Plaintiff's Claims Should Be Dismissed for Lack of Subject-Matter Jurisdiction Under Rule 12(b)(1).

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The party invoking subject-matter jurisdiction (here, La'Tiejira) bears the burden of establishing this Court's subject-matter jurisdiction.

La'Tiejira has not met that burden. She relies exclusively on 28 U.S.C. § 1332(a)(1), which provides that this Court may exercise jurisdiction over disputes between "citizens of different States." To invoke diversity jurisdiction, however, La'Tiejira must allege that the parties are completely diverse. *See Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991). She has not. La'Tiejira fails to allege anything about the citizenship of defendant Kyle Anders. *See* Compl. ¶ 4. And her allegations about the unnamed defendants suggest that they, like La'Tiejira, are citizens of Texas. *See id*. ¶ 5 ("Fictitious defendants A, B, and C, whose identities are presently unknown to La'Tiejira, *are subject to the court's jurisdiction* . . . .") (emphasis added). La'Tiejira's claims should therefore be dismissed under Rule 12(b)(1). *See Stafford*, 945 F.2d at 805 ("Failure adequately to allege the basis for diversity jurisdiction mandates dismissal."); *Sourcing Mgmt., Inc. v. Simclar, Inc.*, No. 3:14-CV-2552-L, 2015 WL 2212344, at *5 (N.D. Tex. May 12, 2015) (dismissing case for failure to allege citizenship of all parties, including unnamed defendants).

B. Plaintiff's Claims Should Be Dismissed for Lack of Personal Jurisdiction Under Rule 12(b)(2).

La'Tiejira also bears the burden of establishing this Court's personal jurisdiction over the Facebook Defendants. *See, e.g.*, *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000). If she does not, then her claims must be dismissed under Rule 12(b)(2).

La'Tiejira alleges (correctly) that Facebook is a foreign corporation headquartered in California and that Zuckerberg is a resident of California. *See* Compl. ¶¶ 2, 3. Thus, the Facebook Defendants are subject to this Court's personal jurisdiction only if "(1) the long-arm statute of [Texas] creates personal jurisdiction over [the Facebook Defendants]; and (2) the exercise of personal jurisdiction is consistent with the due process guarantees of the United States Constitution." *Clemens v. McNamee*, 615 F.3d 374, 378 (5th Cir. 2010). "Because Texas's

long-arm statute reaches to the constitutional limits," those two inquiries collapse into one and this Court need only decide whether asserting personal jurisdiction over the Facebook Defendants comports with due process. *Id*. Asserting personal jurisdiction comports with due process, in turn, only if (1) the Facebook Defendants have "purposefully availed [themselves] of the benefits and protections of [Texas] by establishing minimum contacts with [Texas] and (2) the exercise of jurisdiction over [the Facebook Defendants] does not offend traditional notions of fair play and substantial justice." *Id*.

"There are two types of minimum contacts: contacts that give rise to specific personal jurisdiction and those that give rise to general jurisdiction." *Id*. To subject the Facebook Defendants to *general* jurisdiction in Texas, La'Tiejira must show that the Facebook Defendants' "affiliations with [Texas] are so continuous and systematic as to render [them] essentially at home" here. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Alternatively, to establish *specific* jurisdiction over the Facebook Defendants, La'Tiejira must show that (1) the Facebook Defendants have purposefully directed their activities at Texas, and (2) La'Tiejira's claims "'arise out of or relate to those activities.'" *Clemens*, 615 F.3d at 378 (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

La'Tiejira has not shown and cannot show that the Facebook Defendants are subject to general or specific jurisdiction in Texas. Her claims should therefore be dismissed.

1. Facebook Is Not Subject to General Jurisdiction in Texas.

Out-of-state defendants are subject to general jurisdiction only if their "affiliations" with the forum state are "so 'continuous and systematic' as to render [them] essentially at home" there. *Goodyear*, 564 U.S. at 919. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Id*. at 924. A corporation that does

business in a number of states is deemed to be "at home" where it is incorporated and where it has its principal place of business. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). Only "in an exceptional case" will a corporation be considered "at home" elsewhere. *Id.* at 761 n.19; *see also Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) ("It is . . . incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business.").

