No. _____

In The

Supreme Court of the United States

LARRY KLAYMAN,

Petitioner,

v.

MARK ZUCKERBERG and FACEBOOK, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is an unbridled First Amendment right to post whatever one wants on the internet, including but not limited to terrorist death threats and calls to carry out death threats, as free speech has its limits under these particular and extreme circumstances.

2. Whether internet service providers are liable under the CDA for a third-party's tortious, dangerous, and deadly content posted on the internet service provider's forum when it has the ability to edit, and has edited, third-party content in lesser circumstances.

3. Whether an internet service provider violates its contractual and fiduciary duty to its subscribers and users to take down violent and deadly content when the internet service provider refuses to take down reported content that calls for, and resulted in, the death of others.

PARTIES TO THE PROCEEDINGS

Petitioner Larry Klayman ("Petitioner") and Respondents Mark Zuckerberg and Facebook, Inc. (collectively "Respondents") appeared before the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

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INTRODUCTION

Under well-established First Amendment precedent, just as a person does not have the right to yell "fire" in a crowded theater, a person does not have an unbridled right to post whatever he or she wants on the internet, especially dangerous or deadly material that results in death or harm to others. The Communications Decency Act ("CDA"), legislation that addresses internet service providers' liability for third-party content, has been written in conjunction with the First Amendment. Under extreme circumstances, where terrorists are instructing their creed to kill people and where internet service providers are furthering these instructions by refusing to take down the deadly content, the First Amendment, in conjunction with the CDA, does not permit internet service providers to be accessories to crimes by allowing them to further criminal and terrorist conduct.

Dangerous and deadly third-party content posted online, namely by terrorists, has led to the deaths of many innocent people, and therefore, the United States Supreme Court (the "Court") must step in now to prevent further deaths from occurring. Such an important constitutional issue involving the First Amendment must be heard by this Court because posting deadly material affects not just the lives of potential victims, but also e-commerce as well as the welfare of the United States, and the world. This case is thus of seminal importance. Furthermore, just a few of the United States Courts of Appeals ("Circuit Courts") have ruled that the CDA supposedly excuses

internet service providers from liability for any and all dangerous content posted by third-parties, including terrorists. The United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"), however, has ruled that Congress did not so intend for this to happen. Thus, not only are crucial constitutional issues at stake, there is a division among the circuits, and this Court must respectively break the legal impasse by finding that the CDA does not shield all speech, as Congress did not so intend.[1]

OPINION BELOW

The ruling under review is the affirmation of the D.C. Circuit in the case of *Klayman v. Zuckerberg*, No. 13-7017, 753 F.3d 1354 (June 13, 2014).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] Ironically, the deadline for filing this Petition for Writ of Certiorari is September 11, 2014, on the 13th anniversary of 9/11, when a series of attacks conducted by radical Islamic terrorists resulted in the deaths of almost 3,000 innocent people. The internet postings at issue here call for similar deadly terrorist acts, against Jews in particular.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

CDA, 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."

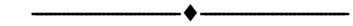
CDA, 47 U.S.C. § 230(f)(2):

> The CDA defines an "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, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

CDA, 47 U.S.C. § 230(f)(3).

> An "information content provider" is defined as "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."



STATEMENT OF THE CASE

On March 31, 2011, Petitioner filed the Complaint (App. 29-37) in the Superior Court of the District of Columbia, Civil Division ("Superior Court"), asserting claims for assault and negligence against Respondents. *See* Compl. ¶¶ 14-20. The action arose from the harm caused by a page that was posted on Respondents' website, titled "Third Palestinian Intifada," which contained threatening calls to action by radical Islamic terrorists to kill Jews.

On May 10, 2011, Respondents filed a Notice of Removal seeking to remove the action from the Superior Court to the United States District Court for the District of Columbia ("District Court"). The case was subsequently removed to federal court.

On July 21, 2011, in response to a Joint Stipulation filed by the parties, the District Court provided that Petitioner shall file an Amended Complaint. *See* Min. Order, dated July 21, 2011. Subsequently, on August 22, 2011, Petitioner filed a Motion for Extension of Time to Amend Complaint. *See* Mot. For Extension of Time to Amend Compl. On August 24, 2011, inexplicably the District Court denied Petitioner's request for an extension of time to amend the complaint. *See* Min. Order, dated August 24, 2011. Strangely, the District Court appears to have removed Petitioner's

motion for extension of time from even the court docket, and thus it cannot be included in the appendix filed herewith as it was excised from the record.

On April 13, 2012, Respondents filed both a Motion to Dismiss Amended Complaint and a Motion to Transfer Case. In their Motion to Dismiss, Respondents sought immunity from their unlawful conduct by attempting to hide behind a flawed reading of the Communications Decency Act ("CDA"). However, it is inconceivable that the CDA is a vast limitless shield of immunity, particularly as the Act itself explicitly draws out limitations as to applicability. Despite Respondents' attempt to hide behind the CDA, they failed to candidly bring to the District Court's attention that the immunity provided was not intended to be used by internet service providers who refuse and repeatedly fail to take any action in controlling deadly terrorist content in particular posted on their webpage, as is the issue in the instant case. On May 2, 2012, Petitioner filed his Response in Opposition to Respondents' Motion to Transfer Case and his Response in Opposition to Respondents' Motion to Dismiss.

On December 28, 2012, the Honorable Judge Reggie B. Walton issued a Memorandum Opinion and Order (App. 13-28) granting Respondents' Motion to Dismiss. On January 25, 2013, Petitioner filed his notice of appeal to the D.C. Circuit. On June 13, 2014, the D.C. Circuit affirmed the District Court's ruling. (App. 1-12)

STATEMENT OF FACTS

Respondents Mark Zuckerberg and Facebook, Inc. (collectively "Respondents") are unjustifiably relying on an inconceivable notion that the CDA provides them with absolute immunity from liability when Respondents failed to remove a page posted on its website even though they were fully aware of the page and the contents of the page, posted by radical Islamic terrorists, which advocated death to Jews. Despite receiving numerous requests, including a letter from the Public Diplomacy Minister of Israel, and being fully aware of the significant harm and death that would inherently be furthered and result, particularly given the number of readers of the page, Respondents refused to remove the inciting page, which called for deadly attacks against Jews, and even supported, encouraged, and participated in promoting this violent conduct, by not only allowing the page to remain on the website but also allowing other similar pages advocating similar messages to be posted on their webpage. Compl. ¶ 7. As a result, Petitioner, an American citizen of Jewish origin and a pro-Israel activist who has been called a Zionist by radical Palestinian terrorists, filed a complaint seeking injunctive relief as well as enjoining Respondents from allowing postings of websites advocating violent, hateful, and threatening deadly messages towards Jews and others who support Israel and its right to exist. Compl. at p. 7; App. 36-37.

Respondents operate the website, www.facebook.com ("Facebook"), which is a "social networking" website.

Memo. Opinion of December 28, 2012 ("Memo. Opinion") (also "App. 13-28") at 2. Facebook allows users to share contents with others, including articles, news, and opinions about world events. Memo. Opinion at 2. Users can also view content shared by other Facebook users on one or more of the hundreds of millions of Facebook Pages. Memo. Opinion at 2. In fact, viewership of the website is growing fast and exponentially in many parts of the world, especially in the Middle East where there is an ongoing Islamic revolution and, more significantly, efforts by opposition groups to overthrow governments and to establish a Palestinian state on the West Bank. Compl. ¶ 4. Unfortunately, Palestinians have threatened the destruction of Israel and the Jewish people if they do not get this state on the West Bank. Compl. ¶ 4. Facebook also maintains wide viewership in the United States and, in fact, is widely viewed and read in the District of Columbia ("D.C.") by many Facebook users, which include radical Palestinians and other such Muslims with anti-Semitic interests who reside in D.C. and the Metropolitan area. Compl. ¶ 5.

Petitioner is a highly visible, well-known lawyer, advocate, writer, television and radio commentator, and public figure, who is also a renowned expert on terrorism and the Middle East. Compl. ¶ 12. Petitioner is also the Chairman and General Counsel of Freedom Watch, Inc., an organization that conducts business in D.C. Compl. ¶ 2. Moreover, Petitioner is publicly active in matters concerning the security of Israel and all people, including but not limited to

Jews, Christians, and Muslims who believe in freedom, and the rights of persons to not be discriminated against, to live in peace, to worship as they wish as long as they do not cause harm to others, and the rights of man not to be harmed in any way on the basis of national and religious origins. Compl. ¶ 11.

Furthermore, Petitioner, an American citizen of Jewish origin, is also a civil and individual rights activist and is widely known throughout the Muslim/Arabic world for his support of Israel and his strong opposition to radical Islam. Compl. ¶¶ 4, 11. In addition, Petitioner has also publicly taken a firm stance in opposition to the formation of a Palestinian state on the West Bank. To further his advocacy and activism, Petitioner has traveled to Israel, where he has met with Israeli government officials including the Office of the Prime Minister and the Ministry of Foreign Affairs, and has promoted his values, ideologies, and, more significantly his principles of ending the unprovoked vicious attacks by radical Muslim terrorists against Jews.

Petitioner maintains a Facebook account, titled "Larry Klayman," and while using his account, Petitioner encountered a Facebook page titled "Third Palestinian Intifada" ("Third Intifada Page"). Compl. ¶¶ 6, 7. An Intifada is commonly described as a violent revolt conducted by Muslims against non-Muslims and particularly against Jews. Compl. ¶ 9. Thus, the Third Intifada Page, and similar pages posted on Facebook, openly advocated a violent revolt,

(an "Intifada") against persons of Jewish origin, encouraging and inciting the violent attack of and the death of Jews. Compl. ¶ 7. Specifically, the Third Intifada Page called for an uprising beginning on May 15, 2011, after Muslim prayers were completed, and further threatened that "Judgment Day will be brought upon us only once Muslims have killed all the Jews." Compl. ¶ 7. Unfortunately, the deadly attacks against Jews called for by these radical Palestinian terrorists on the Third Intifada Page became a terrorizing reality and caused many people, including Petitioner, to fear an imminent attack at any moment to cause him severe bodily harm or even death. Indeed, as set forth in the complaint Petitioner received death threats. Compl. ¶ 11. Moreover, the sheer number of viewers, followers, and supporters of the Third Intifada Page significantly intensified this already terrifying actuality. In fact the Third Intifada Page has had over 360,000 participants and has given rise to three similar Facebook pages with over 7,000 subscribers. Compl. ¶ 7; Memo. Opinion at 2. Indisputably, the substantial viewership and the amount of participants in the Third Intifada Page undeniably advanced and further perpetuated the violent deadly threat and call to action to kill Jews posed from the page's abhorrent fatal content. Indeed, Jews were killed as a result. Compl. ¶ 10.

