

EXHIBIT B

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Electronically

FILED

By Superior Court of California, County of San Mateo

ON 05/05/2022

By /s/ Jimenez, Vanessa

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CLERK OF THE SUPERIOR COURT
SAN MATEO COUNTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

11 DR. ANDREW FORREST, an individual,

12 Plaintiff,

13 v.

14 FACEBOOK, INC., a Delaware Corporation,
and DOES 1 through 20, inclusive,

15 Defendant.

Case No. 21-CIV-05055

**[PROPOSED] ORDER SUSTAINING
DEFENDANT FACEBOOK INC's
DEMURRER**

Hearing Date: April 22, 2022

Time: 9am

Dept: Department 21

Judge: Robert D. Foiles

Trial Date: None Set

Date Action Filed: September 17, 2021

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[PROPOSED] ORDER

On April 22, 2022, the Court heard oral argument on Defendant Facebook, Inc.’s (“Facebook”) demurrer (“Demurrer”) to Plaintiff Dr. Andrew Forrest’s First Amended Complaint (“FAC”). After hearing and considering the parties’ positions as to the Demurrer, the Court adopted its April 21, 2022 tentative ruling (“Tentative Ruling”) sustaining the Demurrer with prejudice as to the Fifth Cause of Action of Plaintiff’s FAC and without prejudice as to First through Fourth Causes of Action of the FAC.

The Court granted Plaintiff until June 3, 2022 to file and serve a Second Amended Complaint with respect to the First through Fourth Causes of Action. The Tentative Ruling, attached to this order as **Exhibit A**, is otherwise adopted.

IT IS ORDERED.

Electronically
SIGNED
By /s/ Foiles, Robert
05/04/2022

Dated _____, 2022

HON. ROBERT D. FOILES
JUDGE OF THE SUPERIOR COURT

EXHIBIT A

9:00

LINE: 6

21-CIV-05055 DR. ANDREW FORREST VS. FACEBOOK, INC.

DR. ANDREW FORREST
FACEBOOK, INC.

BRIAN E. KLEIN
JACOB M. HEATH

HEARING ON DEMURRER TO PLAINTIFF'S AMENDED COMPLAINT BY DEFENDANT
FACEBOOK, INC.

TENTATIVE RULING:

Demurrer based on Communications Decency Act

Demurrer to the entire complaint based on the Communications Decency Act ("CDA") is sustained as to the first, second, third, fourth, and fifth causes of action. (47 U.S.C. § 230, subd. (c)(1).)

In *Force v. Facebook*, the plaintiffs were survivors of persons who were killed in Israel by members of Hamas. The plaintiffs alleged that Facebook was liable for "giving Hamas a forum with which to communicate and for actively bringing Hamas' message to interested parties." Like Plaintiff Forrest, the plaintiffs in *Force* alleged that Facebook "does not act as a publisher," because "it uses algorithms to suggest content to users, resulting in 'matchmaking.'" The Court of Appeal held that using "matchmaking" algorithms to direct content to readers is a function of a publisher. "[A]rranging and distributing third-party information inherently forms 'connections' and 'matches' among speakers, content, and viewers of content, whether in interactive internet forums or in more traditional media. That is an essential result of publishing." (*Force v. Facebook, Inc.* (2d Cir. 2019) 934 F.3d 53, 66.)

Like a publisher, Facebook decided "where . . . particular third-party content should reside and to whom it should be shown. . . ., [and] what type and format of third-party content they will display." (*Force v. Facebook, Inc.* (2d Cir. 2019) 934 F.3d 53, 66-67.)

Facebook's algorithms might cause more such "matches" than other editorial decisions. But that is not a basis to exclude the use of algorithms from the scope of what it means to be a "publisher" under Section 230(c)(1). The matches also might . . . present users with targeted content of even more interest to them But it would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at

performing the functions of publishers, they are no longer immunized from civil liability.

