

No. 21-1582

**United States Court of Appeals
for the First Circuit**

RIAN G. WATERS

Plaintiff-Appellant,

v.

FACEBOOK INC.; GOOGLE LLC.; AIDAN KEARNEY,

Defendants-Appellees

KATHERINE PETER; JEREMY HALEY; MARTHA SMITH-BLACKMORE; WILLIAM
HIGGINS; JIM DALTON; MAURA TRACY HEALEY; JOHN DOES (1-10),

Defendants,

On Appeal from the United States District Court
District of Massachusetts, Civil Action No. 3:20-CV-30168-MGM
The Honorable Mark G. Mastroianni, District Judge

RESPONSE BRIEF OF APPELLEE FACEBOOK, INC.

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FACEBOOK, INC.’S CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Facebook, Inc.,¹ states (a) that it has no parent corporation and (b) that no publicly held corporation owns 10% or more of Facebook, Inc.’s stock.

s/ Erica S. Miranda

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¹ On October 28, 2021, Facebook, Inc. changed its name to Meta Platforms, Inc. Because the proceedings in the district court in this matter occurred prior to the name change, and for ease of reference, Defendant-Appellee continues to refer to the party identified in the pleadings as “Facebook, Inc.”

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction in this appeal pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 4(a)(4)(A)(iv).

II. STATEMENT OF THE ISSUES

As to Defendant Facebook, Appellant Rian G. Waters' opening brief raises the following issues:

1. Did the district court properly dismiss Mr. Waters' claims against Facebook for failure to state a claim, including (1) 42 U.S.C. § 1983, (2) 42 U.S.C. § 1986, (3) 18 U.S.C. § 1962(d), (4) breach of the implied warranty of merchantability, and (5) gross negligence?
2. Did the district court properly exercise its discretion in denying Mr. Waters' motion for an order governing extrajudicial statements under District of Massachusetts Local Rule 83.2.2?
3. Did the district court properly exercise its discretion in denying Mr. Waters' motion for relief from judgment under Federal Rule of Civil Procedure 60(b)?^{2, 3}

² Mr. Waters did not comply with Federal Rule of Appellate Procedure 30(b)(1). Accordingly, Facebook submits a supplemental appendix.

³ Mr. Waters also asserts that an issue in this appeal is whether 42 U.S.C. § 1985(3) "provides a remedy for conspiracies with a political animus." (AOB at 2). Mr. Waters' operative complaint does not allege against Facebook any

III. STATEMENT OF THE CASE

This lawsuit arises out of a personal dispute between Mr. Waters and an individual named Aidan Kearney. Kearney allegedly cyber-bullied Mr. Waters across multiple online platforms, including Kearney's blog, Facebook, and YouTube.⁴ In response to that dispute, Mr. Waters filed suit against a disparate collection of defendants—including Facebook—alleging a far-reaching conspiracy involving police officers, his public defender, judges of the Commonwealth of Massachusetts, and even the Massachusetts Attorney General. The operative amended complaint is at docket entry 81-1.⁵

In his amended complaint, Mr. Waters makes only sparse allegations relating to Facebook. The bulk of his factual allegations focus on Kearney's alleged cyber-bullying.⁶ He also alleges that police officers and the Massachusetts Attorney General's office were part of Kearney's scheme, and the Massachusetts

violation of 42 U.S.C. § 1985(3). *See* Dkt. 89 at 1 (FBAPP120) (granting Mr. Waters' motion to amend his complaint); Dkt. 81-1 at ¶¶ 132–149 (alleging violation of 42 U.S.C. § 1985(3) against only Aidan Kearney and Katherine Peter) (FBAPP111–FBAPP113). Accordingly, this issue does not arise as to Facebook.

⁴ Dkt. 81-1 ¶¶ 28–29, 33–34, 75 (FBAPP094–FBAPP095, FBAPP101).

⁵ *See* Dkt. 89 at 1 (FBAPP120) (granting Mr. Waters' motion to amend his complaint); Dkt. 81-1 (FBAPP089–FBAPP119).