Notably, as evidence of the detrimental influence of content advocated for such violent attacks on Jews and the brutal, inhumane, and deadly harm from such content, there have been two previous Intifadas

against people of Jewish origin by radical Palestinian terrorists. Compl. ¶ 10. The first occurred between 1987 and 1993, and resulted in the civilian death toll of 164 Jews. Compl. ¶ 10. The second occurred between 2000 and 2005 and resulted in the civilian death toll of 1,115 Jews. Compl. ¶ 10. The threats and terrorist attacks on Jews have taken place and continue to take place even without regard to formal Intifadas. Compl. ¶ 10.

Justifiably, the Third Intifada Page caught the attention of the Public Diplomacy Minister of Israel, who subsequently wrote a letter to Respondents requesting that the Third Intifada Page and other similar pages be removed from Facebook, as these pages featured "wild incitement" with calls to kill Jews and talk of liberating Jerusalem through violence and death. Compl. ¶ 7; Memo. Opinion at 2. Respondents, however, refused to remove the page, apparently since viewership and participation of the website dramatically increased, particularly in the Middle East, given the controversial and radical nature of the matter. Compl. ¶ 7. In fact, Respondents adamantly declined to remove the hateful, inciting, and threatening page for many days, but when the public outcry became even louder eventually removed it "begrudgingly," after the damage had already been done and Jews had been killed. Compl. ¶ 12. After all, not only did viewership of Respondents' webpage increase, but, not coincidentally, so did Facebook's revenue during a period when Facebook was seeking to go public and sell shares of stock though Goldman

Sachs. Obviously, increased viewership particularly in the Middle East would increase the value of any eventual public offering of shares.

This type of behavior in failing to remove inappropriate content from its webpage has become the norm for Respondents, as acknowledged by Marne Levine ("Levine"), a Facebook Vice President in charge of public policy. Specifically, in addressing and essentially admitting Respondents' repeated failures and inadequate actions in responding to inappropriate content posted on its webpage, Levine made the following statement:

> "In some cases, content is not being removed as quickly as we want. In other cases, contents that should be removed has not been or has been evaluated using outdated criteria . . . the guidelines used by these systems have failed to capture all the content that violates our standards." (https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054).

Levine further stated the following:

> "We [Facebook] prohibit content deemed to be directly harmful. . . . We define harmful content as anything organizing real world violence, theft, or property destruction, or that directly inflicts emotional distress on a specific private individual. . . . " (https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054).

Interestingly, Respondents somehow still manage to fail to remove content that violates their standards even when Respondents are given explicit notice of the inappropriate content and are repeatedly and relentlessly asked to remove the improper content. Through these detailed, comprehensive, and painstaking notices and countless requests for Respondents to remove the Third Intifada Page, it could not have possibly been any more clear to Respondents of the requisite actions needed to be taken and yet they still managed to fail in completing the simple and effortless task of merely removing the violent and dangerous Third Intifada Page. The bottom line is that Jews died as a result, Compl. ¶ 10, and Petitioner had reason to believe he too could be killed as a result of this Palestinian terrorist call to action. Compl. ¶ 11.

In fact, a recent publication discussed yet another incident of Facebook's indifferent and unresponsive behavior. Specifically, it was revealed that Facebook recently received a request asking the company to review a page posted on its website dubbed "RIOT for Trayvon," which advocated an attack on George Zimmerman (a Florida resident who was recently acquitted for the death of a teenager, Trayvon Martin) and contained a picture of an unconscious person on the floor. *See* "Facebook Won't Remove 'Kill Zimmerman' Page, Delays Blocking 'Riot for Trayvon Martin,'" by Christian Toto, dated July 3, 2013 (http://www.breitbart.com/Big-Journalism/2013/07/03/facebook-wont-remove-riot-trayvon-page). However, Facebook initially refused to remove the page, claiming it "doesn't violate

our community standard on credible threat of violence." *Id*. Facebook later removed the page from its website, but allowed another page titled "Kill Zimmerman" to remain on Facebook. *Id*.

Moreover, in addition to the above statements, Levine also refers to a list of prohibited categories of content that can be found on Facebook's "Community Standards" page, which addresses, in part, violence and threats. In regard to the violence and threats found on posted pages, Respondents undertake an explicit promise and assumed obligation to remove such content from Respondents' webpage as provided on Facebook's "Community Standard" page. Specifically, the Community Standards provides the following:

> "Safety is Facebook's top priority. We remove content and may escalate to law enforcement when we perceive a genuine risk of physical harm, or a direct threat to public safety. You may not credibly threaten others, or organize acts of real-world violence. Organizations with a record of terrorist or violent criminal activity are not allowed to maintain a presence on our site. We also prohibit promoting, planning, or celebrating any of your actions if they have, or could, result in financial harm to others. . . ." (https://www.facebook.com/communitystandards).[2]

[2] Facebook's Statement of Rights prohibits "hate speech." Marne Levine's statement addresses this portion of Facebook's Statement of Rights by stating the following: " . . . We define

(Continued on following page)

Ironically, Respondents have forgotten about their self-implemented "Community Standards," and "Statement of Rights," as Respondents have failed to remove such violent and threatening content as promised but have, instead, remarkably ignored the perceived genuine risk of physical harm caused by Respondents' own conduct and their careless and unjustifiable inaction.

Specifically, Respondents have undoubtedly disregarded their responsibilities and have endangered the safety and the life of Petitioner and others by allowing the violent and threatening Third Intifada Page to remain posted for a lengthy period of time, despite repeated demands for its removal. In fact, Respondents reluctantly removed the page only after it had already been widely viewed on the internet and was undoubtedly read by Palestinians and other radical Muslims, many of whom reside in D.C. and, Jews died as a result.

Accordingly, Respondents' inaction, as described above, encouraged and promoted viewers to severely harm or kill Petitioner, especially given Petitioner's public opposition to radical Islam. Compl. ¶ 11. By allowing the Third Intifada Page to remain posted,

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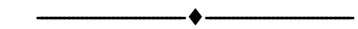
[hate speech] to mean direct and serious attacks on any protected category of people based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or disease. We work hard to remove hate speech quickly. . . ." (https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054).

Respondents have not only disregarded their responsibilities but have also acted in concert in the ongoing threats and assaults on Petitioner and other Jews, consequently endangering the safety and the lives of Petitioner and others. Compl. ¶ 12.

As such, Petitioner is seeking relief from Respondents' intentional, reckless and negligent conduct in allowing and in fact furthering the posting of webpages that advocated the killing of Jewish people to obtain the state on the West Bank, which directly placed Petitioner in immediate harm. *Id.* ¶ 4. Put simply, Petitioner, who travels to Israel and works in Washington, D.C., which has a large Arabic and Palestinian population, has a target on his back as a direct result of Respondents' conduct. The District Court erred in granting Respondents' Motion to Dismiss, and denying Petitioner his right to lawfully pursue his claims against Respondents. The D.C. Circuit affirmed the District Court's ruling.

Due to the important Constitutional issues that have arisen, Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari.



SUMMARY OF THE ARGUMENT

This is a case about the unlawful conduct of persons, including terrorists, who post harmful and deadly content on the internet, and the alleged absence of

liability attached to internet service providers that host, permit, and further said content.[3] This is not simply a case about Petitioner Larry Klayman. This is a case about the rights of all persons to live peacefully, and without fear of being killed as a result of dangerous and tortious content posted by terrorist and extremist groups on the internet that can easily be removed by an internet service provider.

The First Amendment has its limitations, including but not limited to yelling "fire" in a crowded theater. It is undisputed that when free speech calls for the deaths of others, such speech is unlawful and would result in great criminal and civil punishment. Moreover, just like a theater owner owes a duty of care to his or her customers, when an internet service

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[3] Respondents have not learned their lesson as, more recently, Facebook has been permitting ISIS terrorists to use Facebook to link to friends and sites that support the Islamic State. *See* News.au.com, *Facebook riddle with Australian Muslims supporting ISIS* (Aug. 24, 2014), available at http://www.news.com.au/technology/online/facebook-riddled-with-australian-muslims-supporting-isis/story-fnjwmwrh-1227034437804. Attorney-General George Brandis' spokesman said "it was a grey area as to whether people cheering from sidelines, on Facebook or other social media, were liable to prosecution. . . ." *Id.* Many other ISIS terrorists are seen posting photos of themselves holding weapons and raising their right index finger pointed to the skies, a symbol of ISIS. *See id.* This continued conduct underscores why this Court must take up this matter as Congress could not have intended an unbridled right to post death threats and calls to action to kill Jews and others on the internet, without the internet provider having to take these death threats and calls to action down to prevent serious bodily injury and death.

provider owes a contractual and fiduciary duty to its users and subscribers, that internet service provider is liable for any resulting harm of a third-party that uses its forum to facilitate said harm.

This Court must determine whether, in spite of the limitations on free speech, a person possesses an unbridled right under the First Amendment to post whatever he or she wants on the internet, including but not limited to terrorist death threats and calls to carry out death threats that result in the death of others. This Court must also determine whether an internet service provider, that owes a contractual and fiduciary duty to its users and subscribers, is liable for dangerous third-party content when it has the power to filter, edit, and delete said content.