Here, La'Tiejira does not allege that the Facebook Defendants are "at home" in Texas. To the contrary, she correctly alleges that Facebook is incorporated in Delaware and headquartered in California, and that Zuckerberg resides in California. In fact, she alleges *no* contacts between the Facebook Defendants and Texas. This Court therefore lacks general jurisdiction. *See Ralls III v. Facebook, Inc.*, No. C16-0007JLR, slip op. at 6-9 (W.D. Wash. Oct. 20, 2016) (Dkt. 33) (attached as Exhibit A to the Declaration of Natalie Naugle in Support of Motion to Dismiss ("Naugle Decl.")) (no general jurisdiction over Facebook Defendants where, as here, plaintiff failed to show that they were essentially "at home" in forum state).[1]

2. Facebook Is Not Subject to Specific Jurisdiction in This Case.

"Specific jurisdiction arises when the defendant's contacts with the forum arise from, or are directly related to, the cause of action." *Revell v. Lidov*, 317 F.3d 467, 470 (5th Cir. 2002) (citation and internal quotation marks omitted). In other words, specific jurisdiction requires a relationship among the forum, the defendant, and the plaintiff's claims. Importantly, "the relationship must arise out of contacts that the defendant *himself* creates with the forum State."

[1] Facebook is not subject to general jurisdiction in Texas merely because its electronic services are accessible to Texas residents. *See First Metro. Church of Houston v. Genesis Grp.*, 616 F. App'x 148, 149 (5th Cir. 2015) ("[M]aintaining an interactive website is not enough to establish general personal jurisdiction."). Nor is Facebook subject to general jurisdiction merely because it maintains an office and has employees in Texas. *See Hazim v. Schiel & Denver Book Publishers*, 647 F. App'x 455, 460 (5th Cir. 2016).

Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014) (citation and internal quotation marks omitted). Equally importantly, the "analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id*. (citation and internal quotation marks omitted). Thus, to establish specific jurisdiction in this case, La'Tiejira must allege that the Facebook Defendants' "*suit-related conduct* . . . create[d] a substantial connection with [Texas]." *Id*. at 1121 (emphasis added).

La'Tiejira cannot establish specific jurisdiction under those principles. She does not allege *any* contacts between the Facebook Defendants and Texas, let alone conduct creating a "substantial connection" to this state. Nor does she allege that her claims arise from the Facebook Defendants' efforts to target Texas. At best, La'Tiejira alleges that the Facebook Defendants operate a website and other electronic services that are accessible to Texas residents. *See* Compl. ¶¶ 1, 14. That is insufficient. *See Revell*, 317 F.3d at 475-76 (Texas court could not exercise specific jurisdiction because New York-based website was not specifically aimed at Texas); *Gullen v. Facebook.com, Inc.*, No. 15 C 7681, 2016 WL 245910, at *2 (N.D. Ill. Jan. 21, 2016) (Illinois court could not exercise specific jurisdiction over Facebook where, as here, the only contact between Illinois and Facebook was Facebook's website); *Ralls III*, slip op. at 6-9 (no specific or general jurisdiction over Facebook Defendants in Washington State). It follows that La'Tiejira's claims should be dismissed for lack of personal jurisdiction under Rule 12(b)(2).[2]

[2] The fact that Facebook has an office and employees in Texas does not alter the analysis because La'Tiejira's claims do not arise from those contacts. *See Gullen*, 2016 WL 245910, at *2. Facebook's policies regarding user-generated content, including policies about what content will or will not be removed, are made in California, not in Texas. *See* Naugle Decl. ¶ 11; *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 834 (S.D.N.Y. 2012).

C. The Communications Decency Act Bars Plaintiff's Claims.

1. Overview of the Communications Decency Act

The Communications Decency Act ("CDA") provides that "[n]o 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," and "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(c)(1), (e)(3). The CDA applies "in all cases arising from the publication of user-generated content." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008).

"At its core," the CDA "bars '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.'" *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). By immunizing interactive computer services like Facebook from liability for claims based on user-generated content, Congress sought "to promote the continued development of the Internet and other interactive computer services . . . [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(1), (2). Thus, "[p]arties complaining that they were harmed by a Web site's publication of user-generated content have recourse; they may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online." *MySpace, Inc.*, 528 F.3d at 419.

In light of that clear congressional intent, courts construe CDA immunity broadly "to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008); *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*,

591 F.3d 250, 255 (4th Cir. 2009) (courts "aim to resolve the question of § 230 immunity at the earliest possible stage of the case") (emphasis omitted) (citation and internal quotation marks omitted). Indeed, the Ninth Circuit Court of Appeals recently emphasized the importance of construing the CDA broadly and rejecting artful attempts to plead around it. *See Kimzey v. Yelp! Inc*., No. 14-35487, 2016 WL 4729492, at *2 (9th Cir. Sept. 12, 2016).