⁶ *Id.* ¶¶ 28–29, 33–34, 75 (FBAPP094–FBAPP095, FBAPP101).

judges who adjudicated Mr. Waters’ state court suit against Kearney tolerated Kearney’s alleged misconduct.⁷

As to Facebook, the amended complaint fixates on Mr. Waters’ belief that Facebook does not properly enforce its Terms of Service against Kearney and Kearney’s ever-growing number of accounts, many of which are allegedly set up under fake names.⁸ It further alleges that a Facebook algorithm caused offensive content created by Kearney and others to appear in the news feeds and notification of Mr. Waters’ friends and family.⁹ Mr. Waters claims that Facebook somehow joined the alleged far-reaching conspiracy against him, but his amended complaint does not allege *any connection* between Facebook and Kearney other than that Kearney is one of Facebook’s 2 billion-plus users. Nor does the amended complaint allege that anyone at Facebook communicated with Kearney or was in any way involved in Kearney’s alleged campaign against Mr. Waters.¹⁰

⁷ *Id.* ¶¶ 16–17, 19–23 (FBAPP092–FBAPP093).

⁸ *Id.* ¶¶ 26–32 (FBAPP094–FBAPP095).

⁹ *Id.* ¶¶ 36, 42, 163 (FBAPP095, FBAPP096, FBAPP115).

¹⁰ On appeal, Mr. Waters introduces new allegations that certain purported Facebook employees spoke with Kearney and put him on a list that would allow him to post offensive content without ramifications. *See* AOB at 23, 52; Waters Affidavit ¶ 5 (ADD028). These allegations were never included in any of the multiple complaints Mr. Waters filed, and he cannot introduce them on appeal. *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 11 (1st Cir. 2003) (“it is a virtually ironclad rule that a party may not advance for the first time on appeal either a new argument or an old argument that depends on a new factual predicate”); *see also Rosaura Bldg. Corp. v. Municipality of Mayaguez*, 778 F.3d 55, 63 (1st Cir. 2015)

Based on these threadbare allegations, Mr. Waters brought the following claims against Facebook: breach of the implied warranty of merchantability (Count I); gross negligence (Count II); failure to prevent a violation of his rights under 42 U.S.C. § 1986 (Count IV); conspiracy to engage in racketeering activity under 18 U.S.C. § 1962(d) (Count VI); and violation of the Eighth Amendment of the United States Constitution via 42 U.S.C. § 1983 (Count IX).¹¹

After due consideration (spanning seven months, five iterations of Mr. Waters' complaint, twelve motions from Mr. Waters) and liberal construction of Mr. Waters' amended complaint, the district court concluded that Mr. Waters failed to state a claim against any Defendant and dismissed his action.¹² With respect to the claims against Facebook, the district court held that Mr. Waters cannot state constitutional claims because Facebook is not a state actor (Count IX), and that Mr. Waters failed to allege facts suggesting that Facebook entered into

(same); *Emp'r Ins. Co. of Wasau v. OneBeacon Am. Ins. Co.*, 744 F.3d 25, 29 (1st Cir. 2014) (same).

Moreover, Mr. Waters' own appendix reflects that Facebook did not enter into any agreement with Kearney to let him post content that violated its Terms of Service—much less any agreement to violate Mr. Waters' civil rights. Mr. Waters quotes a passage from Kearney's book in which Kearney says the purported Facebook employee told him “he *wasn't* going to discuss removal of posts[.]” *See* Dkt. 68 at 14 (RA068) (emphasis added).

¹¹ *See* Dkt. 81-1 (FBAPP089–FBAPP119).

¹² *See* Dkt. 89 at 1–5 (FBAPP120–FBAPP124).

any conspiratorial agreement (Count VI) or knew of and failed to prevent any conspiracy to violate his civil rights (Count IV).¹³ Having dismissed the federal law claims against Facebook, the district court declined to exercise supplemental jurisdiction over the remaining state law claims (Count I & II).¹⁴ The district court also explained that an *in forma pauperis* appeal from its dismissal “would not be taken in good faith.”¹⁵

Undeterred, Mr. Waters moved the court to amend its judgment relying on his recycled and deficient arguments, which the district court considered and denied.¹⁶ He subsequently filed a motion for relief from judgment, which the district court again considered and denied.¹⁷ Mr. Waters now appeals.¹⁸

IV. SUMMARY OF ARGUMENT

The district court liberally construed Mr. Waters’ pleadings and nevertheless concluded that he failed to state a claim against Facebook. The district court’s analysis is correct and should be affirmed. None of Mr. Waters’ arguments to the

¹³ See *id.* at 2–4 (FBAPP121–FBAPP123).

¹⁴ *Id.* at 4 (FBAPP123).

¹⁵ *Id.* (FBAPP123) (citing 28 U.S.C. § 1915(a)(3)).

¹⁶ See Dkt. 91 (FBAPP126–FBAPP127); Dkt. 91-1 (FBAPP128–FBAPP136); Dkt. 93 (FBAPP149).