ARGUMENT

I. UNDER THE FIRST AMENDMENT, THERE IS NO UNBRIDLED RIGHT TO POST WHATEVER ONE WANTS ON THE INTERNET, INCLUDING BUT NOT LIMITED TO TERRORIST DEATH THREATS AND CALLS TO CARRY OUT THESE DEATH THREATS, AS FREE SPEECH HAS ITS LIMITATIONS UNDER THESE EXTREME CIRCUMSTANCES (SIMILAR TO YELLING FIRE IN A CROWDED THEATER), AND THUS, THIS COURT MUST DETERMINE THAT INTERNET SERVICE PROVIDERS ARE LIABLE FOR ANY HARM THAT HAS BEEN CAUSED BY THEIR FAILURE TO TAKE DOWN DANGEROUS THIRD-PARTY CONTENT.

The Court must determine whether there is an unbridled First Amendment right to post whatever one wants on the internet, including death threats and calls to carry out death threats, in spite of the limitations on free speech. The First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

Petitioner, a civil rights activist, is concerned for the well-being of all minorities. The outcome of this case does not solely apply to Jewish people. The

Supreme Court's ruling would apply to anyone who fears being targeted, or are targeted by extremist groups with death. Petitioner also fully believes in the First Amendment, and is in fact a First Amendment lawyer in many ways. By and through Petitioner's professional experiences and his knowledge of the First Amendment's protections, Petitioner is aware, however, that there are certain restrictions on free speech. For instance, in *Schenck v. United States*, 249 U.S. 47, 52 (1919), Justice Holmes, while delivering the Court's majority opinion, recognized such limitations to the First Amendment, and famously stated that "free speech [does] not protect a man in falsely shouting fire in a theatre and causing a panic." The First Amendment does not protect statements that intend to, or have the effect of, provoking violence or unlawful activities, especially where there is a clear and present danger. In fact, this Court found that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* The court's finding is applicable to the present case.

In conjunction with the well-known black-letter law restricting free speech, Congress did not intend for the CDA to grant total immunity to internet service providers that purposely do not delete dangerous content provided by terrorists that calls for, and even instructs, terrorist interests and terrorist acts, including but not limited to the deaths of millions of people.

CDA, 47 U.S.C. § 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The CDA defines an "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, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." CDA, 47 U.S.C. § 230(f)(2). An "information content provider" is defined as "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." CDA, 47 U.S.C. § 230(f)(3).

The CDA has been applied to cases involving defamatory statements posted on an internet message board, *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[4] defamatory statements as a part of an internet hoax, *Zeran v. America Online, Inc.*,[5] internet access to a hidden-camera scam where several college sports teams were videotaped in their locker rooms and bathrooms, *Doe v. GTE Corp.*,[6] postings of discriminatory housing advertisements in violation of

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[4] 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

[5] 129 F.3d 327 (4th Cir. 1997).

[6] 347 F.3d 655 (7th Cir. 2003).

the federal Fair Housing Act, *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,[7] potentially discriminatory information as a condition of enrolling in a website, *Fair Housing Council v. Roommates.com, LLC*,[8] and prostitution arising from certain online solicitations, *Dart v. Craigslist, Inc.*[9] The presiding courts in these cases ruled that the internet service providers were not liable for the offensive third-party postings and other conduct.

One of the key differences in the present case, however, is that the third-party postings in question involved real death threats[10] and calls to carry out death threats that resulted in the actual deaths of innocent people, and Respondents furthered this unlawful conduct. *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997) (finding that "[b]ecause long-established caselaw provides that speech – even speech by the press – that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment[,] . . . the First Amendment does not pose a bar to a finding that [the defendant] is civilly liable as an aider and abetter of [the] triple contract murder" for writing instructions to successfully carry out a murder in a book). In *Rice*, "representatives of murder victims brought state law wrongful death

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[7] 519 F.3d 666 (7th Cir. 2008).

[8] 521 F.3d 1157 (9th Cir. 2008).

[9] 665 F. Supp. 2d 961 (N.D. Ill. 2009).

[10] Petitioner himself has received a number of death threats as a result of Respondents' furthering of the Third Intifada Page.

action against publisher of 'hit man' instruction book that assisted murderer in soliciting, preparing for, and committing murders." The publisher was found liable for aiding in the deaths. Facebook has done the exact same thing in aiding in the deaths of innocent Jews.

This case is more significant because no one died in the other cases. A threat that calls for the death of all Jewish people is not the same as defamation, prostitution, posts on dating sites, or discriminatory housing advertisements. There is a substantial difference of degree, and the CDA cannot be applied under the circumstances of this case. Also, unlike the other cases, Respondents here are not internet service providers because Respondents are able to remove any content they so choose, under their own discretion, as admitted by Respondents in their contract with their subscribers and users. Respondents also do not qualify as internet service providers because Respondents admittedly seek to control the content posted on their pages. True internet service providers do not exercise control over third-party content primarily because they do not have control of the content posted on their pages. Facebook, by contrast, is a unique animal by its own admission, as Respondents allow information to travel from one user to the next. Petitioner simply requested that Respondents take down the dangerous and deadly content, but they did not until two entire weeks after the posts originated, and while people were dying.

In the *Craigslist*[11] case, the court found that when an internet service provider has the ability to edit third-party content, as Respondents admittedly possess the ability to do so, and have done so, then the internet service provider is effectively a "publisher" under the CDA. It is also important to point out that Respondents have profited from allowing terrorists to post on their website, as Respondents are traded by Goldman Sachs and the New York Stock Exchange, and market themselves to the Middle East to increase circulation and revenue.[12] Respondents are obviously more concerned with increasing viewership and revenue than they are with preventing the deaths of others. Respondents have admitted they control their conduct, and, thus, they could have simply taken down the dangerous and deadly content when Petitioner and the Public Diplomacy Minister of Israel made their justifiable and easily understandable requests to Respondents.

The current division of the Circuit Courts over whether internet service providers have immunity when third-parties post unlawful information is another reason for this Court to hear this case. The Circuit Courts remain divided in determining the

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[11] 519 F.3d 666 (7th Cir. 2008).

[12] Respondents, to further their revenues and the net worth of Facebook, which is traded by Goldman Sachs and other investment firms, are joint tortfeasors and are acting in concert in the on-going threats and assaults on Petitioner and other Jews.

scope of immunity for internet service providers under the CDA, and whether internet service providers may be held liable for extremely dangerous and offensive content, especially where the internet service provider admittedly has control to take down third-party content. Although the Circuit Courts remain divided, under the vague language of the CDA, the Supreme Court can simply read the statute using simple logic: as it is undisputed that it is a federal crime to threaten the lives of our Supreme Court justices, it is also not permissible to threaten and call for the deaths of millions of innocent people.

In comparison to the United States Court of Appeals for the Fourth Circuit's ("Fourth Circuit") overly broad reading in *Zeran v. Am. Online, Inc.*,[13] this Court should find the Seventh Circuit's more narrow reading of the immunity provision of the CDA persuasive because the Seventh Circuit has correctly recognized Congress' intent in holding internet service providers liable for third-party content in certain and necessary situations, such as in the present case. Unlike the Fourth Circuit, the Seventh Circuit reads CDA Section 230(c)(1) "as only a 'definitional' clause preliminary to a more limited grant of immunity to follow." Mark D. Quist, "*Plumbing the Depths*" *of the CDA: Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity Under Section 230 of the Communications Decency Act*, 20 Geo.

[13] 129 F.3d 327 (4th Cir. 1997).

Mason. L. Rev. 275, 283 (2012) (citing *Chi. Lawyers' Comm.*, 519 F.3d at 669-70, (citing *Doe v. GTE Corp.*, 347 F.3d 655); *see GTE Corp.,* 347 F.3d at 660) (finding that "[o]n this reading, an entity would remain a 'provider or user' – and thus be eligible for the immunity under § 230(c)(2) – as long as the information came from someone else; but it would become a 'publisher or speaker' and lose the benefit of § 230(c)(2) if it created the objectionable information").

In fact, in *Roommates*, the Seventh Circuit expressly advocated for the limited view of Section 230 immunity. 521 F.3d at 1172 n.33. Section 230(c)(1) does not expressly use the term "immunity," and thus, the Seventh Circuit determined that Section 230(c)(1) should be read merely as a definitional clause – only limited immunity should be granted under Section 230(c)(2). In pointing out its deviation from the overly broad view of immunity that has been adopted by the Fourth Circuit, the Seventh Circuit has "questioned whether § 230(c)(1) creates any form of 'immunity'. . . ." *See also Chi. Lawyers' Comm.*, 519 F.3d at 670 ("[The Supreme Court's opinion in] *Grokster* is incompatible with treating § 230(c)(1) as a grant of comprehensive immunity from civil liability for content provided by a third party."). "[A]s a policy matter, Congress cannot possibly have intended Section 230(c)(1) as an immunity provision because of the [ ] absurd result it would produce." Quist, *supra* at 301.

The Seventh Circuit also recognized the dangers in imposing zero liability on internet service providers when certain content is posted by third-parties.

> "If [the Fourth Circuit's] reading [in *Zeran*] is sound, then § 230(c) as a whole makes [internet service providers] indifferent to the content of information they host or transmit: whether they do . . . or do not . . . take precautions, there is no liability under either state or federal law. As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, [internet service providers] may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1). Yet § 230(c) – which is, recall, part of the "Communications Decency Act" – bears the title "Protection for 'Good Samaritan' blocking and screening of offensive material", hardly an apt description if its principal effect is to induce [internet service providers] to do nothing about the distribution of indecent and offensive materials via their services. Why should a law designed to eliminate [internet service providers'] liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?" *See Chi. Lawyers' Comm.*, 519 F.3d at 670 (quoting *GTE Corp.*, 347 F.3d at 660).

If Congress intended to provide broad immunity to internet service providers, it could have written a statute that expressly stated the proposition. That is not, however, what Congress enacted.

