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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
AUG 18 2023
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 22-15602

D.C. No. 3:21-cv-04573-EMC

ADRIENNE SEPANIAK KING;
CHRISTOPHER EDWARD SEPANIAK KING,
Plaintiffs-Appellants,

v.

FACEBOOK., INC., a Delaware corporation,
Defendant-Appellee.

MEMORANDUM[*]

Appeal from the United States District Court

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

for the Northern District of California
Edward M. Chen, District Judge, Presiding

Submitted August 16, 2023[**]
San Francisco, California

Before: CALLAHAN, BADE, and BRESS, Circuit Judges.

Plaintiff-Appellant Adrienne King (King) was a Facebook user whose account was permanently disabled for failing to follow Facebook's "Community Standards." King's son, Plaintiff-Appellant Christopher King, a computer engineer, attempted to help get her account reinstated, but was unsuccessful. Appellants, both citizens of Hawaii, sued Facebook, Inc. (Facebook)[1] in the Northern District of California, bringing emotional distress-based tort claims, contract-based claims, and a claim alleging violation of Section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230 *et seq*. The district court dismissed Appellants' First Amended Complaint (FAC), almost in its entirety with prejudice, but granted King leave to amend her cause of action for breach of the implied covenant of good faith and fair dealing as it related to Facebook's alleged failure to

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[1] On October 28, 2021, Facebook changed its name to Meta Platforms, Inc. Because the parties' briefing and the district court orders still refer to Defendant-Appellee as "Facebook," we do the same to avoid confusion.

provide her with an explanation for disabling her account.

After King filed her Second Amended Complaint (SAC), the district court granted Facebook's motion to dismiss, holding that King had failed to articulate a cognizable damages theory relating to the loss of the photos on her account because (1) her damages were not proximately caused by the alleged misconduct by Facebook, (2) the type of damages she sought–special damages–were expressly barred by Facebook's Terms of Service (TOS), and (3) the photos did not hold any ascertainable economic value. The district court held that because King could not establish a cognizable damages theory, it was a "legal certainty" that she could not establish the requisite amount in controversy to maintain diversity jurisdiction. Accordingly, the district court dismissed the action for lack of subject-matter jurisdiction and declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3). Appellants timely appeal the dismissal of their action.

We have jurisdiction under 28 U.S.C. § 1291 and review de novo dismissals for lack of subject-matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). *Naffie v. Frey,* 789 F.3d 1030, 1035 (9th Cir. 2015) (citation omitted). We affirm.

1. King's CDA theory is foreclosed by existing authority. *See, e.g., Barnes v. Yahoo!, Inc.,* 570 F.3d

1096 (9th Cir. 2009).[2] And as the district court correctly explained, there is no private right of action under the CDA. A private right of action to enforce federal law "must be created by Congress," and without a statutory manifestation of congressional intent, "a [private] cause of action does not exist and courts may not create one." *Alexander v. Sandoval,* 532 U.S. 275, 286-87 (2001). King does not contest this on appeal, and thus waives any challenge to it. *See Corro-Barragan v. Holder,* 718 F.3d 1174, 1177 n.5 (9th Cir. 2013) (failure to contest issue in opening brief results in waiver).

2. The district court also properly concluded that King's breach of the implied covenant of good faith and fair dealing claim relating to her account termination was foreclosed by *Barnes.* King contends that *Barnes* establishes a categorical rule that contract-based claims are never barred by Section 230(c)(1). We disagree. The specific promise to take down explicit content at issue in *Barnes* does not compare to the general promise made by Facebook, and incorporated into its TOS, to use "good faith" or make an "honest" determination before deciding to exercise publishing or editorial discretion. *See* 570 F.3d at 1105, 1107-09. Regardless, the district court properly determined that King had not alleged cognizable damages relating to her account determination.

---

[2] Appellants' motion for initial *en banc* review of this case is DENIED without prejudice to appellants seeking *en banc* review in the normal course.

3. The district court did not err in dismissing the SAC for lack of subject-matter jurisdiction because it was a "legal certainty" that King could not establish the amount in controversy exceeded $75,000. *See* 28 U.S.C. § 1332(a)(1). The district court identified several deficiencies with King's damages theory, each of which are independently fatal to her claim, including as it relates to Facebook allegedly failing to provide her with an explanation for terminating her account. King does not address the district court's holding that she is seeking special damages as opposed to general damages. Nor does she address the district court's conclusion that Facebook's TOS expressly bars recovery for such damages.

4. The district court did not err in dismissing Appellants' claims of intentional and negligent infliction of emotional distress. Appellants argue in conclusory fashion that Facebook's conduct was "outrageous" and that it "went out of its way to be malicious," but the district court was not required to accept such conclusory allegations as a matter of law. *See Berkley v. Dowds,* 61 Cal. Rptr. 3d 304, 317 (Cal. Ct. App. 2007) ("Whether a defendant's conduct can reasonably be found to be outrageous is a question of law that must initially be determined by the court.").

AFFIRMED.

APPENDIX B

599 F.Supp.3d 901

Adrienne Sepaniek KING, Plaintiff,
v.
FACEBOOK INC., Defendant.

Case No. 21-cv-04573-EMC

United States District Court, N.D. California.

Signed April 20, 2022

[599 F.Supp.3d 904)

Russel David Myrick, The RDM Legal Group, La Jolla, CA, Samuel P. King, Pro Hac Vice, King & king LLP, Honolulu, HI, for Plaintiff.

Jacob Marcus Heath, Orrick, Herrington & Sutcliffe, LLP, Menlo Park, CA, Jason S. George, Matan Shacham, Keker, Van Nest and Peters LLP, San Francisco, CA, Michelle Lynn Visser, Orrick, Herrington & Sutcliffe, San Francisco, CA, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Docket No. 62

EDWARD M. CHEN, United States District Judge

[599 F.Supp.3d 905]

Adrienne Sepaniak King filed suit against Defendant Facebook, Inc. after the company disabled the account that Ms. King had with Facebook. According to Ms. King, Facebook claimed that the account was disabled because she had violated Community Standards even though she had not. Facebook also did not give specifics as to how Ms. King had violated Community Standards. Based on a prior order, Ms. King was allowed to file a second amended complaint ("SAC") to assert a single claim for breach of the implied covenant of good faith and fair dealing. Pending before the Court is Facebook's motion to dismiss the SAC. Having considered the parties' briefs as well as the oral argument of counsel, the Court hereby **GRANTS** Facebook's motion to dismiss.

I. FACTUAL & PROCEDURAL BACKGROUND

A. Order on FAC

Previously, the Court adjudicated a motion to dismiss on the first amended complaint ("FAC") which had been filed by Ms. King and her son. *See* Docket No. 56 (Order). In the FAC, there were various causes of action, both contract and tort-based, but most of the claims were clearly meritless. The only claims that warranted more careful analysis were the claims for breach of contract and breach of the implied covenant (claims brought by Ms. King only).

The Court noted that, as alleged, Ms. King

> had a contract with Facebook based on its Terms of Service and that Facebook breached that contract and/or the implied covenant undergirding the contract in three ways: (1) Facebook disabled her account even though she had not violated any Community Standards; (2) after disabling her account, Facebook destroyed content associated with the account; and (3) Facebook refused to give her any specifics as to how she had purportedly failed to follow Community Standards.

Docket No. 56 (Order at 11).

As to destruction of content ((2) above), the Court rejected that theory because

> Ms. King has not pointed to any provision in the Terms of Service that suggests Facebook would not destroy content (or, conversely, that Facebook had an obligation to retain content). Moreover, the destruction of content, following the disabling of an account, does not injure a user's core contractual right – the right to use Facebook's social media platform.

Docket No. 56 (Order at 11). Notably, the Court dismissed the theory of liability with prejudice on the

basis of futility. *See* Docket No. 56 (Order at 12).

On the other theories ((1) and (3) above), the Court found them plausible but agreed with Facebook that Ms. King had failed to [599 F.Supp.3d 906] allege cognizable remedies caused by the purported breach.

This, however, would only justify a dismissal of the claims for breach of contract and breach of the implied covenant *without* prejudice. Facebook argued still that there should be a dismissal *with* prejudice because of futility – i.e., it had immunity from the claims under the Communications Decency Act ("CDA"). The Court agreed in part. Specifically, it agreed that Facebook had CDA immunity "for the contract/implied covenant to the extent that claim is based on Facebook's disabling of Ms. King's account" ((1) above). Docket No. 56 (Order at 22). However, the Court did not agree that there was CDA immunity for the implied covenant claim based on the failure to provide an explanation for the disabling of Ms. King's account ((3) above).

Accordingly, at the end of the day, the Court dismissed all of the claims pled in Ms. King's FAC *with* prejudice, *except* for the implied covenant claim based on Facebook's failure to provide an explanation for the disabling of her account. *See* Docket No. 56 (Order at 24). The Court allowed Ms. King to replead that claim if she could do so in good faith. *See* Docket No. 56 (Order at 24) ("[T]he claim as currently pled is not viable because Ms. King has not sufficiently pled any cognizable damages as a result of Facebook's conduct. Furthermore, Ms. King has waived any claim for

specific performance."). The Court also noted that "[a]ny amendment must also take into account whether there is a reasonable basis to assert diversity jurisdiction (in particular, the amount in controversy) given the rulings made by the Court herein." Docket No. 56 (Order at 24).

