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## **A Federal Rules of Civil Procedure Rule 12(b)(6) Simulated Ruling Using *Atkinson v. Facebook et al.* as the Basis for the Simulation**



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**ABSTRACT:** This essay simulates a Federal Rules of Civil Procedure Rule 12(b)(6) ruling by a federal court. The case that serves as the basis for this simulation is *Atkinson v. Facebook et al.* The simulated ruling is not the actual ruling, but a simulated ruling, demonstrating how the Willing criteria can be successfully employed when a federal court rules on a Rule 12(b)(6) motion. The methodology that is employed herein reviews the counts in *Atkinson's* complaint, presuming that a Rule 12(b)(6) was filed for each count. Each ruling is divided into three parts. In the first part, a summary of the count is discussed. Second, the reasons why the count is not appropriate is described. Finally, the Willing criteria are employed, showing where the motion fits within the criteria. Finally, for each motion, the essay concludes whether the Rule 12(b)(6) motions should either be granted or rejected with or without prejudice.

**KEYWORDS:** *Atkinson v. Facebook et al.*, *Bell Atlantic Corp. v. Twombly*, *Conley v. Gibson*, FRCP Rule 12(b)(6), Willing Criteria

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### **INTRODUCTION**

The purpose of this article is to simulate a ruling on a Federal Rule of Civil Procedure (FRCP) Rule 12(b)(6) motion. The case that is employed in this simulation is *Atkinson v. Facebook et al.*, where Plaintiff Cameron L Atkinson (Mr. Atkinson) sued the Defendants Facebook, Inc (Facebook) and Mark Zuckerberg (Mr. Zuckerberg) for violation of his civil rights regarding the removal of three postings about Eric Ciaramella (Mr. Ciaramella). The postings were entered into the Facebook website to test the company's community standards policies. The Defendants seek to have the Plaintiff's complaint dismissed based on the FRCP Rule 12(b)(6) or failure to state a claim upon which relief may be granted. Four of the five motions were granted with prejudice. The motion to dismiss where the claim was based on fraud was dismissed without prejudice because, in the court's opinion, more facts were needed to adjudicate the motion. Plaintiff may refile their complaint, where fraud is the only issue considered.

### **ANALYSIS**

The Analysis section is divided into two parts. The first subsection addresses the conditions under a complaint is dismissed under the Federal Rule of Civil Procedure (FRCP) 12(b)(6), where a "district court must construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his [or her] claims that would entitle him [or her] to relief."<sup>1</sup> The second subsection provides a factual background of the events surrounding *Atkinson v. Facebook et al.*

### **CONDITIONS FOR DISMISSAL**

In the five motions contained herein, the defendants are asking the court to dismiss the plaintiffs' complaints based on FRCP Rule 12(b)(6), where there is a "failure to state a claim upon which relief can be granted."<sup>2</sup> To survive an FRCP Rule 12(b)(6) motion, a plaintiff must demonstrate the reasons they are entitled to relief above and beyond labels and conclusions or a formal recitation of

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<sup>1</sup> *Amadasu v. The Christ Hospital*, 514 F.3d 504, 506 (6th Cir. 2008), quoting *Columbia National Res., Inc. v. Tatum*, 58 F3d 1101, 1109 (6th Cir. 1995).

<sup>2</sup> *Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing*, LEGAL INFORMATION INSTITUTE (n.d.), available at [https://www.law.cornell.edu/rules/frcp/rule\\_12](https://www.law.cornell.edu/rules/frcp/rule_12).

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the elements of a cause of action.<sup>3</sup> <sup>4</sup> In *Twombly*, the Supreme Court opined that a complaint does not have to contain detailed factual statements but that “[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.”<sup>5</sup> Also, in *Twombly*, the Court rejected the FRCP Rule 12(b)(6) standard from *Conley*, where “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>6</sup> Finally, in *Twombly*, the Court characterized the rule as an “incomplete, negative gloss on an accepted pleading standard.”<sup>7</sup>

The FRCP also provides that a district court may *sua sponte* (i.e., “of one’s own accord; voluntarily”<sup>8</sup>) grant summary judgment by converting an FRCP Rule 12(b)(6) motion into a summary judgment by presuming that “[i]f, on a motion under FRCP Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under FRCP Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”<sup>9</sup> <sup>10</sup> FRCP Rule 12(c) states that when the pleadings are closed, either the Plaintiff or the defendant may ask the court for a judgment on the pleadings. If the parties present materials that are not contained in the pleadings, the motion is viewed as a summary judgment.<sup>11</sup>