As it is well-known that the owner of a theater would be found liable if a person yelled "fire" in a crowded theater, and the theater owner did nothing

to correct such conduct, or even furthered such conduct, internet service providers, including Respondents, must be responsible for the deadly and dangerous content that is posted on their forums. Under current copyright law, information content providers may be liable for contributory infringement if their system is designed to help people steal music or other material in copyright – the same reasoning should be applied here. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 125 S.Ct. 2764 (2005); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003). In considering the Seventh Circuit's narrower reading of the CDA's so-called "immunity provision," this Court should find that an internet service provider that edits third-party content is in fact a "publisher" under the CDA for the purpose of attaching liability to the internet service provider for allowing dangerous content to remain on its forum. No internet service provider should remain immune when it refuses to take down said content. It is also important to note that Petitioner has solely requested injunctive relief, and merely requests that Respondents be ordered to take down offensive and dangerous content, especially when people are dying as a result of the posted content.

In essence, as this Court has famously found that one cannot yell "fire" in a crowded theater, this Court must apply this finding to the present case, and hold that under the CDA, in conjunction with the First Amendment, there is no unbridled right for a person to post whatever he or she wants on the internet,

especially where that person posts dangerous content that calls for the death of others.

II. RESPONDENTS OWE A DUTY OF CARE TO THEIR USERS AND SUBSCRIBERS, AND RESPONDENTS HAVE BREACHED THIS DUTY.

Respondents have breached their duty of care to Petitioner, both contractual and fiduciary, as asserted under Petitioner's claim for breach of contract and negligence.

Facebook has an admitted agreement with its users and subscribers the moment they sign up for an account. Facebook Vice President Levine refers to a list of prohibited categories of content that can be found on Facebook's "Community Standards" page, which addresses, in part, violence and threats:

> "We [Facebook] prohibit content deemed to be directly harmful. . . . We define harmful content as anything organizing real world violence, theft, or property destruction, or that directly inflicts emotional distress on a specific private individual. . . ." (https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054).

In regard to the violence and threats found on posted pages, Respondents undertake an explicit promise and assumed obligation to remove such content from Respondents' webpage as provided on Facebook's

"Community Standards" page. Specifically, the Community Standards provides the following:

> "Safety is Facebook's top priority. We remove content and may escalate to law enforcement when we perceive a genuine risk of physical harm, or a direct threat to public safety. You may not credibly threaten others, or organize acts of real-world violence. Organizations with a record of terrorist or violent criminal activity are not allowed to maintain a presence on our site. We also prohibit promoting, planning, or celebrating any of your actions if they have, or could, result in financial harm to others. . . ." (https://www.facebook.com/communitystandards).

Under Petitioner's negligence claim, Respondents breached their duty to Petitioner because Respondents refused to take down the prohibited content as defined in their Community Standards page. Undisputedly, death threats, and calls to carry out death threats that lead to the actual deaths of individuals would be included in the very content that Facebook has agreed to remove. Instead, under the influence of financial gain[14] and increased viewership

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[14] Mark Zuckerberg is infamous for having a less-than-credible reputation; in fact, he is known for stepping on the toes of others for his own financial gain. *See* Courtney Palis, *6 People Mark Zuckerberg Burned On His Way To The Top*, Huffington Post (May 17, 2012), available at http://www.huffingtonpost.com/2012/05/16/people-mark-zuckerberg-burned_n_1518702.html. For example, "Zuck[erberg] elbowed out co-founder Eduardo Savarin in 2005. In what appears to be a particularly damning email, a

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by terrorists, Respondents have allowed the dangerous and deadly content to remain on their website for a staggering two weeks. Jews died as a result. Respondents thus breached their duty to Petitioner. The District Court inexplicably denied Petitioner's amended complaint to include his breach of contract claim, which is normally and freely granted.[15] However, the operative complaint contained a negligence claim that subsumes any contract claim, as it correctly pleaded a duty of care to the Petitioner.

Respondents have nonetheless breached their duty to protect Petitioner. Under a theory of negligence, negligent conduct may consist of either an act, or an omission to act when there is a duty to do so. *See* Restatement (Second) of Torts § 282 (1965). As stated, Respondents failed to act by refusing to take down the Third Intifada Page. Respondents have stated that they will take anything down that is considered threatening or causes physical harm. Death is

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20-year-old Zuckerberg's [sic] outlines his plan to dilute Savarin's shares down from more than 30 percent without modifying the stakes held by other shareholders." *Id.* In another example, Zuckerberg settled with the "Winklevoss twins" after they sued Zuckerberg for ripping off their idea to program a social networking site that they had founded called ConnectU, before Zuckerberg launched Thefacebook. *See id.*

[15] Although Petitioner moved to amend the complaint, and included an Amended Complaint, the District Court judge denied the motion to amend, and inexplicably, the motion to amend as well as the Amended Complaint were both removed by the District Court, thus inhibiting any appeal of the District Court's denial.

a physical harm. Respondents did not take down the dangerous content that caused the physical harm of and death to innocent people.

Also, given the fact that Facebook is the most powerful, and essentially is the only, social media site of its kind, Respondents' online disclaimer is a contract of adhesion, and is void for public policy[16] as it must be signed on a "take it or leave it" basis. A disclaimer is not an equal or fair agreement when a 200 billion dollar company creates the disclaimer, which its users and subscribers are obligated to sign, especially when said company is a powerful company and is the only one of its kind. A disclaimer does not nullify the U.S. Constitution and therefore cannot relieve a company of its legal rights, especially where the disclaimer is a contract of adhesion,[17] such as in

[16] "Public policy is a term not easily defined. Its significance varies as the habits and needs of a people may vary. It is not static and the field of application is an ever increasing one. A contract, or a particular provision therein, valid in one era may be wholly opposed to the public policy of another. *See Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29 (1958). Courts keep in mind the principle that the best interests of society demand that persons should not be unnecessarily restricted in their freedom to contract. But they do not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way. *Hodnick v. Fidelity Trust Co.*, 183 N.E. 488 (Ind. App. Ct. 1932)." *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 403-04 (1960).

[17] "The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of

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the present case. Facebook's users and subscribers would not reasonably realize that Facebook's disclaimer limits it from any and all liability for dangerous conduct, that can result in the death of others, that is posted by third-parties, including terrorists. *See* Restatement (Second) of Contracts § 211(3) ("Where the other party has reason to believe that the

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contract will be a threat to the social order as a whole. But in present-day commercial life, the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. 'The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all." *Henningson*, 32 N.J. at 389-90 (citing Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 632 (1943); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 Colum. L. Rev. 1072, 1075, 1089 (1953). "Courts carefully scrutinize adhesion contracts and sometimes void certain provisions because of the possibility of unequal bargaining power, unfairness, and unconscionability. Factoring into such decisions include the nature of the assent, the possibility of unfair surprise, lack of notice, unequal bargaining power, and substantive unfairness. Courts often use the 'doctrine of reasonable expectations' as a justification for invalidating parts or all of an adhesion contract: the weaker party will not be held to adhere to contract terms that are beyond what the weaker party would have reasonably expected from the contract, even if what he or she reasonably expected was outside the strict letter of agreement." Cornell University, *Adhesion Contract* (*Contract of Adhesion*), Legal Information Institute, available at http://www.law.cornell.edu/wex/adhesion_contract_contract_of_adhesion.

party manifesting [ ] assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."). An unlawful disclaimer does not nullify the U.S. Constitution and absolve Facebook from liability just because it does not want to be held responsible for dangerous third-party conduct. We are talking about death threats here. Accordingly, Respondents have breached their fiduciary duty owed to Petitioner, and this Court must rule even more importantly that the CDA does not insulate Respondents from removing death threats and calls to action to kill others from its internet pages.

CONCLUSION

Pursuant to the First Amendment, this Court must grant this Petition for Writ of Certiorari and take action now to prevent future deaths and further harm that arises from internet service providers hiding behind what they perceive to be an unbridled shield of the CDA in permitting and furthering persons, including terrorists, to post dangerous deadly content on their forums which will foreseeably lead to death and destruction. Under well-established First Amendment precedent, just as a person does not have the right to yell "fire" in a crowded theater, a person does not have an unbridled right to post whatever he or she wants on the internet, especially dangerous or deadly material that results in death or harm to others. A number of people have already died as a

result of terrorist conduct that could have easily been prevented. Congress did not so intend for the CDA to excuse internet service providers from liability for any and all dangerous content posted by third-parties, including terrorists.

Given the rise in terrorist threats and calls to action to kill Jews, Christians and others on the internet, this case presents one of the most important constitutional issues of our time and this Court must act now to instruct that the CDA does not insulate parties such as Respondents from doing the responsible thing and removing these deadly pages from their website before persons are killed. And, in this case, they were killed! In addition to the crucial constitutional issues at stake, there is a division among the circuits, and this Court must respectively break the legal impasse by finding that the CDA does not shield all speech under the First Amendment.

Respectfully submitted,

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Pro Se

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 25, 2014 Decided June 13, 2014

No. 13-7017

LARRY ELLIOTT KLAYMAN,
APPELLANT

v.

MARK ZUCKERBERG AND FACEBOOK, INC.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-00874)

Larry Klayman argued the cause and filed the brief for appellant.

Craig S. Primis argued the causes for appellees. With him on the brief was *K. Winn Allen*.

Before: TATEL, BROWN and MILLETT, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

MILLETT, *Circuit Judge*: Three years ago, plaintiff-appellant Larry Klayman encountered a page on Facebook's social networking website entitled "Third Palestinian Intifada," which called for Muslims to

rise up and kill the Jewish people. Facebook subsequently removed the Third Intifada page from its website, but not promptly enough for Klayman. He filed suit against Facebook and its founder, Mark Zuckerberg, alleging that their delay in removing that page and similar pages constituted intentional assault and negligence. The district court held that the Communications Decency Act of 1996, 47 U.S.C. § 230, shielded Zuckerberg and Facebook from suit. We affirm.

I

In enacting the Communications Decency Act, Congress found that the Internet and related computer services "represent an extraordinary advance in the availability of educational and informational resources," and "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a). The Internet has done so, Congress stressed, "with a minimum of government regulation." *Id*. Congress accordingly made it the "policy of the United States" to "promote the continued development of the Internet," and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.]" *Id.* § 230(b).