B. SAC

In response to the Court order, Ms. King filed a SAC. In the operative SAC, Ms. King alleges as follows.

Ms. King had a personal account with Facebook for more than ten years until November 17, 2020, when she discovered that it had been disabled. *See* SAC ¶¶ 1, 10. Prior to the account being disabled, Ms. King had accumulated about 1,000 "friends." She had shared both political and nonpolitical information. *See* SAC ¶¶ 1, 11-12.

Ms. King discovered her Facebook account had a problem on or about November 17, 2020, when she tried to log into her account but was not successful. On November 19, she received a message from Facebook stating that her account had been disabled, but no reason was provided as to why. *See* SAC ¶¶ 1, 13-14. Below is the full message she received.

> Your Account Has Been Disabled
>
> For more information please visit the Help Center.
>
> Your account was disabled on November

> 17, 2020. If you think your account was disabled by mistake you can submit more information via the Help Center for up to 30 days after your account was disabled. After that, your account will be permanently disabled and you will no longer be able to request a review.

SAC ¶ 14.

Mr. King – Ms. King's son who lives with her – tried to reinstate her account. They subsequently received a message from Facebook that the account had been disabled because "'it did not follow our Community Standards. This decision can't be reversed.'" SAC,¶ 16. No specifics were provided about the purported violation of Community Standards, and, although the Kings thereafter made further inquiry, Facebook did not respond. *See* SAC ¶¶ 16-17.

Mr. King still persisted over the next few months. He received the following

[599 F.Supp.3d 907]

message from Facebook on or about March 9, 2021:

> I am told that the review (I placed) was rejected and that the user (your mother) should have been told what is the policy area they were violating. Unfortunately I do not have much else to add. As for the downloading of data, it seems there should be a way to ask for your data.

> There should be a flow somewhere, but the person dealing with the problem was not sure what that was. Maybe a search can help? Let me know otherwise.
>
> Sorry man, sorry it took so long and sorry we don't know much more, I suppose for FB to share with me would be absurd and not proper, so I suspect I cannot help you much more than this (which I am sure is not very satisfactory) [followed by a frowning emoji]

SAC ¶ 18.

According to Ms. King, she did not violate any Facebook Community Standards. *See* SAC ¶ 19.

Based on, *inter alia*, the above allegations, Ms. King has asserted the following causes of action:

> (1) Breach of contract. Ms. King alleges that Facebook breached the contract between them – specifically, Facebook's Terms of Service ("TOS") – by (a) disabling her Facebook account, (b) failing to provide her with information to allow her to "appeal" Facebook's decision to disable her account, and (3) destroying all content in her account. *See* SAC ¶ 29.
>
> (2) Breach of the implied covenant of good faith and fair dealing. Ms. King alleges that Facebook breached the

> implied covenant by failing to sufficiently explain how she had purportedly violated Community Standards and/or by failing to provide information about how she had purportedly violated Community Standards. *See* SAC ¶ 36. In addition, Facebook breached the implied covenant by destroying all content in her account. *See* SAC ¶ 37.
>
> (3) Specific performance. Ms. King asks the Court to order Facebook to take certain action: (a) to provide sufficient information about why her account was disabled; (b) to provide her with access to the content on her account so that she can make a full accounting of the damages she has suffered; (c) to reinstate her account; (d) to reinstate her posts (both on her account and on the accounts of others); and (e) to reinstate her name and contact information on Facebook.com. *See* SAC ¶ 45.

Ms. King does not seek specific performance alone as a remedy. Rather, she also seeks damages. Ms. King alleges that she has suffered damages in excess of $75,000 as a result of Facebook's conduct. According to Ms. King, she has suffered, in fact, at least $100,000 in damages because, over the ten years she has had a Facebook account, she posted on Facebook pictures of trips that she has taken over the years (including at least ten international trips), and, when Facebook disabled her account, her photos – along with

commentary she provided on the photos and comments made on those photos by her hundreds of Facebook friends – were destroyed. *See* SAC ¶ 24.

> [Ms. King] estimates that each [international] trip cost an average of $10,000 (some significantly more because they lasted for several weeks each) so that it would cost her at least $100,000 to recreate all her photographs of these places and people she met and re-experience all of these places and people, not to mention the thousands of hours KING spent
>
> [599 F.Supp.3d 908]
>
> selecting hundreds of photographs from thousands of photographs to upload to her Facebook Account and making comments regarding the photographs when the events were fresh in her mind. SAC ¶ 24.

II. DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Fed. R.

Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), a plaintiff's "factual allegations [in the complaint] 'must ... suggest that the claim has at least a plausible chance of success.'" *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014). The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But "allegations in a complaint ... may not simply recite the elements of a cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Levitt,* 765 F.3d at 1135 (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted).

B. Claims for Breach of Contract and Specific Performance

As noted above, Ms. King has asserted three causes of action in her SAC: (1) breach of contract, (2) breach of the implied covenant, and (3) specific performance.

The first and third causes of action are dismissed because the Court allowed Ms. King to replead a claim for breach of the implied covenant only.

Furthermore, there are merit-based reasons to dismiss the first and third causes of action. Regarding (3), specific performance may be a remedy for the claim for breach of the implied covenant, but it is not an independent cause of action. *See e.g. Murj, Inc. v. Rhythm Mgmt. Grp., PLLC*, No. 5:21-CV-00072-EJD, 2021 WL 5507170, at *5 (N.D. Cal. Nov. 24, 2021) ("[S]pecific performance is not an independent cause of action under California law, but is instead a remedy for breach of contract."). As for (1), as the Court previously noted, the express terms of the contract simply state that would inform a user if her account was suspended or terminated. *See* Docket No. 56 (Order at 14). The contract did not expressly promise that an explanation would be provided. Thus, Ms. King has at most only a claim for breach of the implied covenant, not the contract itself.[1]

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[1] In the SAC, Ms. King seems to suggest that the Court should reconsider the dismissal of her breach of contract claim. *See* SAC ¶ 26 (alleging that "FACEBOOK has claimed that its TOS does not guarantee that [it] will preserve the content of [its] user accounts, but this is not true" because (1) its "business model, and one of the attractions about FACEBOOK for [its] users[ ] is that FACEBOOK will preserve user content during the lifetime of the users," (2) because ¶ 4.2 of the TOS promises "that an account will be disabled and account's content made unavailable (destroyed), only if a user breaches the TOS according to the standard set forth by FACEBOOK in paragraph 4.2," (3) because Facebook "guarantees preservation of user content by promising to provide an appeal and review process in paragraph 4.2," and (4)

[599 F.Supp.3d 909]

Accordingly, the Court focuses on Ms. King's claim for breach of the implied covenant.

C. Claim for Breach of the Implied Covenant

As the Court previously noted,

> [e]very contract imposes on each party a duty of good faith and fair dealing in each performance and in its enforcement. Simply stated, the burden imposed is that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. Or, to put it another way, the implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose.

Careau & Co. *v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1393, 272 Cal.Rptr. 387 (1990) (internal quotation marks omitted); *see also Avidity Partners, LLC v. State of Cal.*, 221 Cal. App. 4th 1180, 1204, 165 Cal.Rptr.3d 299 (2013) (stating that "'the covenant is

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because Facebook "provides for preservation of user content by providing .. . for a 'memorialization page' even after a user is deceased"). To the extent Ms. King is seeking reconsideration, her request for relief is denied. She has not shown, *e.g.*, that, "in the exercise of reasonable diligence[,] [she] did not know [of] such fact[s] ... at the time of the [prior] order." Civ. L.R. 7-9(b)(1).

implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract'") (emphasis omitted). That being said, "[t]he implied covenant of good faith and fair dealing does not impose substantive terms and conditions beyond those to which the parties actually agreed." *Id.*

The Court dismissed the implied covenant claim as pled in the FAC because Ms. King failed to plead cognizable damages and failed to address Facebook's arguments as to why specific performance was not warranted. In the SAC, Ms. King has attempted to address those deficiencies. The Court addresses the request for damages first.

1. Causation

Facebook argues first that Ms. King has failed to allege viable damages because she is claiming damages based on the destruction of her photos and related content but that injury is not causally related to the alleged breach of the failure to provide an explanation why her account was disabled. The Court agrees. In contract-based cases, damages must be "proximately caused by the defendant's breach." *Vu v. California Com. Club, Inc.*, 58 Cal. App. 4th 229, 233, 68 Cal.Rptr.2d 31 (1997). Here, Ms. King has failed to show that the destruction of her photos is related to Facebook's failure to provide a sufficient explanation

as to why her account was disabled.[2] *Cf. id.* at 235, 68 Cal.Rptr.2d 31 (finding that plaintiffs' claim for damages were based on speculation). Instead, Ms. King appears to attempt to revive her dismissed claims for wrongful termination of her account and destruction of contents.

[599 F.Supp.3d 910]

This Court previously held that the contract between Facebook and Ms. King did not require Facebook to preserve her content. It will not revisit that holding. Any asserted claim for breach of the implied covenant is not only unrelated to the claim this Court said it might allow, but the claim here would contradict the express terms of the contract. Accordingly, Ms. King's claim for damages must be dismissed.

2. General v. Special Damages

Even if causation were not an issue, Ms. King still would fare no better.