Courts routinely reject claims against Facebook under the CDA where, as here, the claims are based on Facebook's alleged failure to prevent or remove allegedly unlawful user-generated content. *See, e.g.*, *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (CDA barred negligence and assault claims); *Caraccioli v. Facebook, Inc.*, No. 5:15-cv-04145-EJD, 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016) (CDA barred claims for defamation, invasion of privacy, intentional infliction of emotional distress, and violation of California's Unfair Competition Law); *Sikhs for Justice ("SFJ"), Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095-96 (N.D. Cal. 2015) (CDA barred claims for violation of civil rights laws); *Gaston v. Facebook, Inc.*, No. 3:12-cv-0063-ST, 2012 WL 629868, at *7 (D. Or. Feb. 2, 2012) (CDA barred claims for defamation, invasion of privacy, and related torts), *report and recomm. adopted*, 2012 WL 610005 (D. Or. Feb. 24, 2012).

The Facebook Defendants are entitled to CDA immunity in this case if (1) they are providers of an "interactive computer service"; (2) La'Tiejira's claims treat them as "publishers" of the allegedly defamatory statements; and (3) the allegedly defamatory statements were "provided by another information content provider." 47 U.S.C. § 230(c)(1); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *2 (E.D. Tex. Dec. 27, 2006). Because each of those elements is present, La'Tiejira's claims are barred by the CDA.

2. The Facebook Defendants Provide an Interactive Computer Service.

The CDA defines "interactive computer service" to mean "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). Many courts have held that Facebook meets that definition. *See, e.g.*, *Klayman*, 753 F.3d at 1357; *Caraccioli*, 167 F. Supp. 3d at 1065; *Sikhs for Justice*, 144 F. Supp. 3d at 1093. And the D.C. Circuit has specifically held that Zuckerberg, in his role as the CEO of Facebook, is also entitled to immunity under the CDA as a "provider" of interactive computer services. *See Klayman*, 753 F.3d at 1358. Thus, the first requirement for CDA immunity is met.

3. Plaintiff's Claims Treat the Facebook Defendants as Publishers.

It is equally clear that all of La'Tiejira's claims seek to treat the Facebook Defendants as publishers of the allegedly defamatory statements regarding La'Tiejira's gender identity.

In evaluating whether a claim treats a provider as a publisher of user-generated content, "what matters is not the name of the cause of action." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009). "[W]hat matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.* at 1102. In other words, "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability." *Id.*

A fair reading of La'Tiejira's Complaint reveals that she seeks to hold the Facebook Defendants liable for failing to prevent or failing to remove allegedly defamatory statements on Facebook's website. *See, e.g.*, Compl. ¶ 12. As many courts have made clear, however, "the monitoring, screening, and deletion of [user-generated] content" are actions "quintessentially related to a publisher's role." *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003). As a

result, "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Roommates.com*, 521 F.3d at 1170-71.

In this case, La'Tiejira's claims are based solely on the theory that the Facebook Defendants failed to "exclude material that third parties [sought] to post online." *Id*. It follows that her claims are barred by the CDA. *See, e.g.*, *MySpace*, 528 F.3d at 420 (CDA barred suit against MySpace based on MySpace's alleged failure to prevent or remove user-generated content because plaintiff's theory was "merely another way of claiming that MySpace was liable for publishing the communications [of third parties]"); *see also Kimzey*, 2016 WL 4729492, at *2 (CDA barred suit against Yelp based on Yelp's alleged failure to remove user-generated reviews on Yelp's website); *Klayman*, 753 F.3d at 1359 (CDA barred suit against Facebook based on Facebook's alleged failure to remove user-generated content on Facebook).

4. The Allegedly Defamatory Statements Were Created by Another Information Content Provider.

La'Tiejira's Complaint does not specifically identify the allegedly defamatory content that she claims appeared on Facebook. However, assuming that some potentially defamatory statements regarding La'Tiejira's gender identity did, in fact, appear on Facebook's website, those statements were not authored by the Facebook Defendants. Rather, they were authored by the other named defendant, Kyle Anders, or unknown Facebook users. Indeed, La'Tiejira seems to concede as much when she describes the Facebook Defendants' role as "operat[ing]" and "manag[ing]" Facebook's website—not authoring content. Compl. ¶ 12.

