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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

RIAN WATERS, Plaintiff, v. FACEBOOK INC., GOOGLE LLC., OFFICER JEREMY HALEY, AIDAN KEARNEY, KATHERINE PETER, SPRINGFIELD POLICE, DR. MARTHA SMITH-BLACKMORE, WILLIAM HIGGINS, MAURA HEALEY, JOHN DOES 1-10, Defendant.	Case No. 3:20-CV-30168 MGM **DEFENDANT FACEBOOK, INC.'S OPPOSITION TO PLAINTIFF'S EMERGENCY EX PARTE MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** Judge: Hon. Mark G. Mastroianni Date Filed: October 26, 2020 Trial Date: None Set

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Defendant Facebook, Inc. opposes Plaintiff Rian Waters's Ex Parte Motion for a Temporary Restraining Order and Preliminary Injunction. ("TRO Motion," Dkt. 17.)

I. INTRODUCTION

Pro se plaintiff Rian Waters alleges that Defendants Aidan Kearney, Katherine Peter, and others associated with Kearney's Turtleboy Sports online persona have engaged in various acts of wrongdoing against him, including posting hurtful and harassing statements about him on several online forums. Further, Plaintiff attempts to morph this dispute with Kearney into a far-reaching conspiracy involving the entire Springfield Police Department, his public defender, and even the Massachusetts Attorney General. The details of Plaintiff and Kearney's personal dispute are unclear, and Plaintiff may or may not have claims against Kearney and the other individual defendants. But Plaintiff improperly seeks to drag Facebook into this dispute. Based only on a handful of vague allegations in his Complaint and a two-page declaration that barely mentions Facebook, he now asks the Court to impose an inchoate temporary restraining order and/or preliminary injunction against Facebook.

Plaintiff has not come close to meeting his burden for obtaining this extraordinary and extreme remedy. First, and most importantly, Plaintiff fails to make a clear showing that he is likely to succeed on the merits of any of his claims against Facebook. To the contrary, each of his claims is facially deficient. Moreover, Plaintiff's claims against Facebook are barred by Section 230(c)(1) of the Communications Decency Act (CDA). Indeed, claims such as these, which seek to hold an online platform operator such as Facebook liable for allegedly offensive content posted by another user, are precisely the sort of claims that Section 230(c)(1) of the CDA was intended to bar, and courts around the country have repeatedly and consistently rejected such claims as a result. Second, Plaintiff fails to meet his burden of showing that he would suffer irreparable harm if a TRO were not issued, that the balance of equities is in his favor, or that a TRO would be in the public's interest.

For these reasons, and as detailed below, the Court should reject Plaintiff's request for a TRO or a preliminary injunction against Facebook.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Allegations Against Kearney

Plaintiff's Complaint (dkt. 1) alleges an ongoing personal dispute with Aidan Kearney dating back to January 2017, when Kearney posted about Plaintiff's arrest for alleged animal cruelty and battery.[1] Plaintiff asserts he was arrested because Samantha Cardin falsely accused him of these crimes to Defendant Officer Jeremy Haley—who then lied about Plaintiff admitting to those crimes and stole $300 from his pocket.[2] As a result of Kearney's postings, Plaintiff began receiving threats.[3] Plaintiff's public defender, Defendant William Higgins, allegedly failed to provide exculpatory evidence to him and his new counsel.[4] But eventually the charges were dropped, and Plaintiff sued Kearney for libel, slander, and intentional infliction of emotional distress.[5]

According to the Complaint, Kearney's alleged cyber-bullying campaign spanned multiple platforms: Kearney's blog, Facebook, and YouTube.[6] Kearney and his followers harassed him using multiple accounts, fake names, posting pornographic images with Plaintiff's face superimposed, and "liking" the posts of other users who threatened him.[7] Plaintiff asserts that the police joined in this effort, by refusing to help him after he was threatened and by coordinating with Kearney to provide information for Plaintiff's continued harassment.[8]

Plaintiff contends that Kearney's online conduct, and the online conduct of his followers, constitutes witness intimidation.[9] Kearney posted articles about Plaintiff shortly before hearings in Plaintiff's case against him in Massachusetts Superior Court, said that he would "murder"

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[1] Compl. ¶¶ 66, 70.
[2] *Id.* ¶¶ 66, 68-69.
[3] *Id.* ¶ 71.
[4] *Id.* ¶¶ 11, 75-76, 144.
[5] *Id.* ¶¶ 77-79.
[6] *Id.* ¶¶ 17-18, 23-24, 34.
[7] *Id.* ¶¶ 17, 18, 34, 37, 39, 46-47.
[8] *Id.* ¶¶ 55-59, 80-83,123.
[9] *Id.* ¶¶ 34-60.