> "Contractual damages are of two types general damages (sometimes called direct damages) and special damages (sometimes called consequential damages). [¶] ... [¶] General damages are

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[2] Ms. King's contention that if she could obtain an explanation why her account was disabled would lead to Facebook reversing that decision and accepting responsibility for damages for destruction of her photos relies on a highly speculative chain of events.

> often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are 'deemed' to have contemplated them. [¶] ... [¶] Unlike general damages, special damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement. Instead, they are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test). Special damages 'will not be presumed from the mere breach' but represent loss that 'occurred by reason of injuries following from' the breach."

Schellinger Bros. v. Cotter, 2 Cal. App. 5th 984, 1010, 207 Cal.Rptr.3d 82 (2016); *see also Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 34 Cal. 4th 960, 968, 22 Cal.Rptr.3d 340, 102 P.3d 257 (2004).

In the instant case, the damages Ms. King seeks are not general damages – *i.e.*, damages that flow directly and necessarily from Facebook's alleged breach. At best, they are highly unpredictable special damages. Special damages are recoverable only "if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test)." *Schellinger,* 2 Cal. App. 5th at 1010.

Here, Ms. King has failed to show that either the subjective or objective test has been satisfied. Ms. King did not actually communicate to Facebook that she was using her account as a photo repository and that she did not otherwise retain her photos elsewhere as one normally would. Nor is there any indication that Facebook actually knew that Ms. King was using her account as a photo repository. Finally, Ms. King's suggestion that Facebook should have known that she was using her account as a photo repository - because it "was more convenient and permanent and did not involve storing photo albums and preserving physical photographs," SAC ¶ 24 – strains credulity. Arguably, Facebook should have known that Ms. King would post photos on her account. However, nothing suggests Facebook should have known that she would not maintain her photos elsewhere (whether as hard copies or digital copies saved onto a hard drive, on a phone, flash drive, or in the cloud),

[599 F.Supp.3d 911]

especially given that the photos were of great personal value to her (so much so that she planned on compiling them into a memoir of her life). *See* SAC ¶ 24. Certainly, there is no suggestion that Facebook markets itself as a photo repository. And the fact that Facebook has a "memorialization" feature for people who have died can hardly be considered the same thing as a photo storage.

Accordingly, Ms. King's special damages are not recoverable as a matter of law. The Court also notes that, even if the damages were theoretically recoverable, Ms. King would run into another obstacle – namely, the limitation of liability provision in the TOS. That provision states as follows:

> We work hard to provide the best Products we can and to specify clear guidelines for everyone who uses them. Our Products, however, are provided "as is," and we make no guarantees that they always will be safe, secure, or error-free, or that they will function without disruptions, delays, or imperfections. To the extent permitted by law, we also DISCLAIM ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT. We do not control or direct what people and others do or say, and we are not responsible for

> their actions or conduct (whether online or offline) or any content they share (including offensive, inappropriate, obscene, unlawful, and other objectionable content). [¶] We cannot predict when issues might arise with our Products. Accordingly, our liability shall be limited to the fullest extent permitted by applicable law, and **under no circumstance will we be liable to you for any** lost profits, revenues, information, or data, or **consequential, special, indirect, exemplary, punitive, or incidental damages arising out of or related to these Terms or the Facebook Products, even if we have been advised of the possibility of such damages**. Our aggregate liability arising out of or relating to these Terms or the Facebook Products will not exceed the greater of $100 or the amount you have paid us in the past twelve months.

TOS ¶ 3 (emphasis added). The limitation of liability provision expressly bars Ms. King's claim for special damages, and Ms. King has not challenged the validity of that provision. *See, e.g., Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118, 1126, 147 Cal.Rptr.3d 634 (2012) ("With respect to claims for breach of contract, limitation of liability clauses are enforceable unless they are unconscionable ....").

3. Peculiar Value

Even if Ms. King could overcome the above, her claim for damages would still falter for yet another reason. As the Court previously noted, although a plaintiff may obtain damages based on peculiar value, the peculiar value must still represent economic value and not personal value. *See* Docket No. 56 (Order at 15). Here, the allegations of the SAC suggest that the value of the photos is personal in nature. *See, e.g.*, SAC ¶ 24 (estimating the damages based on the cost to "recreate all her photographs of these places and people she met and re-experience all of these places and people" along with the "thousands of hours KING spent selecting hundreds of photographs from thousands of photographs to upload to her Facebook Account and making comments regarding the photographs when the events were fresh in her mind[;]" but nonetheless remarking that much of her content "relate[s] to spontaneous events which occurred

[599 F.Supp.3d 912]

as she was present over the years and [is] irreplaceable."). The statements she made at the hearing – asserting that the value of the photos was not just the photos themselves but also the comments she made for the photos and then the comments that her friends posted on the photos underscores that that is actually the case.

Furthermore, even putting this problem aside, Ms. King has failed to show that she is entitled to peculiar value because peculiar value is available only where the defendant had prior notice of the peculiar value or otherwise was a willful wrongdoer. *See* Docket No. 56

(Order at 15); *see also* Cal. Civ Code § 3355 ("Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer."). As indicated above, there is nothing to indicate that Facebook had prior notice of the peculiar value of the photos. In addition, Facebook cannot be said to have been a willful wrongdoer when the contract did not require it to preserve any content of its users.

Finally, Facebook raises a fair argument that the value claimed by Ms. King is speculative in nature and therefore not recoverable. *See, e.g., Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 962 (9th Cir. 2001) (denying damages because they were "too speculative to satisfy California's longstanding reasonable certainty requirement" and noting that "California case law [ ] require[s] that damages not be speculative or, conversely, that they be proved to a reasonable certainty").

Accordingly, there are multiple reasons why Ms. King has failed to allege any cognizable damages as a result of the alleged breach of the implied covenant.

D. Subject Matter Jurisdiction

Because Ms. King does not have a viable claim for damages, the Court lacks diversity jurisdiction over her claim for breach of the implied covenant. The amount in controversy has not been met. *See* 28 U.S.C.

§ 1332 ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 ..."). The Court acknowledges that there must be a legal certainty that damages do not exceed $75,000 in order for it to hold that diversity jurisdiction is lacking. *See Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d 1102, 1106 (9th Cir. 2010) (stating that the amount in controversy alleged by the plaintiff generally controls and that, "'[t]o justify dismissal, it must appear to a legal certainty that the claim is really for less than the jurisdictional amount'"; "the 'legal certainty' standard ... means a federal court has subject matter jurisdiction unless 'upon the face of the complaint, it is obvious that the suit cannot involve the necessary amount'"). Even though this is a high standard, it has been met in the instant case for the reasons stated above. *See Naffie v. Frey*, 789 F.3d 1030, 1040 (9th Cir. 2015) (noting that the legal certainty test is met "'1) when the terms of a contract limit the plaintiffs possible recovery; 2) when a specific rule of law or measure of damages limits the amount of damages recoverable; and 3) when independent facts show that the amount of damages was claimed merely to obtain federal court jurisdiction'"). Ms. King has failed to establish any damages, much less $75,000 in damages.

Ms. King argues still that the Court may exercise supplemental jurisdiction over her state law claim. She notes that, even if damages are not available as a remedy, she has also asked for specific performance. Specific performance alone

on a state law claim would not satisfy diversity unless the plaintiff alleges that the cost of specific performance would amount to over $75,000. A plaintiff can allege that specific performance would cause either party to lose or gain over $75,000. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 405 (9th Cir. 1996). Here, Plaintiff alleges no such thing and it is clear that neither the cost nor the benefit of specific performance would exceed $75,000.

She also points out that her prior complaint contained a federal claim which gave rise to federal question jurisdiction, even though that claim was ultimately dismissed. The Court does not opine on whether specific performance is viable remedy for Ms. King. (Facebook contends it is not.) Even assuming specific performance is a possibility, the Court has discretion to decline supplemental jurisdiction. *See* 28 U.S.C. § 1367(c)(3) (providing that a court may decline supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction"). Because the Court has dismissed the only claim over which it had original jurisdiction (the federal claim) and litigation is still in the early stages, the Court finds it proper to decline supplemental jurisdiction in the case at bar. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (indicating that, "when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice"). The Court therefore

dismisses Ms. King's case but without prejudice.

III. CONCLUSION

For the foregoing reasons, the Court grants Facebook's motion to dismiss. The dismissal is without prejudice to her pursuit of the claim in state court for her request for specific performance based on her claim for breach of the implied covenant in failing to explain why her account was disabled. All other claims are dismissed with prejudice.

This order disposes of Docket No. 62.

IT IS SO ORDERED.

APPENDIX C

572 F.Supp.3d 776

Adrienne Sepaniak KING, et al., Plaintiffs,

v.

FACEBOOK, INC., Defendant.

Case No. 21-cv-04573-EMC

United States District Court, N.D. California.

Signed November 12, 2021

[572 F.Supp.3d 780)

Russel David Myrick, The RDM Legal Group, La Jolla, CA, Samuel P. King, Pro Hac Vice, King & King LLP, Honolulu, HI, for Plaintiff Adrienne Sepaniak King.

Jacob Marcus Heath, Orrick, Herrington & Sutcliffe, LLP, Menlo Park, CA, Jason S. George, Matan Shacham, Keker, Van Nest and Peters LLP, Michelle Lynn Visser, Orrick, Herrington & Sutcliffe, San Francisco, CA, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Docket No. 28

EDWARD M. CHEN, United States District Judge

Adrienne Sepaniak King and Christopher Edward Sepaniak King are mother and son. They filed suit against Defendant Facebook, Inc. after the company disabled the account that Ms. King had with Facebook. According to the Kings, Facebook claimed that the account was disabled because Ms. King had violated Community Standards (even though she had not). Facebook also refused to give specifics to the Kings as to how Ms. King had violated Community Standards. The Kings have brought claims for, *e.g.*, breach of contract and infliction of emotional distress. Currently pending before the Court is Facebook's motion to dismiss.