¹⁷ See Dkt. 98-1 (FBAPP152–FBAPP153); Dkt. 98-2 (FBAPP154–FBAPP190); Dkt. 99 (FBAPP192–FBAPP193).

¹⁸ See Dkt. 94 (FBAPP150–FBAPP151).

contrary is meritorious. Mr. Waters did not state claims against Facebook under Section 1983 because Facebook is not a state actor. He did not state a claim under Section 1985 because he does not allege any facts supporting an agreement by parties to deprive him of equal protection of the law based on his membership in a protected class. He did not state a claim under Section 1986 because he did not allege that Facebook knew of any alleged conspiracy or had the power to prevent it. Furthermore, the district court did not err by dismissing with prejudice Mr. Waters' federal claims, after Mr. Waters offered five iterations of his complaint.

Mr. Waters offers two further challenges to the district court's rulings, both of which fail. First, the district court did not abuse its discretion in denying Mr. Waters' motion for an order governing extrajudicial statements because it had already dismissed the case in its entirety, and the case was not sensational or widely publicized. Second, although Mr. Waters' opening brief challenges the district court's denial of his motion for relief from a final judgment under Federal Rule of Civil Procedure 60(b), he did not timely file a notice of appeal from that denial. And even if he had properly appealed, the district court did not abuse its discretion in concluding that Mr. Waters failed to show exceptional circumstances or misconduct, as required for Rule 60(b) relief.

This Court should affirm the district court's dismissal of Mr. Waters' claims against Facebook.

V. ARGUMENT

A. Standard of Review

This Court “review[s] de novo a district court’s dismissal of a complaint for failure to state a claim.”¹⁹ This Court reviews the district court’s orders related to declining to exercise supplemental jurisdiction, Mr. Waters’ motion under District of Massachusetts Local Rule 83.2.2, and Mr. Waters’ motion under Federal Rule of Civil Procedure 60(b) for an abuse of discretion.²⁰

B. The district court properly dismissed Mr. Waters’ claims against Facebook.

The district court’s dismissal order liberally construed the amended complaint.²¹ It then correctly determined that Mr. Waters failed to state any claim

¹⁹ *Garcia-Catalan v. United States*, 734 F.3d 100, 102 (1st Cir. 2013); *Bradshaw v. Corr. Med. Servs., Inc.*, 6 Fed. App’x 45, 46 (1st Cir. 2001) (unpublished per curiam) (*de novo* standard of review applies to complaints dismissed under 28 U.S.C. § 1915(e)(2)(B)(ii)).

²⁰ *See Signs for Jesus v. Town of Pembroke, NH*, 977 F.3d 93, 114 (1st Cir. 2020) (“We review a district court’s decision regarding the exercise of supplemental jurisdiction for abuse of discretion”); *Crowley v. L.L. Bean, Inc.*, 361 F.3d 22, 25 (1st Cir. 2004) (“we have held that the application of a district court’s local rule is reviewed for abuse of discretion”); *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 19 (1st Cir. 2002) (“we defer broadly to the district court’s informed discretion in granting or denying relief from judgment, and we review its ruling solely for abuse of that discretion”).

²¹ Dkt. 89 at 2 (FBAPP121).

for relief and was therefore barred from proceeding under 28 U.S.C.

§ 1915(e)(2)(B).²²

1. The district court properly held that Mr. Waters failed to state a claim.

a. The district court properly dismissed each of Mr. Waters’ federal law claims against Facebook.

Mr. Waters alleges that Facebook violated his civil rights and conspired to engage in racketeering activity. Specifically, he alleges that Facebook violated his Eighth Amendment rights under Section 1983, conspired to interfere with federal court proceedings or to deprive him of equal protection of the law under Section 1985—and/or knew of such conspiracies but refused to prevent them—and conspired to engage in racketeering activity.

42 U.S.C. § 1983 (Count IX)—Pursuant to Section 1983, Mr. Waters alleges that Facebook violated his Eighth Amendment rights.²³ Section 1983 provides a private right of action against a person who, under color of state law, deprives another of rights secured by the Constitution or laws of the United States.²⁴ But Mr. Waters cannot bring a Section 1983 claim against Facebook because it is a private actor.²⁵ As this Court has held, “[i]f there is no state action,

²² *Id.* (FBAPP121) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

²³ Dkt. 81-1 ¶¶ 150–166 (FBAPP113–FBAPP116).

²⁴ *Harrington v. City of Nashua*, 610 F.3d 24, 28 (1st Cir. 2010).

²⁵ Mr. Waters tries to reframe this claim as a due process claim under the

then the court may not impose constitutional obligations on (and thus restrict the freedom of) private actors.”²⁶ And while there may be limited circumstances in which there is “such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself,”²⁷ the district court properly concluded that those circumstances do not exist here.