According to Hamabe, the purpose of FRCP Rule 12(b)(6) is to “test pure questions of law on the face of the complaint” by performing substantive and procedural justice and fair notice.<sup>12</sup> The purpose of FRCP Rule 12(b)(6) is to limit the employment of civil procedure in the interests of judicial economy and the interests of the defendant.<sup>13</sup> Disputes from a plaintiff can be classified as (1) substantively entitled to a legal claim, (2) not clear if a plaintiff is substantively entitled to a legal claim due to legal or factual ambiguities, or (3) not entitled to a legal claim because there is an expectation of an unjust settlement, a misunderstanding of substantive law, or some other inappropriate reason.<sup>14</sup>

Hamabe observed that FRCP Rule 12(b)(6) motions ask whether a claimant’s allegations or legality are sufficiently specific.<sup>15</sup> Under FRCP Rule 12(b)(6), a plaintiff must present some substantive legal theory and information that is much more than mere conjecture.<sup>16</sup> In other words, a claim can be dismissed for lack of a substantive legal theory, but in these instances, an FRCP Rule 12(b)(6) motion will be decided on a legal question.<sup>17</sup>

Willging characterized factual allegations as absent, conclusory, highly improbable, or conceivable.<sup>18</sup> According to Hamabe, FRCP Rule 12(b)(6) motions predicated on factual and legal deficiencies can be categorized as follows:

- (A) No legal theory at all based on well-settled rules (frivolous cases);
- (B) Questionable legal grounds that are used to establish a claim (substantive law question);
- (C) No factual allegation of an essential element of a recognized legal theory;
- (D) A conclusory or general allegation of an essential element of recognized legal theory;
- (E) Highly improbable factual allegation of an essential element of a recognized legal theory;
- (F) Conceivable set of facts that are alleged to support the essential elements that establish legal grounds; and

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<sup>3</sup> *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), available at [https://scholar.google.com/scholar\\_case?case=913703117340005992&q=Bell+Atlantic+Corp.+v.+Twombly&hl=en&as\\_sdt=400006&as\\_vis=1](https://scholar.google.com/scholar_case?case=913703117340005992&q=Bell+Atlantic+Corp.+v.+Twombly&hl=en&as_sdt=400006&as_vis=1).

<sup>4</sup> *Association of Cleveland Firefighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007), available at <https://casetext.com/case/assoc-of-cleveland-v-cleveland>,

<sup>5</sup> *Bell Atlantic Corp. v. Twombly*, *supra*, note 3 at 1965-65.

<sup>6</sup> *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), available at <https://supreme.justia.com/cases/federal/us/355/41/>.

<sup>7</sup> *Bell Atlantic Corp. v. Twombly*, *supra*, note 3 at 1969.

<sup>8</sup> *Sua Sponte*, LEGAL INFORMATION INSTITUTE (n.d.), available at [https://www.law.cornell.edu/wex/sua\\_sponte](https://www.law.cornell.edu/wex/sua_sponte).

<sup>9</sup> *Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing*, *supra*, note 2 at 12(d).

<sup>10</sup> *Employers Insurance of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 104-05 (6th Cir. 1995), available at <https://casetext.com/case/employers-of-wausau-v-petroleum-specialties>.

<sup>11</sup> *Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing*, *supra*, note 2 at 12(c).

<sup>12</sup> Yoichiro Hamabe, *Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach*, 15 CAMPBELL L. REV. 2, 128-29 (Spring 1993), available at

<https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1249&context=clr>.

<sup>13</sup> *Id.* at 129.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 143.

<sup>16</sup> *Id.* at 144.

<sup>17</sup> FLEMING JAMES JR. ET AL., CIVIL PROCEDURE at 148 (Little Brown & Co Law 4th ed. 1992).

<sup>18</sup> THOMAS E, WILLGING, USE OF RULE 12(B)(6) IN TWO DISTRICT FEDERAL COURTS, 16 (Federal Judicial Center 1989).

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(G) Excessive or another defective form of pleading.<sup>19</sup>

In the (A) context, there is no doubt that the claim should be dismissed because no claim can be established.<sup>20</sup> In the (B) context, courts will have a substantive law problem, but not a procedural one, because the claim cannot be established as a matter of substantive law.<sup>21</sup> In the (C) context, cases are dismissed on technical or procedural grounds when neither legal facts nor grounds are alleged.<sup>22</sup> For the (D) context, the claim consists of conclusions or general allegations, providing the court with insufficient information about the questions to be presented and the defendant's ability to prepare a defense.<sup>23</sup> In the (E) context, a claim contains allegations of an essential element of an established legal theory that is highly improbable.<sup>24</sup> For the (F) context, a complaint possesses a collection of conceivable facts that support the essential elements of a well-known legal theory.<sup>25</sup> Finally, in the (G) context, a complaint may be dismissed outright via FRCP Rule 12(b)(6).<sup>26</sup> Thus, a claim may be dismissed by FRCP Rule 12(b)(6) for any context above other than the (F) context.<sup>27</sup>

It remains to define what is an essential element of a claim. According to Hamabe, the substantive legal elements of a claim include:

- A description of the relationship or situation between the parties;
- A description of the defendant's conduct that is a violation of their duty;
- The consequences to the Plaintiff where the law acknowledges as deserving compensation or justifying redress; and
- A demand or prayer for relief.<sup>28</sup>

Thus, the case's factual background can now be discussed with this understanding of the issues involved in granting or dismissing an FRCP Rule 12(b)(6) motion.