Plaintiff "with his words" and ruin his life for suing him, harassed an individual who filed an affidavit in the case, and disclosed to followers Plaintiff's phone number and address.[10] He argues that judges adjudicating his claims intentionally tolerated Kearney's misconduct[11] and it became too dangerous to present evidence in his case, resulting in his summary judgment loss.[12]

B. Plaintiff's Allegations Against Facebook

The Complaint's allegations relating to Facebook are sparse. Indeed, it does little more than allege that third parties posted offensive content on various Facebook pages. Plaintiff does not allege there is any connection between Facebook and Kearney other than that Kearney is a Facebook user. Nor does he allege that anyone at Facebook communicated with Kearney or was in any way involved in Kearney's campaign against him. In fact, Plaintiff admits that Facebook has previously suspended at least three accounts associated with Kearney's blog "Turtleboy Sports"[13] if not more.[14]

Instead, Plaintiff alleges that Facebook did not properly enforce its Terms of Service against Kearney and his ever-growing number of accounts, many of which are allegedly set up under fake names.[15] He further alleges that Facebook, to keep users engaged with its platform, uses an algorithm that collects data about its users to match them with content they might find interesting.[16] He claims that this algorithm caused offensive content created by Kearney and others to appear in the news feeds and notifications of Plaintiff's friends and family.[17] Plaintiff does not allege which friends or family members were affected, what posts they saw, when they saw those posts, how they reacted, or how this affected Plaintiff.

Based on these threadbare allegations, Plaintiff asserts six claims against Facebook:

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[10] *Id.* ¶¶ 40-41, 43-46, 51, 53.

[11] TRO Br. at 15.

[12] Compl. ¶ 92.

[13] *Id.* ¶ 42.

[14] *Id.* ¶ 20.

[15] *Id.* ¶¶ 15-22.

[16] *Id.* ¶ 26.

[17] *Id.* ¶¶ 91, 121.

witness intimidation in state court under 42 U.S.C. § 1985(2) (Count I); conspiracy to deprive First Amendment rights under 42 U.S.C. § 1985(3) (Count II); violation of civil rights under Article XII of the Massachusetts Declaration of Rights (Count IV); cruel and unusual punishment under 42 U.S.C. § 1983 (Count V); neglect to prevent violation of his rights under 42 U.S.C. § 1986 (Count VI); and intentional infliction of emotional distress (Count IX).

C. Procedural History

On October 26, 2020 Plaintiff filed his verified Complaint against Facebook, Google LLC, Officer Jeremy Haley, Aidan Kearney, Katherine Peter, Springfield Police, Dr. Martha Smith-Blackmore, William Higgins, Massachusetts Attorney General Maura Healey, and Does 1-10. On November 13, 2020, Plaintiff filed a motion for a temporary restraining order and preliminary injunction against Defendants Facebook, Google, and Kearney. (Dkt. 4.) The Court denied the motion because Plaintiff did not provide information about his efforts to notify those Defendants of his motion, nor did he explain why notice should not be required. (Dkt. 11.)

On December 1, 2020, Plaintiff again moved the Court for a temporary restraining order and preliminary injunction. (TRO Motion; "TRO Brief," Dkt. 18.) He requests that the Court enjoin Defendants Facebook, Google, and Kearney as follows: "requir[e] them not to harass any of the natural parties or potential witnesses, and to make a diligent effort at removing all content from their platforms that harasses or attacks the credibility of the natural parties and potential witnesses in this case." (TRO Motion at 1.) After a hearing, he requests the injunction be expanded to require Defendants Facebook and Google "to remove all pages/profiles associated with Turtleboy Sports that have been primarily used for public shaming, and provide [him] with support to quickly deal with future harassing or obstructive content." (*Id.* at 1-2.)

In support of his TRO, Plaintiff submitted a two-page affidavit. ("Waters Affidavit," Dkt. 19.) But it contains only one substantive mention of Facebook—a single sentence asserting that Kearney posted on his Facebook profile that he learned of this action and would discuss it on his YouTube channel that evening.[18] The affidavit attaches three exhibits. One of those contains

[18] Waters Aff. ¶ 1.

screen captures of comments from various users in January of 2019 on a Facebook page that Plaintiff claims is controlled by Kearney. ("Exhibit B," Dkt. 19-2.) The other exhibit is a set of certain photoshopped images allegedly appearing on the Turtleboy Sports webpage. ("Exhibit A," Dkt. 19-1.)

III. ARGUMENT

A temporary restraining order is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[19] The analyses for granting a temporary restraining order and a preliminary injunction are substantially identical.[20]

A plaintiff seeking preliminary injunctive relief must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest."[21] The plaintiff bears the burden of making a clear showing on these elements and on entitlement to this extraordinary remedy.[22]

Plaintiff has failed to meet his burden on any of the required elements.