“Defendants are not state actors and [Mr. Waters] does not allege that their conduct is ‘fairly attributable’ to the state[.]”²⁸ so Mr. Waters’ Section 1983 claim against Facebook fails. Indeed, Courts routinely dismiss Section 1983 claims brought against Facebook and other internet companies on this basis alone.²⁹

Fourteenth Amendment rather than a cruel and unusual punishment claim under the Eighth Amendment. (AOB at 33–36.) This distinction is without a difference, as he still fails to allege that Facebook’s conduct amounts to state action.

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

²⁷ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

²⁸ Dkt. 89 at 2 (FBAPP121).

²⁹ *See, e.g., Prager Univ. v. Google LLC*, 951 F.3d 991, 997–99 (9th Cir. 2020) (“YouTube may be a paradigmatic public square on the Internet, but it is ‘not transformed’ into a state actor solely by ‘provid[ing] a forum for speech,’” and noting that “the state action doctrine precludes constitutional scrutiny of YouTube’s content moderation pursuant to its Terms of Service and Community Guidelines”); *DeLima v. YouTube, LLC*, 2018 WL 4473551, at *4 (D.N.H. Aug. 30, 2018) (“Defendants are all private companies. DeLima has failed to allege any state action giving rise to the alleged violations of her First Amendment rights [.]”), *report and recommendation adopted sub nom. DeLima v. YouTube Inc.*, 2018 WL 4471721 (D.N.H. Sept. 18, 2018), *aff’d sub nom. Delima v. YouTube, Inc.*, 2019 WL 1620756 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 555 (2019); *Atkinson v.*

The district court properly concluded that Mr. Waters’ Section 1983 claim against Facebook fails “because Defendants are not state actors and [Mr. Waters] does not allege that their conduct is ‘fairly attributable’ to the state.”³⁰ On appeal, Mr. Waters offers a variety of theories as to why he thinks Facebook’s actions (or its lack thereof) constitute action attributable to the state: compulsion, symbiotic relationship with law enforcement, joint action, conspiracy, and inaction.³¹ But, as the district court correctly recognized, the amended complaint alleges no facts to support any of these theories.³² In fact, Mr. Waters’ amended complaint does not allege that Facebook worked with or was compelled to act by *any* state official.³³

Facebook, Inc., 3:20-CV-05546-RS, slip op. at 4-5 (N.D. Cal. Dec. 7, 2020); *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1303-04 (N.D. Cal. 2019) (“Facebook is not a state actor, and the First Amendment only applies to state actors[.]”); *Fehrenbach v. Zeldin*, 2018 WL 4242452, at *3 (E.D.N.Y. Aug. 6, 2018) (dismissing constitutional claims against Facebook for failure to establish that Facebook is a state actor); *Nyabwa v. Facebook*, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018) (same); *Shulman v. Facebook.com*, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (same); *Forbes v. Facebook, Inc.*, 2016 WL 676396 at *2 (E.D.N.Y. Feb. 18, 2016) (declining to hold that Facebook’s actions could be attributable to state); *Young v. Facebook, Inc.*, 2010 WL 4269304, at *2 (N.D. Cal. Oct. 25, 2010) (dismissing section 1983 action against Facebook for failure to allege “action under color of state law”).

³⁰ Dkt. 89 at 2 (FBAPP121).

³¹ AOB at 16–27.

³² *Id.*; Dkt. 89 at 2 (FBAPP121); *see, e.g., Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1311 (N.D. Cal. 2019) (“there are no factual allegations in Plaintiffs’ complaint that would support a finding that Facebook satisfies the joint action test”).

³³ *Alexis v. McDonald’s Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 351

For the first time on appeal, Mr. Waters argues that Facebook should be liable as a state actor because he believes that some unidentified algorithm incentivizes some politicians to take unfavorable positions and that Facebook does not sufficiently enforce its Terms of Service against some politicians. Because these allegations appear nowhere in Mr. Waters’ amended complaint, they should not be considered on appeal.³⁴ In any event, Mr. Waters does not explain how these allegations—even if considered—relate to his action, much less establish state action.³⁵

Finally, Mr. Waters’ opening brief also attempts to morph his state law claims for “product design” (Count I) and “gross negligence” (Count II) into a claim under Section 1983 for failure to train.³⁶ Mr. Waters did not allege a Section 1983 claim on these grounds to the district court and therefore cannot present them as a new claim on appeal.³⁷ Moreover, this re-packaged version of Mr. Waters’

(1st Cir. 1995) (“Where a private individual is a defendant in a section 1983 action, there must be a showing that the private party and the state actor jointly deprived plaintiff of her civil rights”).