La'Tiejira's assertion that all of the defendants, including the Facebook Defendants, "[i]ndividually and collectively" published the offending content does not change the analysis. *Id*. ¶ 14. To the extent that those cryptic allegations are meant to suggest that the Facebook

Defendants authored the content, they fail. When a plaintiff seeks to show that a service provider exceeded its traditional publisher role and *created* unlawful content, she must do more than assert as much; she must allege facts making that far-fetched claim plausible. *See Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (plaintiff must "plead facts tending to demonstrate that the [user-generated content] was not, as is usual, authored by a user")."Were it otherwise, CDA immunity could be avoided simply by reciting a common line that user-generated statements are not what they say they are." *Kimzey*, 2016 WL 4729492, at *4.

Here, La'Tiejira does not allege facts suggesting that the Facebook Defendants authored the offending posts. Nor is that surprising; the notion that the Facebook Defendants would write derogatory remarks about the gender identity of a Facebook user is (to put it mildly) highly implausible. *See Dowbenko v. Google Inc.*, 991 F. Supp. 2d 1219, 1220 (S.D. Fla. 2013) (unsupported claim that Google executives authored defamatory content was "simply implausible"), *aff'd*, 582 F. App'x 801 (11th Cir. 2014). The only reasonable inference is that the remarks were authored by Facebook users—not the Facebook Defendants. Thus, the third and final element of CDA immunity is met.

* * *

In sum, the Facebook Defendants provide an interactive computer service, La'Tiejira's claims treat the Facebook Defendants as the publishers of the allegedly defamatory statements, and the allegedly defamatory statements were not authored by the Facebook Defendants. The CDA therefore bars all of La'Tiejira's claims. *See Klayman*, 753 F.3d at 1357 (CDA barred claims against Facebook based on user-generated content); *Caraccioli*, 167 F. Supp. 3d at 1065 (same); *Gaston*, 2012 WL 629868, at *7 (same).

D. Plaintiff's Claims Should Be Dismissed Under Rule 12(b)(6) Because Plaintiff Fails to Allege the Essential Elements of Her Claims.

Even if the CDA did not bar La'Tiejira's claims against the Facebook Defendants—and it plainly does—La'Tiejira has not alleged and cannot allege the essential elements of her claims. Her Complaint should be dismissed on that ground as well.

1. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege facts sufficient "to raise a right to relief above the speculative level," and to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Pro se complaints are construed liberally under Rule 12(b)(6). *See Brittain v. Trane Am. Standard*, No. 02-40944, 2003 WL 261828 (5th Cir. Jan. 17, 2003). "[N]evertheless," pro se complaints must "'set forth facts giving rise to a claim on which relief may be granted.'" *Id*. at *2 (quoting *Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir. 1993)).

La'Tiejira's claims fall well short of these basic pleading requirements.

2. California Law Governs Plaintiff's Claims.

As an initial matter, La'Tiejira's claims are governed by California law, not Texas law.

First, La'Tiejira specifically relies on California law in her Complaint. *See* Compl. ¶¶ 27, 31. Thus, even she acknowledges that her claims are governed by California law.

Second, La'Tiejira's filings make clear that she is a registered Facebook user or, at the very least, that she accesses and uses Facebook. *See* Dkt. 7 ¶¶ 2-3 (stating that La'Tiejira has accessed defendant Kyle Anders' Facebook profile and used Facebook to attempt "to contact [Anders'] other 'Friends' on Facebook"). That is important because all persons who register for,

use, or access Facebook must agree to Facebook's Statement of Rights and Responsibilities ("SRR"). *See* Naugle Decl. ¶ 5; Facebook, Statement of Rights and Responsibilities, https://www.facebook.com/legal/terms (last visited Oct. 31, 2016) (attached as Exhibit B to the Naugle Decl.); *see also Fteja*, 841 F. Supp. 2d at 835 (plaintiff "must have . . . indicated that he had read and agreed to" the SRR in order to access or use Facebook) (brackets and internal quotation marks omitted); *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-05780 JW, 2010 WL 3291750, at *7 n.20 (N.D. Cal. July 20, 2010) ("[I]n the act of accessing or using the Facebook website alone, [defendant] acceded to [Facebook's] Terms of Use and became bound by them.").[3] The SRR, in turn, provides that the "laws of the State of California will govern . . . any claim that might arise between you and us." Naugle Decl., Ex. B § 15.1. Thus, La'Tiejira's claims should be analyzed under California law. In any case, California law and Texas law are substantially similar with respect to the elements of La'Tiejira's claims. La'Tiejira's claims therefore fail no matter which forum's law this Court applies.