A. Plaintiff has not established a likelihood of succeeding on the merits of any of his claims against Facebook.

"[P]roving likelihood of success on the merits is the 'sine qua non' of a preliminary injunction."[23] If a plaintiff "cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity."[24] That is the case here. Plaintiff has not made any showing, much less a clear showing, that he is likely to succeed on the merits of any of his claims against Facebook. To the contrary, Plaintiff fails to adequately allege any claim

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[19] *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008).

[20] *Kilmowicz v. Deutsche Bank Nat'l Tr. Co.*, 192 F. Supp. 3d 251, 253 (D. Mass. 2016).

[21] *Winter*, 555 U.S. at 20 (citations omitted); *see also Voice of the Arab World, Inc. v. MDTV Medical News Now, Inc.*, 645 F.3d 26, 32 (1st Cir. 2011).

[22] *Winter,* 555 U.S. at 22; *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 120 (1st Cir. 2003).

[23] *Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, Inc.*, 794 F.3d 168, 173 (1st Cir. 2015) (quoting *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002)).

[24] *New Comm Wireless*, 287 F.3d at 9.

against Facebook, and Facebook has immunity from Plaintiff's claims under Section 230(c)(1) of the CDA.

1. Plaintiff cannot assert claims under 42 U.S.C. § 1983 against Facebook because Facebook is not a state actor.

Plaintiff's fifth cause of action is for "eighth amendment violations" raised via Section 1983.[25] But Waters cannot bring a Section 1983 claim against Facebook because it is a private actor. As the First Circuit has held, "[i]f there is no state action, then the court may not impose constitutional obligations on (and thus restrict the freedom of) private actors."[26] Plaintiff acknowledges Facebook is a business.[27] Facebook is a private actor. District courts routinely dismiss Section 1983 claims brought against Facebook and other internet companies on this basis alone.[28]

Plaintiff argues that he can nonetheless bring a Section 1983 claim because private parties jointly engaged with a state official act under color of law.[29] This argument fails. A plaintiff can bring a constitutional claim against a private actor only if the private actor is "jointly engaged" with state officials in the challenged conduct.[30] This occurs when a private party "assumes a traditional public function when performing the challenged conduct; or if the challenged conduct

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[25] Compl. ¶¶ 116-124.

[26] *Yeo v. Town of Lexington*, 131 F. 3d 241, 248-49 (1st Cir. 1997); *see also Santiago v. Puerto Rico*, 655 F.3d 61, 68 (1st Cir. 2011).

[27] Compl. ¶ 5-6.

[28] *See, e.g.*, *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1303-04 (N.D. Cal. 2019) ("Facebook is not a state actor, and the First Amendment only applies to state actors."); *Fehrenbach v. Zeldin*, No. 17-CV-5282 (JFB) (ARL), 2018 WL 4242452, at *3 (E.D.N.Y. Aug. 6, 2018) (dismissing constitutional claims against Facebook for failure to establish that Facebook is a state actor); *Nyabwa v. Facebook*, No. 2:17-CV-24, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018) (same); *Shulman v. Facebook.com*, No. 17-764 (JMV), 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (same); *Forbes v. Facebook, Inc.*, No. 16 CV 404 (AMD), 2016 WL 676396 at *2 (E.D.N.Y. Feb. 18, 2016) (declining to hold that Facebook's actions could be attributable to state); *Young v. Facebook, Inc.*, No. 5:10-cv-03579-JF/PVT, 2010 WL 4269304, at *2 (N.D. Cal. Oct. 25, 2010) (dismissing section 1983 action against Facebook for failure to allege "action under color of state law").

[29] TRO Br. at 14-16 (citing *Dennis v. Sparks*, 449 U.S. 24 (1980)).

[30] *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 351 (1st Cir. 1995) (quoting *Dennis*, 449 U.S. at 27-28).

is coerced or significantly encouraged by the state; or if the state has 'so far insinuated itself into a position of interdependence with the private party that it was a joint participant in the challenged activity.'"[31] Here, Plaintiff does not offer any evidence, or even any allegation, that would support a finding of any connection between Facebook and any state official, much less that they are jointly engaged.[32] Plaintiff also provides no support for the conclusion that Facebook has assumed a traditional public function, that the state coerced Facebook's conduct, or that Facebook and the state are interdependent.[33] Because Plaintiff does not support his argument that Facebook's conduct amounts to state action, his Section 1983 claim against it will fail.[34] Courts have repeatedly held that Facebook is not jointly involved with state actors such that it may be subject to constitutional claims.[35]

2. Plaintiff has not established he is likely to succeed on his conspiracy claims against Facebook under 42 U.S.C. §§ 1985(2), 1985(3), and 1986.