³⁴ *Cochran*, 328 F.3d at 11 (“party may not advance for the first time on appeal . . . an old argument that depends on a new factual predicate”).

³⁵ *See* AOB at 22.

³⁶ *See id.* at 28–30, 32–33.

³⁷ *Cochran*, 328 F.3d at 11 (“a party may not advance for the first time on appeal . . . a new argument”).

state law claims still fails because state action is required to state a claim under Section 1983, and Facebook is not a state actor.

42 U.S.C. § 1985 (Counts III & VII)—Mr. Waters’ appears to argue that Facebook joined some conspiracy to interfere with a federal court action under Section 1985(2) or to deprive him of equal protection of the law based on his membership in a protected class under Section 1985(3).³⁸ Those arguments should be rejected. First, Mr. Waters does not allege these claims against Facebook in his amended complaint, nor does he allege any facts supporting an agreement by any parties to deprive him of equal protection of the law based on his membership in a protected class.³⁹ Second, as the district court held, Mr. Waters’ allegation that Facebook and Google had some profit-based motivation for declining to remove Kearney’s posts about him does not amount to a conspiratorial agreement under Section 1985.⁴⁰

³⁸ See AOB at 15–16, 46–47.

³⁹ See Dkt. 81-1 ¶¶ 73–87, 132–136 (FBAPP101–FBAPP104, FBAPP111–FBAPP112) (alleging Section 1985(2) claims against Aidan Kearney and Google and alleging Section 1985(3) claims against Aidan Kearney and Katherine Peter); see also *Cochran*, 328 F.3d at 11 (“a party may not advance for the first time on appeal . . . a new argument”).

⁴⁰ Dkt. 89 at 3 (FBAPP122); see *Pigott v. Lynn Police Dep’t*, 7 F.3d 218 (1st Cir. 1993) (“Purely conclusory allegations of conspiracy are not adequate to state a claim”).

42 U.S.C. § 1986 (Count IV)—Mr. Waters further argues that Facebook, in violation of Section 1986, knew of and failed to prevent the alleged conspiracy between Kearney and Google to interfere with this federal case.⁴¹ The district court properly dismissed this claim, explaining that Mr. Waters did not adequately allege that Facebook “kn[ew] about a Section 1985 conspiracy and refus[ed] to prevent it.”⁴² Mr. Waters’ opening brief neither provides any argument nor identifies any allegations to support his assertion that this conclusion was improper.

Moreover, the district court was required to dismiss the derivative Section 1986 claim against Facebook⁴³ because it had already concluded that Mr. Waters failed to allege any underlying conspiracy under Section 1985.⁴⁴ And even if Mr. Waters had alleged that Facebook had knowledge of some alleged conspiracy between Kearney and Google or Kearney and Peter, he could not possibly allege that Facebook had any power to prevent it because Kearney’s videos with the “obstructing material” are hosted on YouTube, a platform operated by Google.⁴⁵

⁴¹ Dkt. 81-1 ¶¶ 88–96 (FBAPP104–FBAPP105).

⁴² Dkt. 89 at 3 (FBAPP122).

⁴³ *Maymi v. Puerto Rico Ports Auth.*, 515 F.3d 20, 31 (1st Cir. 2008).

⁴⁴ Dkt. 89 at 3 (FBAPP122)

⁴⁵ Dkt. 81-1 ¶¶ 11, 69, 79–83 (FBAPP091, FBAPP100, FBAPP102–FBAPP103).

18 U.S.C. § 1962(d) (Count VI)—The district court also concluded that Mr. Waters failed to allege racketeering activity or any conspiracy to engage in racketeering activity under the civil RICO statute.⁴⁶ Mr. Waters’ opening brief does not challenge the dismissal of his RICO claim.

Accordingly, the district court properly concluded that Mr. Waters did not state any federal claims against Facebook.

b. The district court properly declined to exercise supplemental jurisdiction over Mr. Waters’ state law claims.

After concluding that Mr. Waters failed to state a claim under federal law, the district court properly declined to exercise supplemental jurisdiction over Mr. Waters’ state law claims pursuant to 28 U.S.C. § 1367(c).⁴⁷ This determination is reviewed for abuse of discretion.⁴⁸ Here, the district court did not abuse its discretion because it dismissed the federal claims early in the litigation, before the parties invested in *any* “pretrial discovery, trial preparation, or the like.”⁴⁹ Mr. Waters identifies the basis for supplemental jurisdiction, 28 U.S.C. § 1367(a), but

⁴⁶ Dkt. 89 at 3–4 (FBAPP122–FBAPP123).