3. Plaintiff Does Not Adequately Allege Any of Her Claims.

a. Defamation

To state a claim for defamation under California law, a plaintiff must allege "(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural

[3] Although it is not necessary to grant Facebook's motion, this Court may consider Facebook's SRR without converting this motion to a motion for summary judgment. The SRR is central to La'Tiejira's Complaint because La'Tiejira alleges that the Facebook Defendants "manage" and "operate" Facebook's online platform, and the SRR sets forth the policies and principles under which the Facebook Defendants administer that platform. *See, e.g.*, *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000). Alternatively, this Court may take judicial notice of the SRR because the SRR is publicly available and its authenticity is not reasonably in dispute. *See, e.g.*, *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 983-84 (N.D. Cal. 2010) (taking notice of terms of service on that ground). This Court may also consider the SRR in ruling on Facebook's motion to transfer venue. *See, e.g.*, *Fteja*, 841 F. Supp. 2d at 834-35 (reviewing SRR on motion to transfer venue and taking judicial notice of Facebook's website and registration process).

tendency to injure or that causes special damage." *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007) (citation and internal quotation marks omitted). Defamatory material is "published" only if it is communicated to "one other than the person defamed." *Cabesuela v. Browning-Ferris Indus. of Cal., Inc.*, 68 Cal. App. 4th 101, 112 (1998) (citation and internal quotation marks omitted).[4]

La'Tiejira's allegations are insufficient for several reasons.

First, La'Tiejira's bare-bones Complaint fails to provide essential facts about the allegedly defamatory statements. For example, La'Tiejira does not quote or attach the allegedly defamatory content; does not recite the date or dates on which the content appeared on Facebook; does not explain whether the content was published in a publicly accessible area of Facebook, in the form of a private message, or in some other form; and does not explain how or why the Facebook Defendants knew or should have known about the content. It is therefore impossible for the Facebook Defendants (or this Court) to evaluate La'Tiejira's defamation claim. *See Code Rebel, LLC v. Aqua Connect, Inc.*, No. CV 13-4539 RSWL (MANx), 2013 WL 5405706, at *4 (C.D. Cal. Sept. 24, 2013) ("At a minimum, necessary defamation allegations must identify the time and place of publication as well as the speaker, the recipient of the statement, [and] the substance of the statements[.]").

Second, even if this Court assumes that the content was defamatory and appeared somewhere on Facebook, La'Tiejira has not adequately alleged that the content was "published." Facebook offers many types of communications channels (e.g., private messages, timeline posts, etc.), and a wide range of privacy settings that control who can see specific items of content. *See* Facebook, Basic Privacy Settings & Tools, https://www.facebook.com/help/325807937506242/ (last visited Oct. 31, 2016) (attached as Exhibit C to the Naugle Decl.). Thus, assuming that the

[4] Texas law is substantially similar. *See, e.g.*, *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

allegedly defamatory statements appeared on Facebook, it is possible that the content was viewable only by the author and/or La'Tiejira—and La'Tiejira does not allege otherwise. La'Tiejira has therefore failed to allege the first element of her claim. *See Cabesuela*, 68 Cal. App. 4th at 112 ("It is axiomatic that for defamatory matter to be actionable, it must be communicated, or 'published,' intentionally or negligently, *to one other than the person defamed*.") (emphasis added) (citation and internal quotation marks omitted).

Third, a publisher cannot be held liable for allegedly defamatory statements if it exerts no control over the authors and has no advance knowledge of the preparation or content of the statements. *See, e.g.*, *Lewis v. Time Inc.*, 83 F.R.D. 455, 463-64 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983); *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 712 (2007). Here, La'Tiejira cannot plausibly allege that the Facebook Defendants exercised control over the third parties who actually authored the content. Thus, her defamation claim fails.

b. Intentional Interference with Economic Advantage

To state a valid claim for intentional interference with economic advantage, a plaintiff must plausibly allege:

> (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant.

Blank v. Kirwan, 39 Cal. 3d 311, 330 (1985).[5] La'Tiejira's allegations satisfy none of those requirements.

[5] The elements of a claim for "tortious interference with business relations" under Texas law are substantially similar. *See, e.g.*, *Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 475 (Tex. Ct. App.-Houston 2006).

Preliminarily, a claim for intentional interference must be based on a defendant's independently wrongful act. *See Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995). Independently wrongful acts are acts that are "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (2003). Here, La'Tiejira fails to adequately allege that the Facebook Defendants engaged in any unlawful acts. That alone requires dismissal. *See Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc.*, 138 Cal. App. 4th 1215, 1225 (2006) (failure to allege unlawful conduct justifies dismissal).