Having considered the parties' briefs as well as the oral argument of counsel, the Court hereby **GRANTS** Facebook's motion but gives Ms. King leave to amend her claim for breach of the implied covenant of good faith and fair dealing.

I. FACTUAL & PROCEDURAL BACKGROUND

In the operative first amended complaint ("FAC"), the Kings allege as follows.

Ms. King had a personal account with Facebook for about ten years until November 17, 2020, when she discovered that it had been disabled. *See* FAC ¶¶ 1, 12. Prior to the account being disabled, Ms. King had accumulated about 1,000 "friends." She had shared both political and nonpolitical

information. (According to Ms. King, most political information reflected a conservative point of view.) *See* FAC, ¶¶ 1, 13-14. Ms. King discovered her Facebook account had a problem on or about November 17, 2020, when she tried to log into her account but was not successful. On November 19, she received a message from Facebook stating that her account had been disabled, but no reason was provided as to why. *See* FAC, ¶ 1. Below is the full message she received.

> Your Account Has Been Disabled
>
> For more information please visit the Help Center.
>
> Your account was disabled on November 17, 2020. If you think your account as disabled by mistake you can submit more information via the Help Center for up to 30 days after your account was disabled. After that, your account will be permanently disabled and you will no longer be able to request a review.

FAC, ¶ 16.

Mr. King – Ms. King's son who lives with her – tried to reinstate her account. They subsequently received a message from Facebook that the account had been disabled because "'it did not follow our Community Standards. This decision can't be reversed.'" FAC ¶ 1; *see also* FAC ¶ 17 (full text of message). No specifics

were provided about the purported violation of Community Standards, and, although the Kings thereafter made further inquiry, Facebook did not respond. *See* FAC ¶¶ 1, 18.

Mr. King persisted still over the next few months. He received the following message from Facebook on or about March 9, 2021:

I am told that the review (I placed) was rejected and that the user (your mother) should have been told what is the policy area they were violating. Unfortunately I do not have much else to add. As for the downloading of data, it seems there should be a way to ask for your data. There should be a flow somewhere, but the person dealing with the problem was not sure what that was. Maybe a search can help? Let me know otherwise.

Sorry man, sorry it took so long and sorry we don't know much more, I suppose for FB to share with me would be absurd and not proper, so I suspect I cannot help you much more than this (which I am sure is not very satisfactory) [followed by a frowning emoji]

FAC ¶ 19. According to the Kings, Ms. King did not violate any Facebook Community Standards. *See* FAC ¶¶ 20-21.

Apparently, not only is Ms. King's account gone but also any reference to her "anywhere in facebook.com is ... gone." FAC ¶ 26.

Based on, *inter alia*, the above allegations, the Kings

have asserted the following causes of action:

> (1) Breach of contract (brought by Ms. King only).
>
> (2) Violation of the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c)(2)(A) (brought by Ms. King only).
>
> (3) Intentional or reckless infliction of emotional distress (brought by Ms. King only).
>
> (4) Negligent infliction of (brought by or grossly negligent emotional distress Ms. King only).
>
> (5) Intentional, reckless, grossly negligent, and/or negligent infliction of emotional distress and loss of consortium (brought by Mr. King only).
>
> (6) Declaratory and injunctive relief (brought by Ms. King only).
>
> (7) Breach of the implied covenant of good faith and fair dealing (brought by Ms. King only).
>
> (8) Conversion (brought by Ms. King only).

II. DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Fed. R. Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), a plaintiffs "factual allegations [in the complaint] 'must . . . suggest that the claim has at least a plausible chance of success.'" *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014). The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the non moving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But "allegations in a complaint ... may not simply recite the elements of a cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Levitt,* 765 F.3d at 1135 (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

(internal quotation marks omitted).

In their opposition, the Kings argue that Facebook is improperly basing its motion to dismiss on affirmative defenses. *See* Opp'n at 1-2 (arguing that "[a] 12(b)(6) motion cannot rely on affirmative defenses which have not yet been pled and required to be pled in an Answer"; also arguing that Facebook should have to "file an Answer stating its affirmative defenses, and meanwhile [be] require[d] ... to answer discovery requests [on] basic questions" such as what did Ms. King do that violated Community Standards). But there is only one argument that Facebook makes that is based on an affirmative defense (*i.e.,* immunity under the CDA). Otherwise, Facebook is contending that the Kings have failed to plead essential elements of their claims. Furthermore, a defendant can bring a 12(b)(6) motion based on an affirmative defense so long as the defense is obvious on the face of the complaint. *See Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013) ("When an affirmative defense is obvious on the face of a complaint, however, a defendant can raise that defense in a motion to dismiss.").

B. CDA Claim (Second Cause of Action)

As noted above, Ms. King has asserted a single federal claim based on the CDA. The Court dismisses the CDA claim because there is no private right of action under the statute.

The specific provision in the CDA cited by Ms. King is 47 U.S.C. § 230(c)(2). Section 230 is titled "protection

for private blocking and screening of offensive material." Subsection (c)(1) is the provision providing for CDA immunity. *See* 47 U.S.C. § 230(c)(1) ("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."). Subsection (c)(2) – the provision invoked by the Kings – is

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titled "Civil liability" and provides as follows:

> No provider or user of an interactive computer service shall be held liable on account of –
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Id. § 230(c)(2).

Nothing on the face of § 230(c)(2) provides for an affirmative claim thereunder. Ms. King admits as much, and instead asserts in the FAC that she has an implied right of action under the statute. *See* FAC ¶ 36 (asserting that "[t]here is an implied cause of action for damages for violations by the provider of an 'interactive computer service' ... of 47 U.S.C. [§] 230(c)(2)(A)"); *see also*, ¶¶ 33-35 (alleging that Facebook disabled Ms. King's account "for reasons not permitted by [the statute]," "without good faith in violation of [the statute]," and "violated her right to constitutionally protected material without good faith in violation of [the statute]"). But that position lacks merit because the statute talks about the *lack* of liability. It provides a source of immunity beyond that provided under (c)(1).

Furthermore, Ms. King has cited no authority that holds or otherwise states that there is an implied right of action under § 230(c)(2). In fact, if anything, the authority suggests that there is no private right of action under the CDA at all. *See, e.g.*, *Doe v. Egea*, 2015 WL 3917112, at *1-2, 2015 U.S. Dist. LEXIS 82632, at *4-5 (S.D. Fla. Jun. 25, 2015) (holding that § 223(a) of the CDA, which is a criminal statute that prohibits the making of obscene or harassing telecommunications, does not give rise to a private right of action); *Nuzzi v. Loan Nguyen,* No. 07-2238, 2009 WL 10710795 at *2-3, 2009 U.S. Dist. LEXIS 144530 at *7 (C.D. Ill. May 18, 2009) (noting the same; citing cases in support); *see also Belknap v. Alphabet, Inc.,* 504 F. Supp. 3d 1156, 1161 (D. Or. 2020) (noting that, "because § 230 is mostly a liability shield, § 230 is less likely to offer a private right of action than

would provisions of the Communications Decency Act criminalizing harassing conduct, provisions that courts have uniformly concluded create no private right of action"); *Millan v. Facebook, Inc.*, No. A161113, 2021 WL 1149937, at *2, 2021 Cal. App. Unpub. LEXIS 1994, at * 4 (Mar. 25, 2021) (noting that § 230(c)(2)(A) "provides an immunity, so even if Facebook acted discriminatorily, at most that would deprive it of the immunity that the statute provides[;] [plaintiff] has not explained how Facebook's failure to acquire immunity under section (c)(2)(A) could establish its liability to him, so the trial court correctly sustained Facebook's demurrer to this claim").

In the opposition brief, Ms. King does little to advance her position that there is an implied right of action. She simply argues that there is a difference between § 230(c)(1) and § 230(c)(2), as Justice Thomas noted in his concurrence in the denial of a writ of certiorari in *Malwarebytes, Inc. v. Software Grp. USA, LLC,* --- U.S. ----, 141 S. Ct. 13, 208 L.Ed.2d 197 (2020). That is, "if a company unknowingly *leaves up* illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it *takes down* certain third-party content in good faith, it is protected by§ 230(c)(2)(A)." *Id.* at 15 (emphasis added). Ms. King then uses this distinction

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articulated by Justice Thomas to springboard into a strained argument on an implied right of action under § 230(c)(2).

> We argue, as does Justice Thomas, that Sec. 230(c)(1) does not apply to material which an interactive computer service (Big Tech) decides will be "not up" (material that is either taken down or barred from uploading). If the limited protection provided by Sec. 230(c)(2)(A) does not apply to a decision by an interactive computer service to either take down or bar material, then Sec. 230(c)(2) provides a basis for an implied federal cause of action. Just as Congress provided protection for an interactive computer service in Sec. 230(c)(1) for any material left "up," the intent of Congress was to provide an implied federal cause of action against an interactive computer service for a decision to block or take down material, especially material that is "constitutionally protected," not covered by Sec. 230(c)(2)(A).