⁴⁷ *Id.* at 4 (FBAPP123).

⁴⁸ *Signs for Jesus*, 977 F.3d at 114.

⁴⁹ *Rivera-Diaz v. Humana Ins. of Puerto Rico, Inc.*, 748 F.3d 387, 392 (1st Cir. 2014) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 530 n.7 (1988) (“in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims”)).

offers no basis to conclude that the district court abused its discretion in declining to exercise that jurisdiction.⁵⁰

The district court also properly rejected Mr. Waters' claim that it had original diversity jurisdiction over his state law claims⁵¹, and Mr. Waters' assertion to the contrary is simply wrong.⁵² For the district court to have original jurisdiction over a state law claim, the amount in controversy must exceed \$75,000, and the action must be between citizens of different states.⁵³ This requires complete diversity,⁵⁴ which means that "no plaintiff is a citizen of the same state as any defendant."⁵⁵ Mr. Waters, Kearney, and Peter are all citizens of Massachusetts.⁵⁶ So, the district court properly determined that it lacks diversity jurisdiction over Mr. Waters' action.

In any event, Mr. Waters does not argue on appeal that he adequately pled his state law claims against Facebook for breach of the implied warranty of

⁵⁰ AOB at 1.

⁵¹ Dkt. 89 at 4 (FBAPP123) (citing 28 U.S.C. § 1332).

⁵² AOB at 1.

⁵³ 28 U.S.C. § 1332(a)(1).

⁵⁴ *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996).

⁵⁵ *Gabriel v. Preble*, 396 F.3d 10, 13 (1st Cir. 2005) (citing *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806); *Am. Fiber & Finishing, Inc. v. Tyco Healthcare Group, LP*, 362 F.3d 136, 139 (1st Cir. 2004)).

⁵⁶ Dkt. 81-1 ¶¶ 7, 13–14 (FBAPP091).

merchantability or gross negligence. Instead, he asserts that these claims are “best read as providing causation for [his claim under] § 1983[,]” asserting that Facebook’s routine operation of its platform somehow provided “substantial assistance or encouragement” to Kearney’s allegedly tortious conduct.⁵⁷ Mr. Waters is not permitted to raise for the first time on appeal new claims not presented to the district court.⁵⁸ Moreover, as addressed in Part V.B.1.a, the district court properly found that Mr. Waters did not state a claim under Section 1983 against Facebook because he did not plausibly allege that Facebook is a state actor.

2. This Court need not rule on Mr. Waters’ Section 230(c)(1) arguments.

Because the district court concluded that Mr. Waters failed to adequately plead *any* of his claims, it did not reach the parties’ arguments as to whether such claims would be barred by Section 230(c)(1) of the Communications Decency Act (CDA).⁵⁹ There is therefore no need for this Court to reach Mr. Waters’ Section 230 arguments in order to affirm the district court’s judgment.⁶⁰

⁵⁷ AOB at 28–33.

⁵⁸ *Cochran*, 328 F.3d at 11 (“it is a virtually ironclad rule that a party may not advance for the first time on appeal . . . a new argument”).

⁵⁹ *See generally* Dkt. 89 (FBAPP120–FBAPP124).

⁶⁰ In any event, Section 230(c)(1) protects Facebook from suit because Mr. Waters’ claims seek to hold Facebook liable as a publisher for the content created by Facebook’s users. *See* Dkt. 50 (FBAPP029–FBAPP056); *see also Universal*

3. The district court did not err by dismissing Mr. Waters' federal claims with prejudice.

Mr. Waters argues that the district court did not give him an opportunity to be heard and erred by *sua sponte* dismissing with prejudice his federal claims.⁶¹

Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18–19 (1st Cir. 2016). Courts routinely dismiss at the pleading stage claims such as Mr. Waters', which seek to hold Facebook or other online platform operators liable for allegedly offensive or hurtful content posted by another user. *See, e.g., Riggs v. MySpace, Inc.*, 444 F. App'x 986, 987 (9th Cir. 2011) (motion to dismiss); *Federal Agency of News LLC*, 395 F. Supp 3d at 1303-04 (same); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1064–66 (N.D. Cal. 2016) (same); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095–96 (N.D. Cal. 2015), *affirmed sub nom, Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (same); *Obado v. Magedson*, 2014 WL 3778261, at *7–9 (D.N.J. July 31, 2014), *aff'd*, 612 F. App'x 90 (3d Cir. 2015) (same); *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1122–23 (E.D. Cal. 2010) (same); *Doe II v. MySpace, Inc.*, 175 Cal. App. 4th 561, 565–68 (2009) (demurrer); *Cross v. Facebook*, 14 Cal. App. 5th 190, 213 (2017) (anti-SLAPP).