La'Tiejira also fails to allege the essential elements of her intentional interference claim. ***First***, La'Tiejira fails to allege "an economic relationship between [La'Tiejira] and some third person containing the probability of future economic benefit to [La'Tiejira]." *Blank*, 39 Cal. 3d at 330. La'Tiejira simply asserts, with no supporting facts, that she has existing economic relationships with unnamed "[p]romoters, producers, and filmmakers." Compl. ¶ 15. By her own admission, however, she has not had any such relationships since 1994—approximately 10 years before Facebook was founded. *See id*. ¶ 10 (incorporating and adopting findings of fact from La'Tiejira's 2009 lawsuit against Carriere and Leisure Time Entertainment, which state that (1) "Plaintiff was last employed in 1993 in the adult entertainment industry" (*id*., Ex. 1 ¶ 6) and (2) Carriere's and Leisure Time Entertainment's false statements about La'Tiejira "effectively ended [her] career" in 1993 or 1994 (*id*., Ex. 1 ¶ 29)). As a result, her claim fails. *See Salma v. Capon*, 161 Cal. App. 4th 1275, 1291 (2008) (rejecting intentional interference claim because plaintiff failed to identify an existing economic relationship or any disruption to that relationship).

Second, even if this Court assumes that La'Tiejira had existing economic relationships with promoters, producers, and filmmakers when the allegedly defamatory statements about her gender identity circulated on Facebook, La'Tiejira does not allege and could not allege that the Facebook Defendants knew of those relationships.

Third, and relatedly, La'Tiejira fails to allege "intentional acts on the part of the [Facebook Defendants] designed to disrupt" any existing economic relationship. *Blank*, 39 Cal. 3d at 330. At most, La'Tiejira plausibly alleges that the Facebook Defendants operated and managed the online platform that the other named and unnamed defendants used to post allegedly false statements about La'Tiejira.

Fourth, because La'Tiejira cannot allege any existing economic relationships, she cannot allege any actual disruption to such relationships. *See Salma*, 161 Cal. App. 4th at 1291 (rejecting intentional interference claim because plaintiff failed to identify disruption).

Fifth, La'Tiejira fails to adequately allege that any harm she suffered was proximately caused by the Facebook Defendants. Again, La'Tiejira's Complaint incorporates and adopts the findings of fact from her previous lawsuit against Carriere and Leisure Time Entertainment. *See* Compl. ¶ 10. Those findings state that Carriere's and Leisure Time Entertainment's false statements about La'Tiejira's gender identity "effectively ended [her] career" in 1993 or 1994. *See id*., Ex. 1 ¶ 29. Those findings also adopt the opinion of La'Tiejira's expert, who estimated that La'Tiejira's career in adult entertainment would have run its course by 2000 even if Carriere and Leisure Time Entertainment had not published false statements about her. *See id*., Ex. 1 ¶ 34. Of course, La'Tiejira cannot allege that false statements on Facebook's website proximately caused harm to her adult entertainment career, while, at the same time, affirmatively alleging that her career ended long before Facebook was founded.

c. Negligent Interference with Economic Advantage

(i) Plaintiff's Claim Is Not Actionable.

To allege a claim for negligent interference with economic advantage, La'Tiejira must first show that the Facebook Defendants owed her a legal duty to refrain from the conduct that they allegedly undertook. *See LiMandri v. Judkins*, 52 Cal. App. 4th 326, 348 (1997).

Here, the only conduct that La'Tiejira plausibly alleges is that the Facebook Defendants operated and managed an online platform that was used by others to disseminate false statements about her gender identity. *See* Compl. ¶ 12. But the Facebook Defendants have no legal duty to refrain from operating and managing the Facebook website according to their terms of service, and the CDA expressly preempts any cause of action that would impose such a duty. *See supra* at 8-12. Nor do the Facebook Defendants have a duty to police the Facebook website and prevent or remove all allegedly harmful content. *See, e.g.*, *Kabbaj v. Google, Inc.*, No. CV 13-1522-RGA, 2014 WL 1369864, at *5 (D. Del. Apr. 7, 2014) ("Internet service providers do not owe a duty to police the Internet, remove content, or otherwise protect users from the speech of third parties."), *aff'd*, 592 F. App'x 74 (3d Cir. 2015); *Young v. Facebook, Inc.*, No. 5:10-cv-03579-JF/PVT, 2010 WL 4269304, at *5 (N.D. Cal. Oct. 25, 2010) (Facebook's SRR "expressly disclaims any duty to provide for the safety of Facebook users"). La'Tiejera's claim fails for that reason alone.

(ii) Plaintiff Has Not Alleged the Elements of Her Claim.