Opp'n at 20. But her argument contains a non-sequitur. Even if (c)(1) were deemed to immunize materials left up and (c)(2) immunizes the taking down of material, nothing in that logic implies the creation of an implied federal cause of action for conduct not immunized.

Additionally, Ms. King does not *substantively* address any of the traditional factors that are considered in deciding whether Congress has meant for there to be a private right of action. *See Nisqually Indian Tribe v. Gregoire*, 623 F.3d 923, 929-30 (9th Cir. 2010) (noting

that the dispositive question is whether Congress intended to create a private right of action, such that the text of the statute and the legislative history should be considered; other factors to consider include whether the plaintiff is one of the class for whose especial benefit the statute was enacted, whether it is consistent with the underlying purposes of the legislative scheme to imply a private right of action, and whether the cause of action is one traditionally relegated to state law); *see also Lil' Man in the Boat, Inc. v. City & Cty. of S.F.*, 5 F.4th 952, 958 (9th Cir. 2021) (noting the same). In *Atkinson v. Facebook, Inc.*, No. C-20- 5546 RS (N.D. Cal.), Judge Seeborg noted that the plaintiff "does not, and cannot, point to any textual support in § 230 for a private right of action." *Id.* (Docket No. 75) (Order at 9).

The Court therefore dismisses the CDA claim. The dismissal is with prejudice as amendment would be futile.[1]

C. Claim for Declaratory and Injunctive Relief (Sixth Cause of Action)

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[1] Because the Court is dismissing the CDA claim, there is no federal question jurisdiction. Plaintiffs suggest that there is still diversity jurisdiction over the remaining state law claims. Facebook has not, at this juncture, made an argument that diversity jurisdiction is lacking. The Court, in ruling on this motion, is not making any definitive ruling as to whether there is diversity jurisdiction in this case. The Court has a sua sponte obligation to ensure that there is subject matter jurisdiction. However, at this point, the record is not sufficiently developed as to whether, *e.g.* Plaintiffs can establish by a preponderance of the evidence that the amount in controversy has been satisfied.

In the claim for declaratory and injunctive relief, Ms. King asks for (1) a declaration that Facebook breached its contract with her; (2) the issuance of an order compelling Facebook to reinstate her account "in toto," FAC ¶ 53; and (3) the issuance of an order enjoining Facebook "from disabling [her] Account, either temporarily or permanently, except for the reasons permitted by 47 U.S.C. [§] 230(c)(2)(A) [i.e., the CDA]." FAC ¶ 54.

In its motion, Facebook argues that the claim should be dismissed because it is not an independent cause of action but

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rather simply reflects the remedies sought by Ms. King. Ms. King does not disagree. The Court therefore dismisses the cause of action with prejudice.[2]

D. Claims for Infliction of Emotional Distress (Third Through Fifth Causes of Action)

The claims for infliction of emotional distress – intentional, reckless, grossly negligent, and negligent – are brought by both Kings. Ms. King's claims are based on Facebook's disabling of her account, not properly engaging with her to address the issue, and destroying the content associated with her account. Mr. King's claims are based on the "emotional distress

[2] This does not mean that injunctive or declaratory relief is not available for any claims Ms. King might successfully assert.

caused by FACEBOOK to [his mother]," which has caused him to suffer "severe emotional distress."[3] FAC ¶ 49; *see also* Opp'n at 22 (asserting that Mr. King's "claims are based on his status as a 'bystander' to KING's 'direct' claims for IIED and NIED"; he "witnessed the trauma FACEBOOK caused to KING by FACEBOOK's wrongful conduct").

The elements of a claim for intentional infliction of emotional distress ("IIED") are as follows:

> (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiffs suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct...
>
> Conduct to be outrageous must be so extreme as to exceed all bounds of that

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[3] In the FAC, Mr. King also claimed a "loss of society, affection, assistance, and conjugal fellowship with KING, all to the detriment of his relationship with his mother." FAC ¶ 49. However, in the opposition, Mr. King admits that he has no basis to claim a loss of consortium because, "[u]nder present California law, ... there is no claim of a child for loss of companionship, affection, etc. related to an injured parent." Opp'n at 22. He adds, however, that he is making the claim "for possible appeal at a later time" since "a number of commentators .. . have urged the California Supreme Court to reverse this position." Opp'n at 22.

> usually tolerated in a civilized community. The defendant must have engaged in conduct intended to inflict injury or engaged in with the realization that injury will result.

Carlsen v. Koivumaki, 227 Cal. App. 4th 879, 896, 174 Cal.Rptr.3d 339 (2014) (internal quotation marks omitted).

As for the claim for negligent infliction of emotional distress, there is no such "'independent tort'"; rather, the claim is simply one of "'negligence to which the traditional elements of duty, breach of duty, causation, and damages apply." *Belen v. Ryan Seacrest Prods., LLC,* 65 Cal. App. 5th 1145, 1165, 280 Cal.Rptr.3d 662 (2021).

Regarding the IIED claim, Facebook argues, *inter alia*, that the Kings have failed to allege outrageous conduct, an intent to cause or reckless disregard of causing emotional distress, and severe or extreme emotional distress. The Court need only address the argument that the Kings have failed to allege outrageous conduct. It agrees with Facebook that, as a matter of law, Facebook's conduct, as alleged, is not outrageous. "A defendant's conduct is considered to be outrageous if it is so extreme as to exceed all bounds of that usually tolerated in a civilized community. Liability for IIED does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."

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Crouch v. Trinity Christian Ctr. of Santa Ana, Inc., 39 Cal. App. 5th 995, 1007, 253 Cal.Rptr.3d 1 (2019). *See, e.g.*, *McNaboe v. Safeway Inc.*, No. 13-cv-04174-SI, 2016 WL 80553 at *6, 2016 U.S. Dist. LEXIS 2493 at *16 (N.D. Cal. Jan. 7, 2016) (stating that "[t]here is nothing, as a matter of law, extreme and outrageous about the act of terminating an employee on the basis of unproven or false or even malicious accusations"); *Kassa v. BP W. Coast Prods., LLC,* No. C-08-02725 RMW, 2008 WL 3494677 at *8, 2008 U.S. Dist. LEXIS 61668 at *22 (N.D. Cal. Aug. 11, 2008) (stating that, "[f]or better or worse, 'civilized community' tolerates run-of-the-mill breaches of contract; such conduct is not sufficiently 'extreme and outrageous' for a claim of intentional infliction of emotional distress"); *Yurick v. Superior Court*, 209 Cal. App. 3d 1116, 1124-25, 1129, 257 Cal.Rptr. 665 (1989) (holding that allegations by an employee that her supervisor called her senile and a liar in front of coworkers on numerous occasions was not outrageous conduct as a matter of law). The Kings argue that "[b]eing publically [sic] embarrassed and humiliated publically [sic] by a Big Tech company on the internet for supposedly violating its 'Community Standards' is hardly a trivial assault on KING's psyche." Opp'n at 20. But the conduct at issue here is far less serious than that, *e.g.*, in *Yurick* where the court still found no outrageous conduct. In any event, the Kings's argument presupposes that Facebook *broadcast* that Ms. King's account was disabled for failure to comply with Community Standards. Although it may be inferred that Ms. King's friends knew her account was not working, there is no indication that they knew *why* and that Facebook was responsible for publication of the why. The IIED claim

as to both Kings is therefore dismissed with prejudice.

As for the negligence claim, it too is meritless because the Kings have failed to make allegations to support Facebook having any kind of duty to them. In the opposition, the Kings argue that Facebook had, at the very least, "a duty to protect KING's property (the content of the King Facebook Account) independent of any contractual relationship between FACEBOOK and King." Opp'n at 21. But the Kings have failed to explain *why* Facebook has such a duty to them. The Kings have not pointed to, *e.g.*, a duty "imposed by law," a duty "assumed by [Facebook]" (*i.e.*, "in which the emotional condition of the plaintiff[s] is an object"), or a duty existing "by virtue of a special relationship." *Potter v. Firestone Tire & Rubber Co.,* 6 Cal. 4th 965, 985, 25 Cal.Rptr.2d 550, 863 P.2d 795 (1993). Regarding a legal duty,

> *Biakanja* [*v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958)] "is the leading California case discussing whether a legal duty should be imposed absent privity of contract." In *Biakanja*, the California Supreme Court held that whether the defendant in a specific case "will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors," including (1) "the extent to which the transaction was intended to affect the plaintiff," (2) "the foreseeability of harm to [the plaintiff]," (3) "the degree of certainty that the plaintiff suffered injury," (4) "the

> closeness of the connection between the defendant's conduct and the injury suffered," (5) "the moral blame attached to the defendant's conduct," and (6) "the policy of preventing future harm."

Daniels v. Select Portfolio Servicing, Inc., 246 Cal. App. 4th 1150, 1181, 201 Cal.Rptr.3d 390 (2016). In the case at bar, even if factors (1), (2), and (4) weigh somewhat in the Kings' favor, the remaining factors weigh strongly in Facebook's favor. The Court therefore dismisses the negligence claim as well. The dismissal is with prejudice as amendment would be futile.

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E. Breach-of-Contract Claim and Claim for Breach of the Implied Covenant and Fair Dealing (First and Seventh Causes of Action)

The Court now turns to the main claims in the instant case – *i.e.*, Ms. King's claims for breach of contract and the implied covenant of good faith and fair dealing. The two causes of action are related because

> [e]very contract imposes on each party a duty of good faith and fair dealing in each performance and in its enforcement. Simply stated, the burden imposed is that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. Or, to put it another way, the implied covenant imposes upon each party the

> obligation to do everything that the contract presupposes they will do to accomplish its purpose.

Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1393, 272 Cal.Rptr. 387 (1990) (internal quotation marks omitted); *see also Avidity Partners, LLC v. State of Cal.*, 221 Cal. App. 4th 1180, 1204, 165 Cal.Rptr.3d 299 (2013) (stating that "'the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract'") (emphasis omitted). Of course, "[t]he implied covenant of good faith and fair dealing does not impose substantive terms and conditions beyond those to which the parties actually agreed." *Id.*

In the instant case, Ms. King alleges that she had a contract with Facebook based on its Terms of Service[4]

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[4] Both parties agree that the correct Terms of Service are those attached to the Pricer declaration (submitted in support of the motion to dismiss). *See* Pricer Decl. ¶ 3 & Ex. A (stating that Exhibit A is a true and correct copy of the Terms of Service as of October 22, 2020, i.e., shortly before Ms. King learned that her account had been disabled); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (noting that the incorporation-by-reference doctrine "permits us to take into account documents 'whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiffs] pleading" and extends "to situations in which the plaintiffs claim depends on the contents of a document, the defendant attaches the document to its motion to

and that Facebook breached that contract and/or the implied covenant undergirding the contract in three ways: (1) Facebook disabled her account even though she had not violated any Community Standards; (2) after disabling her account, Facebook destroyed content associated with the account; and (3) Facebook refused to give her any specifics as to how she had purportedly failed to follow Community Standards.

1. Destruction of Content

The Court addresses first Ms. King's contention that Facebook breached the Terms of Service or the implied covenant of good faith and fair dealing by destroying content associated with her account.[5] This argument lacks merit. Ms. King has not pointed to any provision in the Terms of Service that suggests Facebook would not destroy content (or, conversely, that Facebook had an obligation to retain content). Moreover, the destruction of content, following the disabling of an account, does not injure a user's core contractual right – the right to use Facebook's social media platform. *See Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373, 6 Cal.Rptr.2d 467, 826 P.2d 710 (1992) ("[T]he scope of conduct prohibited by

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dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint").

[5] At the hearing, Facebook suggested that the content associated with Ms. King's account may not have been destroyed; however, for purposes of this motion, the Court accepts Ms. King's allegation of destruction as true.

the covenant of good faith is circumscribed by the purposes and express terms of the contract.... [U]nder traditional contract principles, the implied covenant of good faith is read into contracts 'in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.'"). The fact that Facebook recognized in the Terms of Service that a user "own[s] the intellectual property rights ... in any content that you create and share on Facebook," TOS § 3.3, does not mean that Facebook implicitly agreed to preserve that intellectual property. In fact, § 3.3 of the Terms of Service simply states that the user gives Facebook a license to that intellectual property. The Terms of Service say nothing about the duty of Facebook to retain user postings.

The Court therefore dismisses this theory of liability, and with prejudice on the basis of futility.

2. Disabling of Account

While the Court does not find Ms. King's argument on the destruction of content persuasive, it finds that she has a viable theory for breach of contract and/or the implied covenant based on Facebook's disabling of her account. Ms. King points to § 4.2 of the Terms of Service, which provides as follows:

> [§ 4.2] Account suspension or termination
>
> We want Facebook to be a place where people feel welcome and safe to express themselves and share their thoughts and

ideas.

If we determine that you have clearly, seriously or repeatedly breached our Terms or Policies, including in particular our Community Standards, we may suspend or permanently disable access to your account. We may also suspend or disable your account if you repeatedly infringe other people's intellectual property rights or where we are required to do so for legal reasons.

Where we take such action we'll let you know and explain any options you have to request a review unless doing so may expose us or others to legal liability; harm our community of users; compromise or interfere with the integrity or operation of any of our services, systems or Products; or where we are restricted due to technical limitations; or where we are prohibited from doing so for legal reasons.

You can learn more about what you can do if your account has been disabled and how to contact us if you think we have disabled your account by mistake.

If you delete or we disabled your account, these Terms shall terminated as an agreement between you and us, but the

following provisions will remain in place: 3, 4.2-4.5.

TOS § 4.2 (bold added). According to Ms. King, under § 4.2, Facebook could disable her account only if she had, *e.g.*, violated Community Standards and she did not do so; thus, Facebook's disabling of her account was unwarranted and a breach of the Terms of Service (or the implied covenant).

In response, Facebook asserts that it could not have breached the Terms of Service (or even the implied covenant) when it disabled Ms. King's account because § 4.2 gives it complete and unfettered discretion as to whether to disable an account. Facebook points to the language "If we determine" and "we may suspend." Although the Terms of Service do give Facebook some discretion to act,

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see Pub. Storage v. Sprint Corp., No. CV 14- 2594, 2015 WL 1057923, at *n, 2015 U.S. Dist. LEXIS 30204, at *42 (C.D. Cal. Mar. 9, 2015) (noting that "the phrase 'if Lessee determines' vests the Lessee with a measure of discretion to determine whether the premises are appropriate"), the Court is not convinced at this juncture that that discretion is entirely unrestrained. Notably, the Terms of Service did not include language providing that Facebook had "sole discretion" to act. *Compare, e.g.*, *Chen v. PayPal, Inc.*, 61 Cal. App. 5th 559, 570-71, 275 Cal.Rptr.3d 767 (2021) (noting that contract provisions allowed "PayPal to place a hold on a payment or on a certain amount in a seller's account

when it 'believes there may be a high level of risk' associated with a transaction or the account[,] [a]nd per the express terms of the contract, it may do so *'at its sole discretion*'"; although plaintiffs alleged that "'there was never any high level of risk associated with any of the accounts of any' appellants, ... this ignores that the user agreement makes the decision to place a hold PayPal's decision – and PayPal's alone"). Moreover, by providing a standard by which to evaluate whether an account should be disabled, the Terms of Service suggest that Facebook's discretion to disable an account is to be guided by the articulated factors and cannot be entirely arbitrary. *Cf. Block v. Cmty. Nutrition Ins.*, 467 U.S. 340, 349, 351, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984) (stating that the "presumption favoring judicial review of administrative action ... may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent" – i.e., "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme'"). At the very least, there is a strong argument that the implied covenant of good faith and fair dealing imposes some limitation on the exercise of discretion so as to not entirely eviscerate users' rights.

3. Explanation for Disabling of Account

Finally, the Court finds a viable theory for breach of the implied covenant based on Ms. King's contention that Facebook failed to give her an adequate explanation as to how she purportedly violated Community Standards. On their face, the Terms of Service state:

> Were we take such action [account suspension or termination] **we'll let you know** and explain any options you have **to request a review**, unless doing so may expose us or others to legal liability; harm our community of users, compromise or interfere with the integrity or operation of any of our services, systems or Products; or where we are restricted due to technical limitations; or where we are prohibited from doing so for legal reasons.

Terms of Service § 4.2 (emphasis added). Admittedly, the express terms of the Terms of Service do not require Facebook to provide information to a user beyond the fact that the account has been suspended or terminated. But, as noted above, "the implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose. This rule was developed in the contract arena and is aimed at making effective the agreement's promises." *Gareau,* 222 Cal. App. 3d at 1393, 272 Cal.Rptr. 387 (internal quotation marks omitted). Thus, here, it is plausible that Facebook is obligated to provide at least some information in addition to the fact that the account has been suspended or terminated – *e.g.*, enough information about why the account was suspended or terminated such that an "appeal" could properly be made (*i.e.*, to follow through

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with "options you have to request a review").

4. Remedies

Based on the Court's analysis above, Ms. King has a claim for breach of contract (or breach of the implied covenant) based on Facebook's disabling of her account, as well as the failure to provide a more specific explanation as to why the account was disabled. However, Facebook argues that, to the extent any claim survives, it is still defective because Ms. King has failed to allege cognizable damages caused by the purported breach. *See* Mot. at 6 ("Plaintiffs do not articulate how Facebook caused any pecuniary harm through its application of its Terms of Service."). The Court agrees. The FAC suggests that much of the injury allegedly suffered by Ms. King is emotional distress or injury to reputation. But this kind of injury is generally not compensable for a breach of contract. *See Frangipani v. Boecker*, 64 Cal. App. 4th 860, 865-66, 75 Cal. Rptr. 2d 407 (1998) ("[T]he invariable rule [is] pronounced by a legion of cases that damages are not recoverable for mental suffering or injury to reputation resulting from breach of contract."); *see also Roberts v. L.A. Cty. Bar Ass'n*, 105 Cal. App. 4th 604, 617, 129 Cal.Rptr.2d 546 (2003) (same); *Allen v. Jones*, 104 Cal. App. 3d 207, 211, 163 Cal.Rptr. 445 (1980) ("The great majority of contracts involve commercial transactions in which it is generally not foreseeable that breach will cause significant mental distress as distinguished from mere mental agitation or annoyance. Accordingly, the rule has developed that damages for mental suffering or injury to reputation are generally not recoverable in an action for breach of

contract.").

Ms. King contends, however, that she has still suffered a pecuniary injury because the content associated with her account *(e.g.*, photographs) "is no longer available to her." Opp'n at 9. Ms. King contends that, even though this content has "peculiar value" to her, that does not mean that it is not compensable. She points to California Civil Code § 3355 which provides as follows: "Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer." Cal. Civ. Code § 3355.