Plaintiff also alleges that Facebook participated in an obstruction and witness intimidation conspiracy in violation of Section 1985(2), conspired to injure him because he exercised his First Amendment rights in violation of Section 1985(3), and failed to prevent his injuries in violation of Section 1986.[36] Plaintiff has not adequately alleged a claim against Facebook under any of these statutes—which are intended to address conspiracies to engage in violations of civil rights, not allegedly offensive posts made in an interpersonal dispute. Thus, he cannot meet his burden

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[31] *Santiago*, 655 F.3d at 68-69 (internal brackets omitted) (quoting *Estades–Negroni v. CPC Hosp. San Juan Capestrano,* 412 F.3d 1, 5 (1st Cir. 2005)); *see generally Lugar v. Edmondson Oil Co*., 457 U.S. 922, 937 (1982).

[32] TRO Br. at 14 (citing *Dennis v. Sparks*, 449 U.S. 24 (1980)); *see also* Compl. ¶¶ 116-124; Waters Aff.; Exh. A; Exh. B.

[33] *Santiago*, 655 F.3d at 68-69.

[34] *E.g.*, *Am. Honda Fin. Corp. v. City of Revere*, 1:19-CV-10266-ADB, 2020 WL 3840905, at *3 n.1 (D. Mass. July 8, 2020) (discussing *Nesbitt v. City of Methuen*, 17-CV-11255-DJC, 2018 WL 3130636, at *2 (D. Mass. June 26, 2018)); *see also King v. Friends of Kelly Ayotte*, 860 F. Supp. 2d 118, 124-25 (D.N.H. 2012).

[35] *See, e.g.*, *Fed. Agency of News*, 395 F. Supp. 3d at 1311-13; *Fehrenbach*, 2018 WL 4242452, at *3; *Young,* 2010 WL 4269304, at *3; *Atkinson v. Facebook, Inc.*, 3:20-CV-05546-RS, slip op. at 4-8 (N.D. Cal. Dec. 7, 2020).

[36] *See* TRO Br. at 11 (citing *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996)).

of establishing that he is likely to succeed on the merits of any of these claims.

Section 1985(2) and Section 1985(3) each require Plaintiff to establish that Facebook entered into a conspiracy with the other defendants to deprive him of various civil rights. Section 1985(2) prohibits conspiracies "to deter, by force, intimidation, or threat, any party or witness in any court of the United States" from participating fully in the litigation or to otherwise improperly influence a verdict.[37] Section 1985(2) also prohibits conspiracies "for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws[.]"[38] Section 1985(3) prohibits conspiracies to deprive a person of their right to equal protection of the law. To state a claim under Section 1985(3), a plaintiff must allege: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States."[39]

Setting aside whether Plaintiff can establish that some conspiracy existed between Kearney and some other individuals to deprive him of a protected civil right, Plaintiff's claims against Facebook fail for the simple reason that neither his Complaint nor his affidavit in any way support a finding that *Facebook* joined any such conspiracy. Plaintiff never alleges that Facebook entered into a conspiracy: he does not assert that Facebook agreed to *anything* with Kearney or anyone else. His affidavit and accompanying exhibits similarly fail to mention any agreements between Facebook and any other party. Without establishing that Facebook joined a "conspiratorial agreement," he cannot prevail on his conspiracy claims against it.[40]

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[37] 42 U.S.C. § 1985(2).

[38] *Id.*

[39] *United Broth. of Carpenters and Joiners of Am., Loc. 610, AFL-CIO v. Scott*, 463 U.S. 825, 828-29 (1983).

[40] *O'Rourke v. Hampshire Council of Governments*, 121 F. Supp. 3d 264, 273 (D. Mass. 2015) (citing *Nieves v. McSweeney,* 241 F.3d 46, 53 (1st Cir. 2001)).

Moreover, Plaintiff fails to allege that Kearney's campaign against him constitutes the deprivation of civil rights that Section 1985 was designed to prevent. Crucially, Plaintiff fails to allege any racial or class-based animus, invidiously discriminatory animus motivating the alleged wrongdoing.[41] Plaintiff does not allege that Facebook harbored any animus toward him—class-based or otherwise. He only alleges that Kearney discriminated against him "because [he] was arrested, because [he is] intelligent, and because [he] exercised [his] first amendment right making statements showing [his] disapproval of the Ludlow and Palmer police."[42] But this fails to allege class-based, discriminatory animus under Section 1985.[43] Rather, Kearney's animus toward Plaintiff is rooted in his personal distaste for him and his alleged mistreatment of an ex-partner.[44]

Section 1986 provides a cause of action against a person who has knowledge of and power to prevent the conspiracies described in Section 1985 but neglects to do so. Plaintiff makes no showing that Facebook knew of any conspiracy it should have sought to prevent. Rather, he asserts only that Facebook knew Kearney's profiles violated its Terms of Service and did not remove certain content.[45] This cannot support a claim under Section 1986. Accordingly, Plaintiff cannot establish that he is likely to prevail on any of his conspiracy claims against Facebook.