(Id.)

The *Force* case involved algorithms that directed content to readers who might be more interested in the content ("matchmaking") Plaintiff Forrest's complaint repeatedly describes Facebook's acts as "curating the user experience." Without defining "curating," Plaintiff alleges that Facebook is doing exactly what it was doing in the *Force* case: using algorithms to direct content to a subset of users based on those users' interests and demographics ("data points" (see FAC ¶¶ 3-4, 11, 53, 57, 71.)

As in *Force*, Forrest's claims are based on Facebook's using automation to determine where certain ads are seen and by whom. Facebook is being sued for its role as a publisher of ads. Therefore, Section 230(c)(1) immunizes Facebook from liability for all claims arising from Facebook's role as a publisher.

Demurrers to the first, second, third, fourth, and fifth claims are be sustained because each of those claims is based on allegations that Facebook committed acts in the role of a publisher, which Section 230(c)(1) precludes.

Additional Grounds for Sustaining Demurrer

In addition to immunity under the CDA, demurrer to the Second, Fourth, and Fifth causes of action is sustained for the following reasons.

Demurrer to the Second Cause of Action is sustained because "substantial assistance" may occur only when the Defendant's "own conduct, separately considered, constitutes a breach of duty to the third person." (*Saunders v. Super. Ct.* (1994) 27 Cal. App.4th 832, 846.) "It is essential that the defendant's own conduct was tortious. The particular defendant who is to be charged with responsibility must have proceeded tortiously - i.e., with intent to commit a tort or with negligence." (*Coffman v. Kennedy* (1977) 74 Cal. App. 3d 28, 32.) The FAC does not allege any acts by Facebook that are independently tortious.

Demurrer to the Fourth Cause of Action is sustained because a duty to warn does not exist absent a special relationship between Facebook and Plaintiff. (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal. 3d 425, 435.) Plaintiff Forrest argues that a special relationship is required only when "nonfeasance" causes harm, whereas Plaintiff alleges "misfeasance." (Opp. at 12-13.) The alleged misfeasance, however, consists of acts of a publisher, which are immunized by the CDA.

Demurrer to the Fifth Cause of Action is sustained without leave to amend because Negligent design is a products liability concept. (See Opp. at 12:16-18.) Plaintiff cites no authority holding that the legal theory of products liability, including duty of care, extends to interactive computer services.

Terms of Service and Statute of Limitations Arguments Lack Merit.

1. Demurrer based on Terms of Service lacks merit. The Terms of Service document provides that the Terms govern "your" use of Facebook. (Mov. RJN, Ex. A, at p.1.) The claims in the FAC are not based on Plaintiff's use of Facebook; they are based on Facebook's conduct. Therefore, the Terms of Service do not apply to Forrest's claims. The claims asserted by Forrest could be asserted by a person who never used Facebook, but suffered the same harm. It is unreasonable to hold that the Terms of Service are a defense against a Facebook user, but not against a non-Facebook user who has suffered the same harm.

2. Demurrer based on statute of limitations lacks merit. The demurrer is based on the allegation that Forrest knew of his claims "on or about late March 2019." (Mov. at 20:10.) When a Complaint alleges that a cause of action accrued "on or about" a specific date, a statute-of-limitations argument does not support demurrer. (*Childs v. State of California* (1983) 144 Cal. App. 3d 155, 159-60.) Further, Judicial Council Emergency Rule 9.12 extends the limitations period for six months. Even if "on or about late March 2019" could be an operative date of accrual, the six-month tolling extends the limitations period to some unspecified date in September 2021. The demurrer does not establish that the common law claims are time-barred as a matter of law.

Ruling

Demurrer is sustained as to all causes of action. Plaintiff is granted leave of court to file and serve a Second Amended Complaint addressing the above defects, except for the Fifth Cause of action for which leave is not granted, no later than May 20, 2022.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendant Facebook, Inc. shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court.