Even assuming that La'Tiejira could identify an actionable duty (she cannot), she must also adequately allege the elements of a negligent interference claim:

1. That La'Tiejira and a third party were in an economic relationship that probably would have resulted in a future economic benefit to La'Tiejira;
2. That the Facebook Defendants knew or should have known of this relationship;

3. That the Facebook Defendants knew or should have known that this relationship would be disrupted if the Facebook Defendants failed to act with reasonable care;
4. That the Facebook Defendants failed to act with reasonable care;
5. That the Facebook Defendants engaged in wrongful conduct;
6. That the relationship was disrupted;
7. That La'Tiejira was harmed; and
8. That the Facebook Defendants' wrongful conduct was a substantial factor in causing La'Tiejira's harm.

Judicial Council of Cal. Civil Jury Instruction 2204 (2003). As explained above, La'Tiejira has not alleged and could not allege any of those elements. Her claim fails for that reason as well.

d. Intentional Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress under California law, a plaintiff must plausibly allege:

> (1) extreme and outrageous conduct by the defendant with the intent to cause, or reckless disregard for the probability of causing, emotional distress; (2) suffering of severe or extreme emotional distress by the plaintiff; and (3) the plaintiff's emotional distress is actually and proximately the result of defendant's outrageous conduct.

Chang v. Lederman, 172 Cal. App. 4th 67, 86 (2009) (citation and internal quotation marks omitted).[6] La'Tiejira fails to allege several of those elements.

First, nothing in La'Tiejira's Complaint suggests that the Facebook Defendants (1) intended to cause La'Tiejira to suffer emotional distress or (2) acted with reckless disregard of that outcome. That alone is a sufficient reason to dismiss this claim. *See, e.g.*, *Christensen v. Super. Ct.*, 54 Cal. 3d 868, 906 (1991) (rejecting claim where, as here, "[p]laintiffs . . . have not alleged that the conduct of any of the defendants was directed primarily at them, was calculated to cause them severe emotional distress, or was done with knowledge of their presence and of a substantial certainty that they would suffer severe emotional injury").

[6] Texas law is substantially similar. *See Kroger Texas Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006).

Second, La'Tiejira comes nowhere near alleging that the Facebook Defendants engaged in "extreme and outrageous" conduct. "This standard sets a very high bar." *O'Neil v. Henkel Adhesive*, No. C 06-03914SI, 2007 WL 2261560, at *7 (N.D. Cal. Aug. 6, 2007). "[I]t is not enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Id*. (citation and internal quotation marks omitted). Instead, the plaintiff must allege conduct "so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Id*. (citation and internal quotation marks omitted).

La'Tiejira alleges no such thing here. At most, she alleges that the Facebook Defendants failed to prevent or remove allegedly defamatory content authored by third parties. But the Facebook Defendants have no duty to prevent or remove potentially harmful user-generated content, so it cannot be "extreme or outrageous" for them to fail to do so. *See, e.g.*, *Kabbaj*, 2014 WL 1369864, at *5 ("Internet service providers do not owe a duty to police the Internet, remove content, or otherwise protect users from the speech of third parties."); *Young*, 2010 WL 4269304, at *5 (Facebook's SRR "expressly disclaims any duty to provide for the safety of Facebook users").

Third, La'Tiejira has not alleged and could not allege that the conduct of the Facebook Defendants was the proximate cause of any emotional distress that she suffered. In fact, she alleges that the Facebook Defendants were *not* the proximate cause of her emotional distress. As noted above, La'Tiejira's Complaint incorporates and adopts the findings of fact from her previous lawsuit against Carriere and Leisure Time Entertainment. *See* Compl. ¶ 10. Those findings expressly hold that La'Tiejira "suffered emotional distress and severe depression . . . *as*

a result of" defamatory statements by Carrier and Leisure Time Entertainment in 1993, *id*., Ex. 1 ¶ 31 (emphasis added), and that La'Tiejira "was humiliated, depressed and became suicidal as a *proximate result* of the untrue publication" by Carriere and Leisure Time Entertainment, *id*., Ex. 1 ¶ 16 (conclusions of law) (emphasis added). Because the acts of Carriere and Leisure Time Entertainment proximately caused La'Tiejira's emotional distress, and because La'Tiejira suffered that emotional distress no later than 1993 or 1994 (long before Facebook existed), La'Tiejira cannot allege that the Facebook Defendants proximately caused that distress.[7]

e. Request for Injunctive Relief under California's Unfair Competition Law

In paragraphs 27 and 31 of the Complaint, La'Tiejira asks that the Facebook Defendants "be permanently enjoined from publishing any statements which depict her as anything other than a female" under California's Unfair Competition Law ("UCL"). *See* Cal. Bus. & Prof. Code § 17200. This Court should reject that novel request out of hand.