3. Plaintiff fails to allege essential elements of his state-law claims.

In addition to his federal claims, Plaintiff also brings claims against Facebook for (1) violating the Massachusetts constitution and (2) intentional infliction of emotional distress. In the event the Court finds Plaintiff has failed to adequately allege his federal law claims, the Court

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[41] *See Perez-Sanchez v. Pub. Bldg. Auth.*, 531 F.3d 104, 107-09 (1st Cir. 2008) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

[42] Compl. ¶ 97.

[43] See *United Broth. of Carpenters,* 463 U.S. at 837-39 (holding section 1985(3) does not reach conspiracies rooted in discrimination against union membership); *Aulson,* 83 F.3d at 5-6 (a protected classes must be readily determinable via objective criteria); *Perez-Sanchez*, 531 F.3d at 109 (political beliefs not protected under section 1985).

[44] Compl. ¶¶ 66-70, 77-79.

[45] *Id*. ¶ 127.

lacks subject-matter jurisdiction over these pendant state-law claims.[46] But even if the Court has subject-matter jurisdiction over these claims, they, too, are facially deficient. In his TRO Motion, Plaintiff does not attempt to establish that he has a likelihood of success on any of these claims; indeed, he does not even mention them.

Plaintiff fails to state a claim under Article XII of the Massachusetts constitution, which concerns criminal prosecutions, because he does not allege any facts concerning Facebook to support this claim. Moreover, his Complaint does not support any inference that Facebook interfered with his secured rights by "threats, intimidation or coercion."[47]

Plaintiff also fails to state claim against Facebook for intentional infliction of emotional distress, which requires he allege "(1) that [defendant] intended, knew, or should have known that his conduct would cause emotional distress; (2) that the conduct was extreme and outrageous; (3) that the conduct caused emotional distress; and (4) that the emotional distress was severe."[48] Plaintiff does not allege any facts—much less provide any evidence—relating to Facebook to support any of these required elements. Plaintiff also does not attempt to explain how any conduct by Facebook is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[49]

4. Plaintiff's claims are barred by Section 230(c)(1) of the Communications Decency Act.

Plaintiff also cannot make a clear showing that he is likely to succeed on the merits because his claims against Facebook are barred under federal law. Section 230(c)(1) of the CDA bars Plaintiff's claims because they seek to hold Facebook liable for the content created by Facebook's users.[50] Plaintiff cannot circumvent this broad immunity under the CDA by artful

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[46] 28 U.S.C. § 1367.

[47] *Bell v. Mazza*, 394 Mass. 176, 182 (Mass. 1985).

[48] *Polay v. McMahon*, 468 Mass 799, 385 (2014).

[49] *Foley v. Polaroid Corp.*, 400 Mass 82, 99 (1987) (quoting Restatement (Second) of Torts § 46 comment d (1965)).

[50] *See, e.g.,* Compl. ¶¶ 15-28, 42, 91, 103-104, 121, 127.

1 pleading that attempts to frame his claims in terms of Facebook's actions.[51]

2 Under Section 230(c)(1) of the CDA, "[n]o provider or user of an interactive computer
3 service shall be treated as the publisher or speaker of any information provided by another
4 information content provider."[52] Congress enacted this provision "to promote continued
5 development of the Internet," and "to preserve the vibrant and competitive free market that exists
6 for the Internet and other interactive computer services, unfettered by Federal or State
7 regulation."[53] Accordingly, immunity is construed broadly, recognizing that websites "may have
8 an infinite number of users generating an enormous amount of potentially harmful content, and
9 holding website operators liable for that content would have an obvious chilling effect in light of
10 the difficulty of screening posts for potential issues."[54] "[S]o long as the third party willingly
11 provides the essential published content, the interactive service provider receives full immunity
12 regardless of the specific editing or selection process.[55] CDA immunity is not just a defense to
13 liability, but an immunity from suit.[56]

14 Courts have thus routinely and consistently dismissed at the pleading stage claims such as
15 Plaintiff's, which seek to hold Facebook or other online platform operators liable for allegedly
16 offensive or hurtful content posted by another user.[57] For the same reason, Courts also routinely
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[51] *See Universal Commun. Sys., Inc. v. Lycos, Inc.,* 478 F.3d 413, 418 (1st Cir. 2007)

[52] 47 U.S.C. § 230(c)(1).

[53] *Id.* § 230(b)(1)-(2).