To that end, Section 230(c) of the Act commands that "[n]o provider or user of an interactive computer

service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). A later section of the Act adds preemptive bite to that prohibition, providing that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

As relevant here, the Act defines a protected "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, including specifically a service or system that provides access to the Internet[.]" 47 U.S.C. § 230(f)(2). An information content provider, in turn, is defined as "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." *Id.* § 230(f)(3).

Facebook is an Internet-based social networking website that allows its users worldwide to share information, opinions, and other content of the users' own choosing for free. *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 316 (D.D.C. 2012). Like millions of others, Larry Klayman maintains a Facebook account. When he joined Facebook, the Statement of Rights and Responsibilities for users advised Klayman that Facebook does its "best to keep Facebook safe, but we cannot guarantee it," J.A. 23, and that "YOU USE IT AT YOUR OWN RISK. WE ARE PROVIDING

FACEBOOK 'AS IS' WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES," J.A. 26 (capitalization in original). The Statement continued: "FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OF THIRD PARTIES[.]" J.A. 27 (capitalization in original).

While using the site a few years ago, Klayman came across a page entitled "Third Palestinian Intifada," which called for an uprising to take place after the completion of Islamic prayers on May 15, 2011, and proclaimed that "Judgment Day will be brought upon us only once Muslims have killed all the Jews." More than 360,000 Facebook users were members of the group; three similar pages calling for a Third Intifada attracted over 7,000 members. Compl. ¶ 7.

At some point, Israel's Minister for Public Diplomacy wrote a letter to Facebook and Mark Zuckerberg to request that the Intifada pages be removed. Klayman alleges that he also requested removal of the pages, but does not indicate when. After "many days," Facebook removed the pages. Compl. ¶ 12.

Klayman subsequently sued Facebook and Mark Zuckerberg (collectively, "Facebook"), in the Superior Court for the District of Columbia, alleging that their insufficiently prompt removal of the Third Intifada pages constituted intentional assault and negligent breach of a duty of care that Facebook allegedly owed to Klayman. Specifically, Klayman alleged that the Intifada pages "amount[ed] to a threat of the use of

force against non-Muslims, and particularly Jews," causing him "reasonable apprehension of severe bodily harm and/or death." Compl. ¶¶ 15-16. With respect to negligence, Mr. Klayman alleged that, "[a]s a subscriber to Facebook and as a member of the public, Defendants owed Plaintiff a duty of care, which they violated and breached by allowing and furthering the death threats by the Third Palestinian Intifada, and related and similar sites." *Id.* ¶ 19.

Klayman sought an injunction to prevent Facebook from allowing the Intifada page and other similar pages on its website, as well as more than one billion dollars in compensatory and punitive damages. Compl., Prayer for Relief.

Facebook removed the case to the United States District Court for the District of Columbia, and then moved to dismiss the case or, in the alternative, to have it transferred to the Northern District of California. The district court granted the motion to dismiss, FED. R. CIV. P. 12(b)(6), holding that the Communications Decency Act foreclosed tort liability predicated on Facebook's decisions to allow or to remove content from its website.

II

The court below had diversity jurisdiction under 28 U.S.C. § 1332; this court has jurisdiction over the district court's final judgment of dismissal under 28 U.S.C. § 1291. We review *de novo* a motion to dismiss for failure to state a claim, accepting as true the

factual allegations stated in the complaint and drawing all inferences in favor of the nonmoving party. *See, e.g.*, *Autor v. Pritzker*, 740 F.3d 176, 179 (D.C. Cir. 2014).

Preemption under the Communications Decency Act is an affirmative defense, but it can still support a motion to dismiss if the statute's barrier to suit is evident from the face of the complaint. *See Jones v. Bock*, 549 U.S. 199, 215 (2007); *Jones v. Horne*, 634 F.3d 588, 600 (D.C. Cir. 2011). Normally we afford a liberal reading to a complaint filed by a *pro se* plaintiff. *See*, *e.g.*, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Rhodes v. United States*, 518 F. Supp. 2d 285, 287 (D.D.C. 2007). This Court has not yet decided, however, whether that rule applies when the *pro se* plaintiff is a practicing lawyer like Klayman. *See, e.g.*, *Richards v. Duke Univ.*, 480 F. Supp. 2d. 222, 234 (D.D.C. 2007). We need not resolve that question here because, even under a generous reading of the complaint, the Communications Decency Act forbids this suit.

III

The Communications Decency Act mandates dismissal if (i) Facebook is a "provider or user of an interactive computer service," (ii) the information for which Klayman seeks to hold Facebook liable was "information provided by another information content provider," and (iii) the complaint seeks to hold Facebook liable as the "publisher or speaker" of that

information. *See* 47 U.S.C. § 230(c)(1). We hold that, on the face of this complaint, all three prongs of that test are satisfied.

First, Facebook qualifies as an interactive computer service because it is a service that provides information to "multiple users" by giving them "computer access * * * to a computer server," 47 U.S.C. § 230(f)(2), namely the servers that host its social networking website. When Facebook users like Klayman browse the site and review the pages of other users, *see* Compl. ¶ 7, they do so by gaining access to information stored on Facebook's servers.

Mark Zuckerberg, too, qualifies for protection because he is a "provider" of Facebook's interactive computer service, 47 U.S.C. § 230(c)(1), and Klayman's complaint seeks to hold him accountable for his role in making that service available, Compl. ¶ 12.

Klayman does not seriously dispute that Facebook meets the statutory definition of an interactive computer service, or that Zuckerberg, as a matter of statutory text, provides such a service. He argues, instead, that Facebook should not qualify because it "can control the contents posted on [its] website." Appellant's Br. 21. The short answer is that Congress did not write that additional limitation into the Act, and it is this court's obligation to enforce statutes as Congress wrote them. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

Worse still, Klayman's reading would put Section 230 at war with itself. Section 230(c)(2) prohibits holding providers of interactive computer services liable for "any action voluntarily taken * * * to restrict access to" content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A). It would make nonsense of the statute to say that interactive computer services must lack the capacity to police content when the Act expressly provides them with immunity for doing just that.

Second, the complaint acknowledges that the objected-to information on the Third Intifada pages was provided by third party users, not Facebook itself. The complaint charges the defendants only with "allowing" the pages to exist and "furthering" them by not "remov[ing] these postings." Compl. ¶ 19; *see also, e.g.*, *id.* ¶ 4 (Facebook has been "used [as] a vehicle for bad purposes" in this case); *id.* ¶ 7 (Facebook "refused" to "take down the page and similar and related pages").

Indeed, the complaint nowhere alleges or even suggests that Facebook provided, created, or developed any portion of the content that Klayman alleges harmed him. Instead, liability in this complaint rests on "information provided by another information content provider," within the meaning of Section 230(c)(1). This case thus presents no occasion to address the outer bounds of preemption under the Act; it is enough here to hold that a website does not create or develop content when it merely provides a neutral

means by which third parties can post information of their own independent choosing online. *Compare, e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1166 (9th Cir. 2008) (en banc) (housing website that required users to disclose their sex, family status, and sexual orientation, as well as those of their desired roommate, in violation of federal housing law, not entitled to Communications Decency Act protection), *with Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (website that did not "contribute[ ] to the allegedly fraudulent nature of the comments at issue" protected by the Communications Decency Act).

Klayman alleges that Facebook collects data on its users and their activities, which it employs to make its advertising more profitable. Appellant's Br. 26. Even if true, that would be irrelevant to Klayman's theories of liability. Facebook could only collect such data about the Intifada pages after some third party had created the pages and their content.

Third, Klayman's complaint seeks, for liability purposes, to treat the defendants as "publisher[s]" of the offending content. 47 U.S.C. § 230(c)(1). Although the statute does not define "publisher," its ordinary meaning is "one that makes public," and "the reproducer of a work intended for public consumption." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1837 (1981); *cf. also* RESTATEMENT (SECOND) OF TORTS § 577 (1977) ("Publication of defamatory matter" means both the communication of, and the failure to remove,

the relevant content.). Indeed, the very essence of publishing is making the decision whether to print or retract a given piece of content – the very actions for which Klayman seeks to hold Facebook liable. *See* Compl. ¶¶ 17-20. Specifically, the assault count of the complaint turns on Facebook's allowing the Third Intifada pages to exist on its website in the first place. Compl. ¶ 17. And the negligence claim relies on the timing of Facebook's removal of the pages. Compl. ¶ 19.

Other circuits agree, holding that similar conduct falls under Section 230's aegis. *See, e.g.*, *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (the Communications Decency Act protects against liability for the "exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone, or alter content"); *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003) (same); *Universal Communications Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) (same); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (no liability under the Act for "decisions relating to the monitoring, screening, and deletion of content" by an interactive computer service provider) (quoting *Green*, 318 F.3d at 471); *Roommates.com*, 521 F.3d at 1170-1171 ("[A]ny 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.")*

Klayman objects that his claims "do not derive from Appellees' status or conduct as a publisher or speaker but are based on Appellees' breach of its duties arising from the special relationship between the parties as a result of their contractual relationship and contractual obligations." Appellant's Br. 23. In particular, he points to a section of Facebook's Statement of Rights and Responsibilities, which says: "We do our best to keep Facebook safe * * * ." *Id.* at 24.

That argument does not work. To begin with, Klayman omits the end of that sentence, which reads "but we cannot guarantee it." J.A. 23. Klayman also overlooks the Statement's express warning that "FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OF THIRD PARTIES." J.A. 27. The plain text of the Statement thus disavows the legal relationship that Klayman asserts.

Moreover, to the extent that Klayman means by this argument to state a contractual basis for liability, no breach of contract claim appears anywhere in the

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* Because the conduct for which Klayman seeks to hold Facebook liable falls within the heartland meaning of "publisher," this case presents no occasion to define when other types of publishing activities might shade into creating or developing content.

complaint and is accordingly forfeited, as Klayman acknowledges. Appellant's Br. 23. And to the extent that Klayman means, instead, that any such statement allocating rights and responsibilities between interactive computer services and their users by itself gives rise to a heightened state-law duty of care in publishing, that argument fails. State law cannot predicate liability for publishing decisions on the mere existence of the very relationship that Congress immunized from suit. In other words, simply invoking the label "special relationship" cannot transform an admittedly waived contract claim into a non-preempted tort action.