Moreover, Mr. Waters' argument that Section 230 is unconstitutional is wrong. Section 230 is a shield from civil liability for non-governmental parties. It does not require or prohibit private actors from doing anything, nor does it constitute government regulation of private speech. Numerous courts have rejected arguments that Section 230 is unconstitutional. *See, e.g., Lewis v. Google LLC*, 461 F. Supp. 3d 938, 952–53 (N.D. Cal. 2020), *aff'd*, 851 F. App'x 723 (9th Cir. 2021), *cert denied*, No. 21-419, 2021 WL 5043635 (U.S. Nov. 1, 2021) ("to the extent Plaintiff argues that subdivision (c)(1) violates the First Amendment, it is not clear how," as this "provision does not ban or restrict any speech"); *Green v. Am. Online (AOL)*, 318 F.3d 465, 472 & n.4 (3d Cir. 2003) (rejecting First Amendment and commerce clause challenges to Section 230); *Parker v. Paypal, Inc.*, 2017 WL 3508759, at *7 (E.D. Pa. Aug. 16, 2017) (rejecting due process and Tenth Amendment challenges); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 994 (S.D. Tex. 2017) (rejecting arguments that Section 230 is unconstitutional as applied based on due process and full faith and credit principles).

⁶¹ AOB at 8–9, 11–12.

He is wrong.

First, Mr. Waters is factually wrong that he was not fully heard. He filed five versions of his complaint and ten motions before the district court. The district court allowed Mr. Waters every opportunity to be heard, and the district court properly dismissed his action after liberally construing the allegations in his amended complaint and finding that Mr. Waters failed to state a claim.⁶²

Second, the *in forma pauperis* statute expressly provides that a district court may dismiss “at any time” a complaint that fails to state a claim on which relief may be granted.⁶³ This Court routinely affirms these *sua sponte* dismissals with prejudice where it agrees that a plaintiff failed to state a claim.⁶⁴

Accordingly, the district court properly dismissed with prejudice Mr. Waters’ federal law claims.⁶⁵

⁶² Dkt. 89 at 2 (FBAPP121).

⁶³ 28 U.S.C. § 1915(e)(2)(B)(ii).

⁶⁴ See, e.g., *Truman v. Armstrong*, 2018 WL 11241356, at *1 (1st Cir. Aug. 7, 2018) (affirming *sua sponte* dismissal pursuant to 28 U.S.C. § 1915); see also, e.g., *Papadopoulos v. US Gov’t*, 2019 WL 3253229, at *2 (D. Mass. July 18, 2019), *aff’d sub nom. Papadopoulos v. United States Gov’t, FBI*, 2020 WL 8513586 (1st Cir. Oct. 30, 2020); *Amatucci v. Town of Wolfeboro*, 2017 WL 6816483, at *3 (D.N.H. Dec. 18, 2017), *report and recommendation adopted*, 2018 WL 317815 (D.N.H. Jan. 5, 2018), *aff’d sub nom. Amatucci v. Town of Wolfeboro, NH*, 2019 WL 11025876 (1st Cir. Dec. 6, 2019).

⁶⁵ Facebook acknowledges that Mr. Waters’ state-law claims, over which the district court properly declined to exercise supplemental jurisdiction, cannot be dismissed with prejudice. See *Sexual Minorities Uganda v. Lively*, 899 F.3d 24, 35 (1st Cir. 2018) (“It is clear beyond hope of contradiction that a district court, upon

C. The district court did not abuse its discretion by denying as moot Mr. Waters’ motion for an order under District of Massachusetts Local Rule 83.2.2.

Mr. Waters asserts the district court should not have denied his motion for an order governing extrajudicial statements.⁶⁶ Again, he is wrong.

As an initial matter, it is unclear if this motion was intended to seek relief solely as to Kearney or as to each of the Defendants.⁶⁷ In any event, the district court did not abuse its discretion in denying the motion.⁶⁸ The court properly denied the motion as moot given that it dismissed Mr. Waters’ action in its entirety. Moreover, an order under Local Rule 83.2.2 is only available in a “widely publicized or sensational . . . civil case[.]”⁶⁹ Mr. Waters provides no allegations, evidence, or argument that this action is either widely publicized or sensational.⁷⁰ Finally, Mr. Waters fails to argue that Facebook has made any

appropriately declining to exercise supplemental jurisdiction, must dismiss the unadjudicated state-law claims without prejudice, not with prejudice”).