[54] *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016) (internal quotations omitted).

[55] *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).

[56] *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009).

[57] *See, e.g.*, *Riggs v. MySpace, Inc.*, 444 F. App'x 986, 987 (9th Cir. 2011) (motion to dismiss); *Federal Agency of News LLC,* 395 F. Supp 3d at 1303-04 (same); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1064-66 (N.D. Cal. 2016) (same); *Lancaster v. Alphabet Inc.*, Case No. 15-cv-05299-HSG, 2016 WL 3648608, at * 2-3 (N.D. Cal. July 8, 2016) (same); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095-1096 (N.D. Cal. 2015), *affirmed sub nom, Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (same); *Obado v. Magedson*, No. 13-2382 (JAP), 2014 WL 3778261, at *7-9 (D.N.J. July 31, 2014), *aff'd*, 612 F. App'x 90 (3d Cir. 2015) (same); *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1122–23 (E.D. Cal. 2010) (same); *Doe II v. MySpace, Inc.*, 175 Cal. App. 4th 561, 565-568 (2009) (demurrer); *Cross v. Facebook*¸14 Cal. App. 5th 190, 213 (2017) (anti-SLAPP).

deny injunctions in cases like these, where plaintiffs have sought to force online platform operators to remove user-generated content.[58]

Here, Facebook is entitled to immunity under Section 230(c)(1) because, from the face of the pleadings, it satisfies each of the three requirements for such immunity: (1) it is a provider of an "interactive computer service;" (2) the content at issue was "provided by another information content provider;" and (3) the claims treat Facebook as the "publisher" or "speaker" of that content.[59]

a. Facebook is an interactive computer service provider.

Facebook satisfies the first requirement for Section 230(c)(1) immunity because it is a provider of interactive computer services. The CDA broadly defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[60] Courts consistently conclude that Facebook meets this statutory definition.[61] Plaintiff does not argue otherwise.

b. Facebook did not provide the content at issue.

Facebook satisfies the second requirement for Section 230(c)(1) immunity because the content at issue here comes not from Facebook but from Facebook users—specifically, Kearney. Courts routinely hold that Facebook users are "[]other information content provider[s]" under the statute.[62] Here, Plaintiff alleges that Kearney and his followers created all of the posts at issue.[63] He does not allege that anyone at Facebook authored any of these posts. This satisfies the second

[58] *See, e.g., Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 321-23 (1st Cir. 2017); *see also* Google TRO Opp'n (Dkt. 30) at 7 (citing cases).

[59] 47 U.S.C. § 230(c)(1).

[60] *Id.* § 230(f)(2).

[61] *See, e.g., Klayman v. Zuckerberg*, 753 F.3d 1354, 1357-58 (D.C. Cir. 2014); *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 155-56 (E.D.N.Y. 2017); *Sikhs for Justice*, 144 F. Supp. 3d at 1093.

[62] *Klayman*, 753 F.3d at 1358-59 (information published by users of Facebook was "information provided by another information content provider" within Section 230(c)(1)); *King v. Facebook, Inc.*, 19-CV-01987-WHO, 2019 WL 4221768, at *4 (N.D. Cal. Sept. 5, 2019)

[63] *See, e.g.,* Compl. ¶¶ 14, 37-39, 71, 120.

requirement.

Plaintiff does not dispute any of this, but he attempts to circumvent Section 230(c)(1) by arguing Kearney's content was "developed in part" by Facebook because some unidentified algorithm resulted in Kearney's content appearing in the notifications and news feeds of his friends and family.[64] This argument fails. Courts have repeatedly rejected the argument that an online platform operator somehow "creates" a user's content for purposes of Section 230(c)(1) by choosing how or to whom that content is displayed.[65] For example, in *Force v. Facebook, Inc.*,[66] the Second Circuit expressly rejected the idea that Facebook's engagement algorithm transforms Facebook from a platform operator into a co-developer of its users' content.[67] The court explained that a defendant does not "develop" third-party content unless it "directly and 'materially' contributed to what made the content itself 'unlawful.'"[68] Functions like recommendations and notifications simply facilitate "user-to-user communication"; they do not "develop" content.[69]

c. Plaintiff seeks to hold Facebook liable for exercising "a publisher's traditional editorial functions."

Finally, Facebook satisfies the third requirement for Section 230(c)(1) immunity because Plaintiff seeks to hold Facebook liable as a publisher of Kearney's content. Plaintiff's theory of liability against Facebook "must be premised on imputing to it the alleged [offensive content],

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[64] *Id.* ¶ 21.