First, La'Tiejira has not even attempted to allege statutory standing or the elements of a claim under the UCL, nor could she.

Second, La'Tiejira's requested relief would violate the First Amendment to the U.S. Constitution. *See, e.g.*, *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints."); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (a prior restraint is "the most serious and the least tolerable infringement on

[7] If this Court determines that Texas law applies, then this claim should be dismissed for an additional reason: A plaintiff may not invoke the intentional infliction of emotional distress tort where, as here, she can seek relief for the same alleged harms under other statutory or common-law theories. *See Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 (Tex. 2005) ("As we recently reiterated, intentional infliction of emotional distress is a 'gap-filler' tort never intended to supplant or duplicate existing statutory or common-law remedies. Even if other remedies do not explicitly preempt the tort, their availability leaves no gap to fill.").

First Amendment rights"); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1383 (N.D. Cal. 1995) (rejecting request for injunctive relief against providers of Internet bulletin board because providers "play[ed] a vital role in the speech of their users").

Third, to the extent that La'Tiejira seeks to allege a free-standing claim, it must be rejected because "injunctive relief is a remedy, not an independent cause of action." *Sikhs for Justice*, 144 F. Supp. 3d at 1090.

f. Punitive Damages

In one paragraph, La'Tiejira demands punitive damages based on the conclusory and wholly unsupported allegation that the Facebook Defendants "acted with either malice or gross-negligence." Compl. ¶ 33. Her demand should be rejected because La'Tiejira has not alleged and cannot allege any facts to show that the Facebook Defendants acted with malice. *See Maheu v. Hughes Tool Co.*, 569 F.2d 459, 480 (9th Cir. 1977) (public figures may obtain punitive damages for defamation "where actual malice has been established").

E. Alternatively, This Case Should Be Transferred to California.

If this Court declines to dismiss La'Tiejira's claims against Facebook, it should at least transfer those claims to the proper forum under 28 U.S.C. § 1404(a).

As noted above, La'Tiejira is a registered Facebook user or, at the very least, someone who accesses and uses Facebook. *See supra* at 13-14. It follows that she is subject to Facebook's SRR. *See Fteja*, 841 F. Supp. 2d at 835; *Power Ventures*, 2010 WL 3291750, at *7 n.20; Naugle Decl. ¶¶ 4-5. Facebook's SRR includes the following unambiguous forum-selection clause:

> 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 the U.S. District Court for the Northern District of California or a state court located in San Mateo County . . . .

SRR § 15.1. Thus, La'Tiejira has a contractual obligation to litigate her claims in California.[8]

The Supreme Court recently clarified that valid forum-selection clauses must be enforced except in extraordinary cases. "When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. *Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied*." *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 134 S. Ct. 568, 581 (2013) (emphasis added). Even before *Atlantic Marine*, courts routinely transferred cases in accordance with valid forum-selection clauses, including Facebook's forum-selection clause. *See, e.g.*, *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894, 900 (S.D. Ill. 2012) (transferring case to California based on forum-selection clause in Facebook's SRR); *Fteja*, 841 F. Supp. 2d at 844 (same); *Beard v. PayPal, Inc.*, No. 09-1339-JO, 2010 WL 654390, at *3 (D. Or. Feb. 19, 2010) (transferring case to California based on forum-selection clause).

Here, La'Tiejira agreed to Facebook's forum-selection clause, the clause is valid and mandatory, and there are no extraordinary circumstances militating against transfer. Thus, if this Court does not dismiss La'Tiejira's claims, it should transfer this case.

IV. CONCLUSION

For the foregoing reasons, the Facebook Defendants respectfully request that the Court grant this motion and dismiss La'Tiejira's claims with prejudice or, alternatively, transfer this case to the U.S. District Court for the Northern District of California under 28 U.S.C. § 1404.

[8] Although Facebook's forum-selection clause has been revised, it has identified California as the exclusive forum for litigating claims against Facebook since at least 2007. *See* Naugle Decl. ¶ 8.

Dated: October 31, 2016

Respectfully submitted,

/s/ William W. Maxwell

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ATTORNEYS FOR DEFENDANTS FACEBOOK, INC. AND MARK ZUCKERBERG

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been served upon the pro se plaintiff, via certified mail, return receipt requested, and filed with the Court via the CM/ECF system, on this 31st day of October, 2016, as follows:

Paree La'Tiejira
2714 Eagle St.
Houston, Texas 77004

/s/ William W. Maxwell