The Court rejects Ms. King's arguments for two reasons. First, as noted above, Facebook was not obligated to retain her property for her. Second, even if it were, "[p]eculiar value under Civil Code section 3355 refers to a property's unique *economic* value, not its sentimental or emotional value." *McMahon v. Craig,* 176 Cal. App. 4th 222, 237, 97 Cal.Rptr.3d 555 (2009) (emphasis added). For example, an animal has been deemed to have peculiar value when "its pedigree, reputation, age, health, and ability to win dog shows" were taken into account – i.e., there were "special characteristics which increase the animal's monetary value, not its abstract value as a companion to its owner." *Id.* There could also be peculiar value to, *e.g.*, a family portrait independent of any emotional value.

"[W]hen the subject matter has its chief

> value in its value for use by the injured person, if the thing is replaceable, the damages for its loss are limited to replacement value, less an amount for depreciation .... If the subject matter cannot be replaced, however, as in the case of a destroyed or lost family portrait, the owner will be compensated for its special value to him, as evidenced by the original cost, and the quality and condition at the time of the loss. Likewise an author who with great labor has compiled

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> a manuscript, useful to him but with no exchange value, is entitled, in case of its destruction, to the value of the time spent in producing it or necessary to spend to reproduce it. In these cases, however, damages cannot be based on sentimental value. Compensatory damages are not given for emotional distress caused merely by the loss of the things, except that in unusual circumstances damages may be awarded for humiliation caused by deprivation, as when one is deprived of essential articles of clothing."

Id. (quoting the Restatement Second of Torts § 911).

Given the limitations on peculiar value, it is difficult

to see how, *e.g.*, the photographs allegedly destroyed have some kind of economic value independent of any emotional attachment. Moreover, as indicated by the text of § 3355, Facebook could be liable only if it had *notice* of the peculiar value (at least absent willful wrongdoing). *See* Cal. Civ. Code § 3355 (providing that "[w]here certain property has a peculiar value to a person recovering damages for deprivation thereof ..., that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer"). Ms. King suggests that these are questions of fact that cannot be resolved at the 12(b)(6) phase, but she first needs to make factual allegations to support the plausibility of her theory.

Finally, the Court notes that, theoretically, Ms. King could have argued that her claim for breach of contract or the implied covenant should not be dismissed because, even if she had no viable claim for damages, she could still seek specific performance as a remedy. Ms. King did invoke specific performance as a remedy in her pleading (at least for her claim for breach of contract). *See* FAC at 13 (labeling the first cause of action as "Breach of Contract/Specific Performance"); FAC ¶ 31 (alleging that, "if monetary damages are not awarded or are inadequate to compensate KING for the breach of contract by FACEBOOK, [she is entitled to] an award of specific performance requiring FACEBOOK to reinstate the King Facebook Account, all content and data associated with the King Facebook Account, and reinstatement of KING's name for any person searching for her name through facebook.com").

The problem for Ms. King is that, in its motion to dismiss, Facebook made various arguments as to why specific performance is not a viable remedy, *see* Mot. at 7 (arguing that Ms. King must show that "(1) the contract's terms are sufficiently definite; (2) consideration is adequate; (3) there is substantial similarity of the requested performance to the contractual terms; (4) there is a mutuality of remedies; and (5) plaintiffs legal remedy is inadequate"), but she failed to respond to any of the contentions in her opposition brief.

Accordingly, the claim for breach of contract or the implied covenant – predicated on the disabling of Ms. King's account and the failure to provide a specific explanation – is dismissed.

F. Conversion Claim (Eighth Cause of Action)

"Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiffs ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." *Lee v. Hanley*, 61 Cal. 4th 1225, 1240, 191 Cal.Rptr.3d 536, 354 P.3d 334 (2015) (internal quotation marks omitted). In her claim for conversion, Ms. King alleges that she owned the content on her

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account with Facebook – which "included items of great and special value to [her] such as personal

records, family photographs and other personal photographs accumulated over years of being a Facebook user, ... contact information with hundreds of family, friends, and business associates," etc. – and that Facebook "destroyed the entire content ... without any justification." FAC ¶¶ 63-64.

The Court dismisses the conversion claim because Ms. King has failed to allege a wrongful act with respect to the alleged destruction of content. As noted above, Facebook was not under any obligation not to destroy (or to otherwise retain) the content associated with her account. The dismissal of this claim is with prejudice.

G. CDA Immunity

Based on the analysis above, all of the claims asserted by the Kings are dismissed, some with prejudice. The only claim that the Court has not, at this point, dismissed with prejudice is the claim for breach of contract/implied covenant based on the disabling of Ms. King's account and the failure to provide a specific explanation.

In deciding whether this claim should be dismissed with or without prejudice, the Court must consider Facebook's argument that it has CDA immunity under 47 U.S.C. § 230(c)(1).[6] Because the Court agrees with

[6] At the hearing, Facebook noted that it is not, at this juncture, making an argument of CDA immunity based on § 230(c)(2) because resolution of that issue would turn on disputed facts and thus the issue would not be the proper subject of a 12(b)(6) motion.

Facebook on CDA immunity with respect to the disabling of Ms. King's account, it denies Ms. King leave to amend as amendment would be futile.

Section 230(c)(1) of the CDA provides: "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." 47 U.S.C. § 230(c)(1). Facebook emphasizes that § 230(c)(1) protects an interactive computer service provider from liability for its exercise of traditional editorial functions, which includes *both* whether to post content and to withdraw content. *See* Mot. at 19. *See, e.g.*, *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (stating that "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"); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (stating that "publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content").

In response, the Kings present two arguments: (1) under *Barnes*, there can be only CDA immunity for the tort claims, not for claims based on breach of contract or the implied covenant; and (2) the specific immunity claimed by Facebook – *i.e.*, § 230(c)(1) – applies only where a plaintiff seeks to hold a defendant liable for information that the defendant has published and not for information that the defendant has withdrawn or removed (which is protected by § 230(c)(2) instead, a provision that Facebook has not invoked). As discussed below, the Kings recognize their second argument is

foreclosed by Ninth Circuit precedent; however, they are still making the argument to preserve it for appeal.

1. Tort v. Contract Claims

As noted above, the Kings' first argument – that CDA immunity does not apply to contract-based claims – is based on the Ninth Circuit's decision in *Barnes*. In *Barnes*, the plaintiff sued Yahoo after it failed to take down fraudulent profiles that

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had been created by her ex-boyfriend. She had two theories of liability: (1) Yahoo negligently provided or failed to provide services that it undertook to provide and (2) Yahoo made a promise to her to remove the profiles but failed to do so. *See Barnes*, 570 F.3d at 1099. In deciding whether there was § 230(c)(1) immunity, the Ninth Circuit stated that "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.* at 1102. The Ninth Circuit ultimately held that Yahoo was protected by CDA immunity with respect to the "negligent undertaking" claim because, there, the plaintiff sought to treat Yahoo as a publisher of the indecent profiles. *See id.* at 1103 (stating that "the undertaking that Barnes alleges Yahoo failed to perform with due care [was] [t]he removal of the indecent profiles that her former boyfriend posted on Yahoo's website[,] [b]ut removing content is something publishers do, and to impose liability on the basis of such conduct

necessarily involves treating the liable party as a publisher of the content it failed to remove").

However, it reached a different conclusion on the promissory estoppel theory.

> ... [W]e inquire whether Barnes' theory of recovery under promissory estoppel would treat Yahoo as a "publisher or speaker" under the [CDA].
>
> ... [S]ubsection 230(c)(1) precludes liability when the duty the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker. In a promissory estoppel case, as in any other contract case, the duty the defendant allegedly violated springs from a contract – an enforceable promise – not from any non-contractual conduct or capacity of the defendant. Barnes does not seek to hold Yahoo liable as a publisher or speaker of third-party content, but rather as the counterparty to a contract, as a promisor who has breached.
>
> ...
>
> ... Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from

> publication. Contract law treats the outwardly manifested intention to create an expectation on the part of another as a legally significant event. That event generates a legal duty distinct from the conduct at hand, be it the conduct of a publisher, of a doctor, or of an overzealous uncle.
>
> ...
>
> One might also approach this question from the perspective of waiver .... [O]nce a court concludes a promise is legally enforceable according to contract law, it has implicitly concluded that the promisor has manifestly intended that the court enforce his promise. By so intending, he has agreed to depart from the baseline rules (usually derived from tort or statute) that govern the mine-run of relationships between strangers. Subsection 230(c)(1) creates a baseline rule: no liability for publishing or speaking the content of other information service providers. Insofar as Yahoo made a promise with the constructive intent that it be enforceable, it has implicitly agreed to an alteration in such baseline.