IV

For those reasons, we affirm the district court's judgment of dismissal.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY KLAYMAN, Plaintiff, v. MARK ZUCKERBERG, and FACEBOOK, INC., Defendants.	)	Civil Action No. 11-874 (RBW)

MEMORANDUM OPINION

(Filed Dec. 28, 2012)

The *pro se* plaintiff, Larry Klayman, brings this action against the defendants, Facebook, Inc. and its founder and CEO, Mark Zuckerberg, asserting claims of assault and negligence. See Complaint ("Compl.") ¶¶ 14-20. Currently before the Court are the Defendants' Motion to Dismiss ("Defs.' Mot.") and the Defendants' Motion to Transfer. Upon consideration of the parties' submissions,[1] the Court concludes, for the

[1] In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) the Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss ("Defs.' Mem."); (2) the Plaintiff's Opposition to Defendants' Motion to Dismiss ("Pl.'s Opp'n"); (3) the Defendants' Reply Brief in Support of Motion to Dismiss ("Defs.' Reply"); (4) the Defendants' Memorandum of Points and Authorities in Support of Motion to Transfer ("Defs.' Transfer Mem."); (5) the plaintiff's Praecipe, attaching the Plaintiff's

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reasons stated below, that the defendants' motion to dismiss must be granted. Moreover, because the defendants sought transfer of this action "as alternative relief" to dismissal, Defs.' Transfer Mem. at 1, the Court denies as moot the defendants' motion to transfer without reaching the merits of that motion.

I. BACKGROUND

The defendants operate www.facebook.com ("Facebook"), which is a "social networking" website. Compl. ¶¶ 4, 7; Defs.' Mem. at 2. As explained by the defendants, "Facebook allows users to share content with others, including articles, photographs, news about family members and friends, and opinions about world events. Users can also view content shared by other Facebook users on one or more of the hundreds of millions of Facebook Pages." Defs.' Mem. at 2 (citing Compl. ¶ 4). "Viewership [of the website] is growing fast and exponentially" in many parts of the world, including the Middle East and the District of Columbia. Compl. ¶¶ 4-5. In order to use Facebook's services, "a user must open an account," which is provided without cost. Defs.' Mem. at 2.

The plaintiff, an attorney who acts as the Chairman and General Counsel of an organization called Freedom Watch, Compl. ¶¶ 2, 11, maintains "a Facebook account, titled Larry Klayman," *id.* ¶ 6. While

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Opposition to Defendants' Motion to Transfer; and (6) the Defendants' Reply Brief in Support of Motion to Transfer.

using his Facebook account, the plaintiff "encountered the Facebook page titled 'Third Palestinian Intifada.'" *Id*. ¶ 7. The Third Palestinian Intifada Facebook page "called for an uprising beginning on May 15, 2011, after Muslim prayers [were] completed, announcing and threatening that 'Judgment Day will be brought upon us only once Muslims have killed all the Jews.'" *Id*. The Facebook page "had over 360,000 participants" and "three similar [Facebook] Intifada pages have come up with over 7,000 subscribers." *Id*. The Facebook page at issue, the Third Palestinian Intifada Facebook page, caught the attention of the Public Diplomacy Minister of Israel, who wrote a letter to the defendants requesting that they "take down the page and similar and related pages." *Id*. The defendants initially "refused for many days" to remove the page, but eventually removed it "begrudgingly." *Id*. ¶ 12.

The plaintiff originally filed this action in the Superior Court of the District of Columbia on March 31, 2011. Notice of Removal ¶ 1. The defendants successfully removed the case to this Court in May 2011. *See generally* Notice of Removal. The plaintiff asserts claims of negligence and assault against the defendants, and seeks permanent injunctive relief preventing the defendants from allowing Facebook users to publish the Third Palestinian Intifada Facebook page and other similar pages, compensatory and punitive damages amounting to over $1,000,000,000.00, as well as attorneys' fees and costs. Compl. ¶ 20. The defendants seek dismissal

under Federal Rule of Civil Procedure 12(b)(6). Defs.' Mot at 1.

II. STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) tests whether a complaint has properly stated a claim upon which relief may be granted. *Woodruff v. DiMario,* 197 F.R.D. 191, 193 (D.D.C. 2000). For a complaint to survive a Rule 12(b)(6) motion, Federal Rule of Civil Procedure 8(a) requires that it contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although Rule 8(a) does not require "detailed factual allegations," a plaintiff is required to provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555--57 (2007)), in order to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" *Twombly,* 550 U.S. at 555 (citation omitted and alteration in original). In other words, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly,* 550 U.S. at 556). A complaint alleging facts which are "merely consistent with a defendant's liability . . . stops short of the line

between possibility and plausibility of entitlement to relief." *Id*. (quoting *Twombly,* 550 U.S. at 557) (internal quotation marks omitted).

In evaluating a Rule 12(b)(6) motion under this framework, "[t]he complaint must be liberally construed in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged," *Schuler v. United States,* 617 F.2d 605, 608 (D.C. Cir. 1979) (internal quotation marks and citations omitted), and the Court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint[,] and matters of which [the Court] may take judicial notice," *EEOC v. St. Francis Xavier Parochial Sch.,* 117 F.3d 621, 624 (D.C. Cir. 1997) (footnote omitted). While the Court must accept the plaintiff's factual allegations as true, any conclusory allegations are not entitled to an assumption of truth, and even those allegations pleaded with factual support need only be accepted to the extent that "they plausibly give rise to an entitlement to relief." *Iqbal,* 556 U.S. at 679. If "the [C]ourt finds that the plaintiff[ ] [has] failed to allege all the material elements of [his] cause of action," then the Court may dismiss the complaint without prejudice, *Taylor v. FDIC,* 132 F.3d 753, 761 (D.C. Cir. 1997), or with prejudice, provided that the Court "determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency," *Firestone v. Firestone,* 76 F.3d 1205, 1209 (D.C. Cir. 1996) (internal quotation marks and citations omitted). Although courts ordinarily afford special consideration to *pro se* pleadings

in the motion to dismiss context, the plaintiff here is an attorney, Compl. ¶¶ 2, 11, and is thus "presumed to have a knowledge of the legal system and need less protections from the [C]ourt." *Richards v. Duke Univ.,* 480 F. Supp. 2d 222, 234 (D.D.C. 2007); *see also Holtz v. Rockefeller & Co.,* 258 F.3d 62, 82 n.4 (2d Cir. 2001) ("[A lawyer] . . . cannot claim the special consideration which the courts customarily grant to *pro se* parties.") (internal citation omitted).

III. LEGAL ANALYSIS

The defendants argue that the Communications Decency Act of 1996 (the "CDA"), 47 U.S.C. § 230 (2006), requires that the plaintiff's complaint be dismissed in its entirety. Defs.' Mem. at 1-2. The plaintiff responds that the CDA does not bar his claims,[2] Pl.'s Opp'n at 3-9, and that, in any event, "raising the affirmative defense of § 230 [in] a motion to dismiss is improper and thus, should be denied," *id*. at 9.

The CDA, which has not been extensively construed within this Circuit, provides that "[n]o provider or user of an interactive computer service shall be

[2] Among other arguments, the plaintiff devotes a portion of his opposition to discussing the public policy and legislative intent underlying the CDA. Pl.'s Opp'n at 3-5. The Court declines the plaintiff's invitation to elevate policy considerations above the plain meaning of the statute, and instead "must give effect to the plain meaning of the words Congress has chosen." *News Am. Publ'g, Inc. v. FCC,* 844 F.2d 800, 806 (D.C. Cir. 1988).

treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The Act, in turn, defines an "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, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). An "information content provider" is defined as "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." 47 U.S.C. § 230(f)(3). By its plain terms, then, the CDA immunizes internet computer service providers from liability for the publication of information or speech originating from third parties. 47 U.S.C. § 230(c)(1); *see also Blumenthal v. Drudge,* 992 F. Supp. 44, 49 (D.D.C. 1998) ("Congress . . . in enacting the [CDA] . . . made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others.").

The Court must therefore grant the defendants' motion to dismiss if it answers three questions in the affirmative: (1) whether the defendants are "provider[s] . . . of an interactive computer service," 47 U.S.C. § 230(c)(1); (2) whether the plaintiff seeks to treat the defendants as "publisher[s] or speaker[s] of

any information provided," *id*.; and (3) whether the information at issue was published "by another information content provider," *id*. *See Parisi v. Sinclair,* 774 F. Supp. 2d 310, 315-16 (D.D.C. 2011) (citing *Nemet Chevrolet, Ltd., v. Consumeraffairs.com, Inc.*, 564 F. Supp. 2d 544, 548 (E.D. Va. 2008), *aff'd,* 591 F.3d 250 (4th Cir. 2009)). Contrary to the plaintiff's arguments, Pl.'s Opp'n at 9, the Court may grant a motion to dismiss on CDA grounds, *Nemet Chevrolet, Ltd.,* 591 F.3d at 260.

A. Are the defendants providers of an interactive computer service?

"Courts generally conclude that a website falls within" the definition of an interactive computer service. *Ascentive, LLC v. Opinion Corp.,* 842 F. Supp. 2d 450, 473 (E.D.N.Y. 2011) (collecting cases from the First, Fourth, and Ninth Circuits). At least one court has treated defendants who provided services similar to those at issue in this case as interactive computer service providers. *See, e.g., Doe v. MySpace, Inc.,* 528 F.3d 413, 415, 418-19, 422 (5th Cir. 2008) (affirming district court's dismissal of tort claims against defendant who provided an interactive computer service by creating and maintaining an "[o]nline social networking" website). And other courts have specifically found that "Facebook meets the definition of an interactive computer service under the CDA." *Fraley v. Facebook, Inc.,* 830 F. Supp. 2d 785, 801-802 (N.D. Cal. 2011); *see also Young v. Facebook, Inc.,* No.