[65] *Force v. Facebook,* 934 F.3d 53, 57 (2nd Cir. 2019); *Dyroff v. Ultimate Software Grp.,* 934 F.3d 1093, 1098 (9th Cir. 2019) (recommendations and notifications facilitate communication, but "[t]hey are not content in and of themselves"); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1271 (D.C. Cir. 2019); *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1118-19 (N.D. Cal. 2020); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 890 (N.D. Cal. 2017) (rejecting argument that defendants, including Facebook, were liable as creators of content because they allegedly "select advertisements to pair with content on their services"); *Jurin,* 695 F. Supp. 2d at 1123.

[66] 934 F.3d 53 (2nd Cir. 2019).

[67] *See id.* at 68-72 (Facebook's use of an objective algorithm did not "develop," in whole or in part, postings by its user).

[68] *Id.* at 68 (quoting *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2nd Cir. 2016)).

[69] *Dyroff*, 934 F.3d at 1099; *see also Force*, 934 F.3d at 69-70; *Jurin*, 695 F. Supp. 2d at 1123; *Pennie*, 281 F. Supp. 3d at 890.

1 that is, on treating [Facebook] as the publisher of that information."[70] He seeks to hold Facebook
2 accountable for third-party videos and posts that "were published" on Kearney's Facebook
3 page.[71] Failure to remove user-generated content satisfies this third prong.[72]
4 Facebook cannot be liable for not removing Kearney's allegedly unlawful content.[73] It is
5 "well established that notice of the unlawful nature of the information provided is not enough to
6 make it the service provider's own speech. . . Section 230 immunity applies even after notice of
7 the potentially unlawful nature of the third-party content."[74]
8 Plaintiff tries to avoid this straightforward application of the third requirement by arguing
9 that he does not treat Facebook as a publisher because Facebook's algorithm resulted in his
10 friends and family seeing Kearney's content in their news feeds or notifications.[75] But, as the
11 First Circuit has held, so long as "the cause of action is one that would treat the service provider
12 as the publisher of a particular posting, immunity applies not only for the service provider's
13 decisions with respect to that posting, but also for its inherent decisions about how to treat
14 postings generally."[76] Features "which reflect choices about what content can appear on the
15 website and in what form, are editorial choices that fall within the purview of traditional publisher
16 functions."[77] Moreover, to find that "[an] interactive computer service would be ineligible for
17 Section 230(c)(1) immunity by virtue of simply organizing and displaying content exclusively
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19 [70] *Lycos,* 478 F.3d at 422.
[71] Compl. ¶ 48; *see also id.* ¶ 23, 38, 47, 70, 120.
20 [72] *E.g.*, *Jane Doe*, 817 F.3d at 18 ("lawsuits seeking to hold a service provider liable for its
21 exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred") (citation omitted); *see also Barnes v. Yahoo!,*
22 *Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009) ("removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a
23 publisher of the content if it failed to remove it").
[73] Compl. ¶ 71.
24 [74] *Lycos*, 478 F.3d at 420 (citations omitted).
25 [75] TRO Br. at 8.
26 [76] *Lycos*, 478 F.3d at 422.
[77] *Jane Doe*, 817 F.3d at 21; *see also Barnes,* 570 F.3d at 1103 ("removing content is
27 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 if it failed to remove it").
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provided by third parties"—an "essential result of publishing"—would "eviscerate Section 230(c)(1)[.]"[78, 79]

Because all three requirements for Section 230(c)(1) immunity are met, Plaintiff cannot succeed on any of his claims against Facebook.

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In sum, Plaintiff has failed to establish a likelihood of success on the merits of any of his claims—the "sine qua non" of preliminary injunctive relief.[80] For this reason alone, the Court should deny Plaintiff' motion.

B. The Court need not consider the remaining factors, which also favor denying the Plaintiff's TRO Motion.

Because Plaintiff fails to establish that he is likely to succeed on the merits of his claims, the Court need not consider the remaining requirements. They are "matters of idle curiosity."[81] But Plaintiff fails to meet his burden on each of these additional requirements as well.

1. Plaintiff does not demonstrate that he will suffer irreparable harm without an injunction against Facebook.

Plaintiff does not satisfy his burden of proving he faces irreparable harm because he fails to provide any evidence—or argument—as to how he would be irreparably harmed in the absence of his requested injunctive relief *against Facebook*. Nor could he do so, for several reasons.

First, Plaintiff has an available remedy that does not involve Facebook: he can seek an order against Kearney himself to prevent the allegedly unlawful conduct directly. This would not

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[78] *Force*, 934 F.3d at 66.