Id. at 1108-09. Accordingly, the Ninth Circuit held that, "insofar as Barnes alleges a breach of contract claim under the theory of promissory estoppel, subsection 230(c)(1) of the [CDA] does not preclude her

cause of action." *Id.* at 1109; *see also In re Zoom Video Comms. Priv. Litig.*, 525 F.Supp.3d 1017, 1034-35 (N.D. Cal. 2021) (finding CDA immunity with respect to most of plaintiffs' "Zoombombing" claims – *i.e.*, that "'failures of Zoom's security

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protocols' allowed unauthorized participants" to disrupt Zoom meetings with harmful content such as racial slurs or pornography; but denying motion to dismiss contract claims since they did not "derive from Zoom's status or conduct as a 'publisher' or 'speaker'").[7]

Facebook acknowledges *Barnes* but contends that it does not "establish a categorical rule that contract-based claims can never be subject to Section 230(c)(1) immunity"; rather, the Ninth Circuit "explicitly stated that 'what matters is not the *name* of the cause of action [but rather] whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another.'" Reply at 13 (quoting *Barnes,* 570 F.3d at 1101-02). Facebook emphasizes that "[t]he

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[7] *See, e.g.*, *Zoom*, No. C-20-2155 LHK (N.D. Cal.) (Docket No. 126) (FAC ¶ 230) (alleging that, under implied contracts, "Defendant was obligated to provide Plaintiffs and Class members with Zoom meetings that were suitable for their intended purpose of providing secure video conferencing services, rather than other video conferencing services vulnerable to unauthorized access, incapable of providing safety and security, and instead actually utilized to track its users' personal data for commercial purposes").

Barnes court held that Yahoo's specific promise to remove content ... show[ed] a 'manifest intention to be legally obligated to do something' – not [in] its discretionary role as a publisher." Reply at 14.

Facebook's position has support in the case law. For example, in *Atkinson*, Judge Seeborg of this District noted that, "[t]hough [plaintiffs] claim is styled as a contract cause of action, he is really accusing Facebook of utilizing its community standards to make classic publishing decisions *[e.g.*, regarding COVID-related postings]. Therefore, § 230(c)(1) immunizes Facebook from his state law causes of action." *Atkinson*, No. C-20-5546 RS (Docket No. 75) (Order at 10). And a California appellate court commented as follows in *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 274 Cal.Rptr.3d 360 (2021):

> Unlike in *Barnes*, where the plaintiff sought damages for breach of a specific personal promise made by an employee to ensure specific content was removed from Yahoo's website, the substance of Murphy's complaint accuses Twitter of unfairly applying its general rules regarding what content it will publish and seeks injunctive relief to demand that Twitter restore her account and refrain from enforcing its Hateful Conduct Policy. Murphy does not allege someone at Twitter specifically promised her they would not remove her tweets or would not suspend her account. Rather, Twitter's alleged actions in refusing to

> publish and banning Murphy's tweets, as the trial court in this case observed, *"reflect paradigmatic editorial decisions* not to publish particular content" that are protected by section 230.

Id. at 29, 274 Cal.Rptr.3d 360 (emphasis added).

Ms. King protests still that, by stating in its Terms of Service that it would only withdraw content (*i.e.*, disable accounts) based on certain criteria, Facebook essentially waived any CDA immunity it had and took on a contractual obligation, the breach of which could result in liability. She points out that, in *Barnes*, the Ninth Circuit noted that

> [o]ne might ... approach this question from the perspective of waiver. The objective intention to be bound by a promise ... also signifies the waiver of certain defenses .... [O]nce a court concludes a promise is legally enforceable according to contract law, it has implicitly concluded that the promisor

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> has manifestly intended that the court enforce his promise. By so intending, he has agreed to depart from the baseline rules (usually derived from tort or statute) that govern the mine-run of relationships between strangers. Subsection 230(c)(1) creates a baseline

> rule: no liability for publishing or speaking the content of other information service providers. Insofar as Yahoo made a promise with the constructive intent that it be enforceable, it has implicitly agreed to an alteration in such baseline.

Barnes, 570 F.3d at 1108-09.

Although Ms. King's position is not without any merit, she has glossed over the nature of the "promise" that Facebook made in its Terms of Service. In the Terms of Service, Facebook simply stated that it would use its discretion to determine whether an account should be disabled based on certain standards. The Court is not convinced that Facebook's statement that it would exercise its publishing discretion constitutes a waiver of the CDA immunity based on publishing discretion. In other words, all that Facebook did here was to incorporate into the contract (the Terms of Service) its right to act as a publisher. This by itself is not enough to take Facebook outside of the protection the CDA gives to "'paradigmatic editorial decisions not to publish particular content.'" *Murphy*, 60 Cal. App. 5th at 29, 274 Cal.Rptr.3d 360. Unlike the very specific one-time promise made in *Barnes*, the promise relied upon here is indistinguishable from "'paradigmatic editorial decisions not to publish particular content.'" *Id.* It makes little sense from the perspective of policy underpinning the CDA to strip Facebook of otherwise applicable CDA immunity simply because Facebook stated its discretion as a publisher in its Terms of Service.

Accordingly, the Court holds that Facebook has CDA immunity for the contract/implied covenant claim to the extent that claim is based on Facebook's disabling of Ms. King's account. Because there is CDA immunity, it would be futile for Ms. King to try to amend the claim.

However, to the extent Ms. King's contract/implied covenant claim is based on Facebook's failure to provide an explanation for the disabling of her account, the Court finds that CDA immunity does not apply. This specific claim is tied to an implied promise, one that does not depend on Facebook's status as a publisher to make "'paradigmatic editorial decisions not to publish particular content.'" *Id.* Instead, the implied promise is to explain its decision. Although Facebook contends that "a claim seeking to limit the *manner* in which a publishing decision was made, still seeks to treat Facebook as a publisher," Reply at 14 (emphasis in original), the Court is not persuaded. That Facebook has the editorial discretion to post or remove content has little do to with the implied promise to explain why content was removed.

2. Section 230(c)(1) v. Section 230(c)(2)

In their second argument, the Kings contend that none of their claims is barred by CDA immunity because Facebook has ignored the distinction between § 230(c)(1) immunity (invoked by Facebook) and § 230(c)(2) immunity (not invoked by Facebook). Sections 230(c)(1) and (2) provide as follows:

(c) Protection for "Good Samaritan"

> blocking and screening of offensive material
>
> (1) Treatment of publisher or speaker. 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.
>
> [572 F.Supp.3d 796]
>
> (2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of –
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C. § 230(c). According to the Kings, § 230(c)(1) provides protection to an interactive computer service provider only where it publishes information; where an

interactive computer service provider removes information, § 230(c)(1) does not apply and only § 230(c)(2) can be relied on to provide protection. In support, the Kings rely on Justice Thomas's concurrence in *Malwarebytes u. Enigma Software Group USA, LLC*, --- U.S. ----, 141 S. Ct. 13, 15, 208 L.Ed.2d 197 (2020) (concurring in denial of petition for writ of certiorari; stating that "the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1) [,] and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)").

The Kings, however, acknowledge that Justice Thomas's concurrence is simply that – a concurrence – and thus not binding. More to the point, the Kings acknowledge that binding Ninth Circuit authority holds that § 230(c)(1) covers both a decision to publish content or a decision to remove content. (Indeed, Justice Thomas cited the Ninth Circuit's decision in *Barnes* as reaching an improper holding. *See id.* at 17 ("[B]y construing § 230(c)(1) to protect *any* decision to edit or remove content, courts have curtailed the limits Congress placed on decisions to remove content.") (emphasis in original).) The Kings have simply made their argument to preserve it for appeal. *See* Opp'n at 19 (stating that "the argument in this section of the MIO is made to preserve the issue for appeal to an en banc panel of the Ninth Circuit and ultimately, if necessary, for cert application where Justice Thomas will obviously be an enthusiastic recipient").

III. CONCLUSION

For the foregoing reasons, the Court grants Facebook's motion to dismiss in its entirety. All claims are dismissed with prejudice, except for one – specifically, Ms. King's claim for breach of the implied covenant based on Facebook's failure to provide an explanation for the disabling of her account. This claim for failure to provide an explanation is dismissed without prejudice because CDA immunity does not apply. However, the claim as currently pied is not viable because Ms. King has not sufficiently pied any cognizable damages as a result of Facebook's conduct. Furthermore, Ms. King has waived any claim for specific performance. The Court gives Ms. King leave to amend this singular cause of action with respect to damages and for specific performance (in spite of her arguable waiver) to the extent that she can do so in good faith. Any amendment must also take into account whether there is a reasonable basis to assert diversity jurisdiction (in particular, the amount in controversy) given the rulings made by the Court herein.

Ms. King shall file an amended complaint by **December 10, 2021**. Facebook shall respond to the amended complaint by **January 7, 2022**. Until the pleadings are

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resolved, the Court continues the stay of discovery.

This order disposes of Docket No. 28.

IT IS SO ORDERED

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
SEP 13 2023
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ADRIENNE SEPANIAK KING;
CHRISTOPHER EDWARD SEPANIAK KING,
Plaintiffs-Appellants,

v.

FACEBOOK, INC., a Delaware corporation,
Defendant-Appellee.

No. 22-15602

D.C. No. 3:21-cv-04573-EMC
Northern District of California,
San Francisco

ORDER

Before: CALLAHAN, BADE, and BRESS, Circuit Judges.

The panel unanimously votes to deny the

petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote. Appellants' petition for rehearing en banc, filed on August 20, 2023, is DENIED.

APPENDIX E

47 USC 230 (Community Decency Act ("CDA")):

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) 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;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [sic - "1" should probably be "A"][1].

. . . . . .

(e) Effect on other laws

(1) No effect on criminal law

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[1] Reference to "paragraph (1)" is in the original enactment of this statute, but it appears to be an error. The reference almost certainly should be to "paragraph (A)".

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. 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.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software

provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.