5:10-cv-03579, 2010 WL 4269304 at *5 (N.D. Cal. Oct. 25, 2010).

As the defendants explain, Defs.' Mem at 2, and as the plaintiff describes in his complaint, Compl. ¶¶ 4, 7, 12, the defendants maintain a website that gives its users the ability to create, upload, and share various types of information, potentially with hundreds of millions of other users. In other words, the defendants "provide[ ] or enable[ ] computer access by multiple users to a computer server," 47 U.S.C. § 230(f)(1), and the Court finds that they are therefore interactive computer service providers.

B. Does the plaintiff seek to hold the defendants liable as publishers or speakers of information published by another information content provider?

As another court has observed, when examining a plaintiff's claims through the lens of the CDA, courts must ask whether the alleged conduct "derives from the defendant's status or conduct as a publisher or speaker. If it does, [§] 230(c)(1) precludes liability." *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096, 1102 (9th Cir. 2009) (internal quotation marks omitted); *see also Zeran v. America Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997) ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions . . . are barred."). Although this Circuit has not examined the definition of the word "publisher" within the meaning of the CDA,

other courts have construed the term as referring to one who "review[s], edit[s], and decid[es] whether to publish *or to withdraw from publication* third-party content." *Barnes,* 570 F.3d at 1102 (citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC,* 521 F.3d 1157, 1170-71 (9th Cir. 2008) and *Webster's Third New International Dictionary* 1837 (Philip Babcock Gove ed., 1986)) (emphasis added); *see also Green v. Am. Online,* 318 F.3d 465, 471 (3d Cir. 2003) (describing decisions "whether to publish, withdraw, postpone, or alter content" as falling within "a publisher's traditional editorial functions" (quoting *Zeran,* 129 F.3d at 330) (internal quotation marks omitted)).

The plaintiff in this case asserts two state law causes of action: assault and negligence. Given that the action was filed in the District of Columbia, the law of the District might govern the plaintiff's claims. However, the defendants argue that California state law should control the plaintiff's claims, Defs.' Mem. at 11, and the plaintiff does not dispute the defendants' position, *see generally* Pl.'s Opp'n. The choice of law is of no moment, however, because the elements of each cause of action are identical under both California state law and the law of the District of Columbia. Assault is defined as "an intentional and unlawful attempt or threat, either by words or by acts, to do physical harm to the victim." *Etheredge v. Dist. of Columbia,* 635 A.2d 908, 916 (D.C. 1993); *see also Thing v. La Chusa,* 48 Cal.3d 644, 649 (Cal. 1989) ("'A civil action for assault is based upon an

invasion of the right of a person to live without being put in fear of physical harm.' " (citation omitted)). And in order to prevail on a claim of negligence, the plaintiff "must show: (1) that the defendant owed a duty to the plaintiff, (2) breach of that duty, and (3) injury to the plaintiff that was proximately caused by the breach." *Hedgepeth v. Whitman Walker Clinic,* 22 A.3d 789, 793 (D.C. 2011); *see also Juarez v. Boy Scouts of Am., Inc.*, 81 Cal. App. 4th 377, 401 (Cal. Ct. App. 2000) (citing *Nally v. Grace Cmty. Church,* 47 Cal.3d 278, 292-93 (Cal. 1988)).

As to the assault claim, the plaintiff alleges that the defendants "marketed, used, and allowed [Facebook] to be used" to "intentionally, violently and without just cause" assault the plaintiff. Compl. ¶ 17. As to the negligence claim, the plaintiff alleges that the defendants "owed [him] a duty of care, which they violated and breached by allowing and furthering the death threats by the Third Palestinian Intifada, and . . . refus[ing] . . . to remove these postings." *Id*. ¶ 19. Accordingly, and with respect to both claims, the defendants' alleged conduct ascribed to them the status of publishers of information, whether by "using" the website to post certain content (i.e., publishing), *id*. ¶ 17, "allow[ing]" certain content to be posted to the website (i.e., deciding whether to publish), *id*. ¶¶ 17, 19, or by "refus[ing] . . . to remove these postings," *id*. ¶ 19. The defendants' potential liability is thus "derive[d] from [their] status or conduct as a publisher or speaker." *Barnes,* 570 F.3d at 1102.

The plaintiff argues, however, that the defendants' alleged conduct does not arise from the defendants' status as publishers, but rather from their violation of "contractual, quasi-contractual and fiduciary obligations" and that the defendants are thus not entitled to immunity under the CDA. Pl.'s Opp'n at 5 (citing *Barnes,* 570 F.3d at 1107). Leaving aside the question of whether the plaintiff's argument is legally sound, the Court notes that, unlike in *Barnes,* upon which the plaintiff relies, Pl.'s Opp'n at 5, the complaint here is devoid of any references to any contractual cause of action. *See Barnes,* 570 F.3d at 1099 ("Barnes . . . refers *in her complaint* and in her briefs to Yahoo's 'promise' to remove the indecent profiles and her reliance thereon to her detriment. We construe such references to allege a [breach of contract] cause of action." (emphasis added)). Instead, the plaintiff raises the possibility of contractual liability for the first time in his opposition to the defendants' motion to dismiss. Pl.'s Opp'n at 5-6. It begs credulity that the plaintiff, a "highly visible and well known lawyer," Compl. ¶ 11, would not have included a claim for breach of contract if he contemplated such a claim as a viable possibility. In light of the plaintiff's failure to assert a breach of contract claim or to plead facts consistent with such a claim, as well as his failure to amend his complaint when given the opportunity to do so, September 16, 2011 Order at 1-2 (ECF # 30); March 23, 2012 Order at 1-2 (ECF # 34), the Court declines to entertain the plaintiff's attempt to essentially re-fashion his complaint to now include a claim for breach of contract, *Larson*

v. Northrop Corp., 21 F.3d 1164, 1173-74 (D.C. Cir. 1994) (affirming district court's grant of summary judgment in favor of defendant where plaintiff "failed to plead" a new cause of action, "raised the issue for the first time in his opposition to . . . [the defendant's] motion," and had not adequately pleaded the new cause of action in his complaint).

C. Were the defendants acting as information content providers?

The plaintiff seems to acknowledge that "*another* information content provider," 47 U.S.C. § 230(c)(1) (emphasis added), created the information, Compl. ¶¶ 17, 19. He argues, however, that the defendants are subject to liability under the CDA because they are, themselves, information content providers. Pl.'s Opp'n at 6-8. The defendants reply that they cannot be categorized as information content providers because they "were not responsible for the 'creation or development' of the offending content." Defs.' Reply at 8 (quoting 47 U.S.C. § 230(f)(3)).

While the defendants might well be information content providers as to some information on their website, other courts have framed the relevant question to be whether a defendant "function[s] as an 'information content provider' for the portion of the statement or publication at issue." *Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119, 1123 (9th Cir. 2003); *see also Roskowski v. Corvallis Police Officers' Ass'n,* 250 Fed. App'x 816, 816-17 (9th Cir. 2007) ("To

the extent that [the plaintiff] . . . has not shown that [the defendant] made those postings itself, [the plaintiff] cannot hold [the defendant] liable for the content of the postings."); *Nemet Chevrolet, Ltd.,* 591 F.3d at 260 (affirming district court's dismissal of complaint where plaintiff failed to show that defendant "was responsible for the creation or development of the allegedly defamatory content *at issue*" (emphasis added)). And another member of this Court has stated that "[§] 230(c)(1) would not immunize [the defendant] with respect to any information [the defendant] developed or created entirely by itself and [ ] there are situations in which there may be two or more information content providers responsible for material disseminated on the Internet." *Blumenthal,* 992 F. Supp. at 50. Restricting a defendant's liability as an information content provider to information actually created or developed by the defendant, in whole or at least in part, is in keeping with the stated policy of the CDA "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2). The Court will therefore follow the approach of the Ninth Circuit, Fourth Circuit and the *Blumenthal* Court.

The plaintiff argues only that the "[d]efendants encouraged [the Third Palestinian Intifada Facebook page] . . . by failing to remove" the page "in a timely manner." Pl.'s Opp'n at 8; *see also* Compl. ¶ 7 (alleging that the defendants "refused" to remove the page).

Nowhere in his complaint or in his opposition brief does the plaintiff allege that the defendants contributed to the content of the Facebook page at issue. Rather, as described above, the plaintiff focuses on the role that the defendants played in *publishing* the Facebook page.[3] The plaintiff's own allegations are inconsistent with a finding that the defendants acted as information content providers with respect to the offensive material at issue. The Court thus finds that the defendants are not information content providers within the meaning of the CDA.

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[3] The plaintiff asserts in his opposition that the defendants are nonetheless information content providers because they collect data from Facebook users and then use that data "to make suggestions" to users about content in which the users might be interested. Pl.'s Opp'n at 7-8. Even if this is the case, such actions do not constitute the creation or development of information. Indeed, courts have held in other cases that the manipulation of information provided by third parties does not automatically convert interactive computer services providers into information content providers. *Blumenthal,* 992 F. Supp. at 51-52 (interactive computer service provider that "exercis[ed] editorial control" over content on its website was not an information content provider); *Ben Ezra, Weinstein, & Co., v. Am. Online, Inc.,* 206 F.3d 980, 985-86 (10th Cir. 2000) (internet computer service provider that edited and altered stock quotation information at the request of third parties was not an information content provider); *Carafano,* 339 F.3d at 1123-24 (interactive computer service provider's categorization of postings on website "does not transform [it] into" an information content provider).

IV. CONCLUSION

Because (1) the defendants provide an interactive computer service, (2) the plaintiff's complaint attempts to hold the defendants liable as publishers or speakers of a third party's information, and (3) the defendants are not, themselves, information content providers with respect to the information at issue, the defendants are immune to suit in accordance with the CDA, and the Court must grant the defendants' motion to dismiss.[4]

SO ORDERED this 28th day of December, 2012.

REGGIE B. WALTON
United States District Judge

[4] The Court will contemporaneously issue an Order consistent with this Memorandum Opinion.