[79] Plaintiff seeks to avoid settled precedent by citing Justice Thomas's statement regarding the denial of certiorari in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 19-1284, 2020 WL 6037214 (U.S. Oct. 13, 2020). His reliance is misplaced. This statement is not Supreme Court precedent and does not change widely settled law prohibiting claims like the ones Plaintiff brings here. Moreover, the underlying Ninth Circuit opinion interpreted Section 230(c)(2), whereas this case concerns Section 230(c)(1). *See Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040 (9th Cir. 2019)*, cert. denied,* 19-1284, 2020 WL 6037214 (U.S. Oct. 13, 2020). Nor did that case involve claims rooted in a service provider's failure to remove allegedly unlawful content. *Id.*

[80] *See New Comm Wireless*, 287 F.3d at 9.

[81] *Id.*; *see also Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 10 (1st Cir. 2012).

require the "extraordinary" relief he seeks against Facebook.

Second, Plaintiff admits that, even if Facebook were enjoined, that would not prevent Kearney from continuing to harm him with the content at issue. Plaintiff alleges that Kearney posts the content at issue on numerous forums besides Facebook.[82] And he admits that even "[i]f the requested relief is granted [as to Facebook] Aidan Kearney will still be able to communicate his views using his websites and traditional media.[83]

Third, Plaintiff cannot establish that he would suffer irreparable harm absent the requested relief because he even to explain what, specifically, is the relief that he seeks. Plaintiff describes his requested relief in broad, vague terms. For example, he does not provide the accounts at issue or even explain what "support" his injunction would require Facebook to provide.

2. Plaintiff does not demonstrate that the balance of equities tip in his favor.

Plaintiff fails to demonstrate that the harm he will suffer in the absence of injunctive relief outweighs the harm that granting his proposed injunctive relief will inflict on Facebook.[84] As addressed above, Plaintiff fails to establish that he will suffer irreparable harm in the absence of an injunction against Facebook. And his only arguments concerning the balance of equities assert that Facebook generates advertising revenue from its platform while allegedly disregarding its terms of service.[85] These allegations are generalized and untethered from the merits of his case. Furthermore, Plaintiff's requested injunctive relief would impose the costs of Kearney's alleged misconduct on Facebook—which has no connection to Kearney other than that he is one of its users.

Instead, Plaintiff's Complaint supports the exact opposite conclusion: The terms of his requested injunctive relief are unworkable and would impose a significant burden on Facebook. Plaintiff's requested relief, to the extent it is comprehensible, would require Facebook

[82] Compl. ¶¶ 32, 38, 44, 51-52, 54, 70, 85.

[83] TRO Br. at 17.

[84] *See Winter*, 555 U.S. at 22.

[85] TRO Br. at 16-17.

to remove all content, for all time, that "harasses or attacks the credibility" of unidentified parties and potential witnesses in this action, to remove "all pages/profiles associated with Turtleboy Sports that have been primarily used for public shaming," and to provide quick support with future "harassing or obstructive content."[86] Moreover, the injunctive relief Plaintiff seeks would require Facebook to determine the veracity of Kearney's statements—something Facebook is not in a position to do. Even if Facebook could determine which posts meet Plaintiff's undefined and subjective criteria, doing so would take enormous effort. According to Plaintiff, Kearney's Facebook presence is hydra-like: disable one account—or thirty—and he'll just create more under fake names.[87] Plaintiff also claims he receives threats from Facebook users who are not associated with Kearney or Turtleboy Sports, but who follow Kearney's multitude of social media pages.[88] These alleged harassers also use fake names.[89] Plaintiff provides no cases supporting the imposition of this sort of injunction.

3. Plaintiff does not demonstrate that his injunction serves the public interest.

Plaintiff also fails to establish that his requested injunction against Facebook would be in the public interest. Nor could he do so, given that the relief he requests is contrary to federal law. Plaintiff's proposed injunctive relief undermines the public's interest in continued development and proliferation of internet-based services; if injunctions like the one Plaintiff seeks are available for anyone harassed by other Facebook users, Facebook's ability to operate its platform would be substantially impaired. The First Circuit cites this very concern to explain the broad reach of CDA immunity: Websites "may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content would have an obvious chilling effect in light of the difficulty of screening posts for potential issues."[90] The

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[86] *See* TRO Motion.

[87] Compl. ¶¶ 17, 20, 36.

[88] *Id.* ¶¶ 37-38, 49-50, 71, 94, 119; *see also* Exh. B.

[89] Compl. ¶¶ 36, 47.

[90] *Jane Doe*, 817 F.3d at 19 (internal quotations omitted).

CDA expressly seeks to "promote the continued development of the Internet and other interactive computers services" and to "preserve the vibrant and competitive free market that presently exists for . . . interactive computer services."[91] The CDA's express policy eschews the type of internet regulation Plaintiff seeks.

IV. CONCLUSION

For these reasons, Facebook respectfully requests that the Court deny in its entirety Plaintiff's TRO Motion.

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[91] 47 U.S.C. § 230(b)(1)-(2).