⁶⁶ AOB at 53–54.

⁶⁷ See Dkt. 71-1 (FBAPP074–FBAPP081).

⁶⁸ See *Crowley*, 361 F.3d at 25 (“we have held that the application of a district court’s local rule is reviewed for abuse of discretion”).

⁶⁹ D. Mass. L.R. 83.2.2.

⁷⁰ *Id.*; AOB at 53–54.

statements concerning this action such that it should be subject to any order limiting its speech.⁷¹

D. Mr. Waters did not appeal the district court’s ruling on his motion under Federal Rule of Civil Procedure 60(b)(3), which was properly denied.

Finally, Mr. Waters argues that the district court erred in denying his motion under Federal Rule of Civil Procedure 60(b).⁷² But Mr. Waters is barred from raising that argument here, as he did not timely file a notice of appeal from the district court’s October 12, 2021 order denying that motion.⁷³ The only orders from which Mr. Waters timely appealed are the May 11, 2021 order dismissing his complaint and the July 22, 2021 order denying his motion under Federal Rule of Civil Procedure 59(e).⁷⁴ Accordingly, this Court lacks jurisdiction to review the Rule 60(b) order.⁷⁵

⁷¹ *Id.*; AOB at 53–54.

⁷² *Id.* at 10–11.

⁷³ *See* Dkt. 98-1 (FBAPP152–FBAPP153); Dkt. 98-2 (FBAPP154–FBAPP190); Dkt. 99 (FBAPP192–FBAPP193); *see also* Fed. R. App. Proc. 4(a)(4)(B)(ii); Fed. R. App. Proc. 4(a)(1)(A).

⁷⁴ Dkt. 94 (FBAPP150–FBAPP151).

⁷⁵ *Atlas Glass & Mirror, Inc. v. Tri-North Builders, Inc.*, 997 F.3d 367, 377 (1st Cir. 2021) (“The district court’s order denying that [Rule 60(b)] motion came after Atlas filed its appeal, and Atlas did not amend its notice of appeal or file a second one . . . We are barred from reviewing on appeal ‘any judgment, order or decree,’ in a civil case ‘unless notice of appeal is filed . . . after the entry of such judgment, order or decree’”) (quoting 28 U.S.C. § 2107(a)).

But even if Mr. Waters had timely appealed the district court’s denial of his Rule 60(b) motion, his arguments are unavailing. Relief under Rule 60(b) is “extraordinary in nature[,]” and a party seeking such relief “must persuade the trial court, at a bare minimum, that his motion is timely; that exceptional circumstances exist, favoring extraordinary relief; that if the judgment is set aside, he has the right stuff to mount a potentially meritorious claim or defense; and that no unfair prejudice will accrue to the opposing parties should the motion be granted.”⁷⁶ In addition to the extraordinary nature of obtaining relief under Rule 60(b) in the first instance, this court reviews the district court’s denial solely for an abuse of discretion.⁷⁷

To obtain relief under Rule 60(b)(3) for alleged misconduct, a movant must demonstrate that misconduct by clear and convincing evidence and show that the misconduct foreclosed full and fair presentation of his case.⁷⁸ The district court concluded that Mr. Waters’ claims of misconduct “are simply incredible” and that he had not been inhibited his pursuit of this action.⁷⁹ Not only did the district court

⁷⁶ *Karak*, 288 F.3d at 19.

⁷⁷ *See id.* (“we defer broadly to the district court’s informed discretion in granting or denying relief from judgment, and we review its ruling solely for abuse of that discretion”).

⁷⁸ *Id.* at 20–21 (citing *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988)).

⁷⁹ Dkt. 99 (FBAPP193) (citing *Karak*, 288 F.3d at 21).

not abuse its discretion, it was also right. Mr. Waters does not identify any evidence—much less clear and convincing evidence—that Facebook has engaged in any wrongdoing toward him and his pursuit of this action.⁸⁰

Mr. Waters did not challenge the district court’s denial of his motion under the catchall provision in Rule 60(b)(6). Accordingly, he accepts the district court’s ruling as to his argument for relief on that basis.

VI. CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court affirm the judgment of the district court dismissing Mr. Waters’ baseless claims against Facebook.

Dated: November 15, 2021 Respectfully submitted,

s/ Erica S. Miranda

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⁸⁰ See Dkt. 98-3 (FBAPP191).

CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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