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA CIVIL DIVISION

LARRY KLAYMAN, 2000 Pennsylvania Avenue NW, #345 Washington, DC 20006 Plaintiff, v. MARK ZUCKERBERG AND FACEBOOK, INC. 1601 S. California Avenue Palo Alto, CA 94304 Defendants.	Civil Action No. 002481-11

COMPLAINT

(Filed May 10, 2011)

1. Jurisdiction of this court is founded on D.C. Code Annotated. 2001 edition, as amended, Sec.11-921.

2. Plaintiff, Larry Klayman, is an American citizen of Jewish origin, who at all material times does business at 2000 Pennsylvania Avenue NW, #345, Washington, DC 20006 as the Chairman and General Counsel of Freedom Watch.

3. Defendant, Mark Zuckerberg, is an individual who at all times mentioned herein resides in California.

4. Defendant, Facebook, Inc., is a New York corporation, who at all material times has corporate headquarters in Palo Alto, California, and engages in

social networking via the internet. In the recent film "Social Network," Hollywood depicted the questionable business and ethical practices of its alleged founder, Defendant Mark Zuckerberg. While Facebook is innovative and has done much good, it can also be used a vehicle for bad purposes, and that is the case in this instance. Facebook and Zuckerberg have made huge amounts of money based on their success and the revenues generated by the huge and growing viewership of Facebook. Viewership is growing fast and exponentially, particularly in the Middle East, for obvious reasons dealing with the Islamic revolution there, and efforts by opposition groups to overthrow governments and establish a Palestinian state on the West Bank, and other matters. Palestinians have threatened the destruction of Israel and the Jewish people if they do not get this state on the West Bank. This is coupled with centuries of hatred by radical Palestinians against the Jewish people, manifesting itself in at least three wars – all of which they lost – since Israel was established by the United Nations in 1948.

5. Defendants do business in the District of Columbia (DC) and their Facebook is widely viewed and read here, including by radical Palestinians and other such Muslim and anti-semitic interests residing in DC and the Metropolitan area, as well as around the world.

6. Plaintiff, at all material times, has a Facebook account, titled Larry Klayman.

7. Plaintiff has encountered the Facebook page titled "Third Palestinian Intifada" (Intifada FB Page) through the use of his above-named Facebook page. This Intifada FB Page at all material times calls, and called for an uprising beginning on May 15, 2011, after Muslim prayers are completed, announcing and threatening that "Judgment Day will be brought upon us only once Muslims have killed all the Jews." This Intifada FB Page has had over 360,000 participants. According to reports, three similar FB Intifada pages have come up with over 7,000 subscribers. In the last days, the Public Diplomacy Minister of Israel, Yuli Edelstein, accurately stated in a letter to Facebook founder Mark Zuckerberg that the Intifada FB Page featured "wild incitement" with call to kill Jews and talk of liberating Jerusalem through violence. He asked that Mark Zuckerberg and Facebook take down the page and similar and related pages, but Defendants refused, obviously to boost Facebook's circulation and revenues, as this page created enormous controversy and thus viewership. It also resulted in Facebook adding large amount of additional users to its site, particularly in the Middle East and elsewhere.

8. Thus, the Intifada FB Page, and related and similar pages on Facebook openly advocate an intifada against and thus death to persons of Jewish origin.

9. An Intifada is commonly described as a violent revolt by Muslims against non-Muslims, particularly against Jews.

10. There have been two previous Intifadas against people of Jewish origin by radical Palestinians. The first occurred between 1987 and 1993, and resulted in the civilian death toll of 164 Jews. The second occurred between 2000 and 2005 and resulted in the civilian death toll of 1,115 Jews. The threats and terrorist attacks on Jews have taken place and continue even without regard to formal Intifadas. In the last weeks, there have been two terrorist attacks, killing even Jewish children.

11. Plaintiff, Larry Klayman, is a public interest human, civil and individual rights activist who is "active" in matters concerning the security of Israel and all people, including but not limited to Jews, Christians and Muslims who believe in freedom, and the rights of persons of all races and religions to not be discriminated against, to live in peace, worship as they wish as long as they do not harm others, and the rights of man not to be harmed in any way on the basis of national and religious origins. Under the organization Freedom Watch, Inc., Plaintiff has recently filed suit in the Supreme Court of New York to enjoin the building of a mosque at Ground Zero, which is allegedly a front for terrorist-related interests, and/or would create a nuisance as it would draw more activities relating to terrorism to the Ground Zero neighborhood and New York City. In response, the Imam of this mosque, Imam Feisal Rauf, effectively issued a Fatwah against Mr. Klayman and his client, Vincent Forras, a famous and brave First Responder who was buried under the rubble at Ground

Zero on September 11, 2001. Mr. Forras was nearly killed, and now because of chemical poisoning and other contamination at Ground Zero, is fatally ill and taking over 23 medications. Mr. Klayman and Mr. Forras, who is also Jewish, were branded publicly by Rauf, importantly a Muslim cleric, to the Muslim/ Palestianian [sic] world an enemy of Islam in the New York Post, all over the internet and in other publications read by Palestinians and other radical Muslims in particular. This was a signal to severely cause bodily harm to, or kill, Mr. Klayman and Mr Forras, and it signals to the Palestinians, many of whom reside in Washington, D.C., and throughout the United States, to do so during a Third Intifada. Plaintiff is a highly visible and well known lawyer, advocate, writer, television and radio commentator, and pubic [sic] figure who is a recognized expert on terrorism and the Middle East. He is widely known in the Muslim/Arabic world for his support of Israel and has been called by it a "Zionist." See www.freedomwatchusa.org and Google.

12. When Mark Zuckerberg and Facebook were initially asked to remove the Intifada FB Page and related pages, they refused for many days, on information and belief to boost their revenues and the net worth of Facebook, which they have been marketing through the "legally challenged" firm of Golman [sic] Sachs which has been under federal and state investigation for its unethical and potentially illegal business practices which caused in part the current and on-going economic crisis worldwide. Now – after

many days where significant damage has already been done – they have for the time being begrudgingly done so, but on information and belief only for a short while, given the pressure brought by concerned persons and entities around the world, including Plaintiff. In effect, Defendants, Zuckerberg and Facebook, to further their revenues and the net worth of Facebook, which is traded by Goldman Sachs and other investment firms, are joint tortfeasors and acting in concert in the on-going threats and assaults on Plaintiff and other Jews. This is so because the threats and damage are continuing and are "out there," having been published and continuing to be republished on the internet worldwide, and elsewhere. According to the Intifada FB page, and the continuing republication of it, the attacks on Jews and others will commence on or about May 15, 2011 and are imminent. That is why the Defendants must be preliminary and permanently enjoined now, so as not to increase the harm they have already allowed to occur and participated in. Plaintiff believes in free speech, but free speech is not free speech when it is designed and intended to harm others physically and by death, constituting a clear and present danger. Defendants, by furthering this conduct, may increase the viewership, revenues and net worth to Facebook and themselves, but otherwise do harm to Plaintiff and those similarly situated. The Israeli Public Diplomacy Minister Yuli Edelstein has been quoted as saying, "I welcome that decision although I am sure more cat-and-mouse games (by Defendants and the Palestinians) await us . . . "

13. Plaintiff reserves his right to amend this complaint and convert it into a class action in the public interest.

COUNT I – ASSAULT

14. Plaintiff incorporates paragraphs 1 to 13 of this Complaint as if fully alleged herein.

15. Given the violent history of Intifadas as described in Paragraph 9, the Facebook page titled "Third Palestinian Intifada," and other related and similar sites, amount to a threat of the use of force against non-Muslims, and particularly Jews, who are public figures like Plaintiff who, as alleged above, have already had a de facto Fatwah issued against him and who is a target to be harmed and/or killed by radical Muslims, many of whom exist in the Palestinian community.

16. Given the violent history of Intifadas as described in Paragraph 9, the Intifada Facebook Page and other related and similar sites have caused Plaintiff reasonable apprehension of severe bodily harm and/or death.

17. Defendants, each and every one of them, jointly and severally, have intentionally, violently, and without just cause assaulted Plaintiff for their own financial gain. As depicted in the award winning film "Social Network," Defendant Zuckerberg in particular lacks strong ethical and moral character, having cheated his partners out of their shares and/or ownership in

Facebook early on, for which he was forced to pay large settlements once sued. Now, for financial reasons, he has marketed, used, and allowed to be used, Facebook against the interests of his own people, the Jewish people, and Plaintiff. Plaintiff was damaged thereby, particularly since he is a public figure who is well known and highly visible and has fought against the terrorist and nefarious purposes of these Palestinian and other related Arabic extremists. See www.freedomwatchusa.org and Google.

COUNT II – NEGLIGENCE

18. Plaintiff incorporates paragraghs [sic] 1 through 17 of this Complaint as if fully alleged herein.

19. As a subscriber to Facebook and as a member of the public, Defendants owed Plaintiff a duty of care, which they violated and breached by allowing and furthering the death threats by the Third Palestinian Intifada, and related and similar sites. In particular, the refusal by Defendants to remove these postings when they were asked to do so by the Government of Israel, Plaintiff and others who were directly affected, further underscores their negligence, gross negligence and recklessness, which rises to the level of wanton and intentional conduct.

20. Plaintiff was thereby damaged.

WHEREFORE, Plaintiff demands the judgment for preliminary and permanent injunctive relief against each of the Defendants, and respectfully requests this

court to enjoin Defendants from allowing the Facebook page titled "Third Palestinian Intifada," and other related and similar sites, which advocate violence and death to Jews, like Plaintiff and others, from operating on facebook.com, now and in the future. Plaintiff also prays for compensatory and punitive damages in an amount in excess of $1,000,000,000.00 (One Billion Dollars), plus an award of attorneys fees and costs.

Plaintiff prays for a trial by jury of all claims so triable.

Respectfully submitted,

/s/ Larry Klayman
Larry Klayman
DC Bar No.: 334581
2000 Pennsylvania Avenue NW, #345
Washington, DC 20006

Pro Se