### FACTUAL BACKGROUND

The Plaintiff is Cameron L. Atkinson, a resident of New Haven County, Connecticut, who, at the time the action was filed, was a third-year law student with Quinnipiac University School of Law in New Haven, Connecticut. Facebook, Inc, is a social media company with headquarters in Menlo Park, California, and operates a social media web site serving approximately 2.3 billion users across the planet.<sup>29</sup> Mr. Zuckerberg is the Chairman and Chief Executive Officer (CEO) of Facebook, Inc. He owns a majority interest in the company's voting stock and resides in Palo Alto, California.<sup>30</sup>

### DESCRIPTION OF THE DEFENDANT

In *Packingham*, the Supreme Court opined that Facebook extended the notion of a quintessential public forum from parks and other physical places to cyberspace.<sup>31</sup> More than 65 percent of Americans have free Facebook accounts.<sup>32</sup> Facebook has a dominant or monopolistic position in the global Internet public forum, where the other companies controlling Internet traffic are Amazon, Apple, and Google.<sup>33</sup> Billions of instant messages, timeline posts, and visual stories are communicated daily among Facebook users. Facebook harvests the metadata associated with these entries, building predictive models that project for a profit how Facebook users will respond to third-party marketing efforts.<sup>34</sup> In 2018, Facebook reported gross revenue of \$55.8 billion.<sup>35</sup>

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<sup>19</sup> Yoichiro Hamabe, *supra*, note 12.

<sup>20</sup> *Id.* at 147

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 147-48.

<sup>23</sup> *Id.* at 148.

<sup>24</sup> *Id.* at 148-49.

<sup>25</sup> *Id.* at 149.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 171.

<sup>29</sup> Norman Pattis, *Atkinson v. Facebook: Here's the Writ*, THE BLOG OF NORMAN PATTIS (Nov. 12, 2019), available at <https://www.pattisblog.com/blog/7090/atkinson-v.-facebook-heres-the-writ/>.

<sup>30</sup> *Id.*

<sup>31</sup> *Packingham v. North Carolina*, 582 U.S. \_\_\_\_ (2017), available at <https://supreme.justia.com/cases/federal/us/582/15-1194/#tab-opinion-3749201>.

<sup>32</sup> *Facebook Usage Penetration in the United States from 2017 to 2026*, STATISTICA (2022), available at <https://www.statista.com/statistics/183460/share-of-the-us-population-using-facebook/>.

<sup>33</sup> Norman Pattis, *supra*, note 29.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

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During the 2016 presidential election, Facebook sold user data that Cambridge Analytica gathered.<sup>36</sup> It was believed that the information was used by Russian intelligence operatives attempting to influence American voters.<sup>37</sup> When the public became aware of how the data were being used, Facebook was confronted with tremendous pressure to protect the privacy of its users. In response, Facebook generated “community standards” for content posted on its site to ensure a safe environment by removing bullying and harassing content, even though the terms were undefined.<sup>38</sup> The Facebook community standards distinguished between public and private individuals, where the content would be removed if a public figure was directly tagged by a post. According to Mr. Atkinson, Facebook’s community standards were vague. The company allowed individuals to share and reshape posts if the intent was to condemn or focus attention on bullying and harassment.<sup>39</sup> Facebook reserves the right to remove offensive posts without notifying its originator or allowing them to clarify or edit a post, including temporarily or permanently disabling an account for violating community standards.<sup>40</sup> The issue is that the process of removing user posts is opaque. The criteria employed in determining community standards violations is unknown, where the interaction between computer algorithms and human beings in deciding what constitutes a violation is a mystery.<sup>41</sup>

### DISCUSSION ABOUT THE PLAINTIFF

Plaintiff Cameron L. Atkinson found out from friends that Facebook was allegedly censoring posts from political conservatives that mentioned Mr. Ciaramella, the suspected Ukrainian whistleblower who was initially responsible for the impeachment proceeding against then-President Donald Trump.<sup>42</sup> Mr. Atkinson decided to test Facebook’s censorship process by first posting the message, “Test post: Eric Ciaramella is a hero for blowing the whistle on the Trump administration’s treason with Ukraine.”<sup>43</sup> About four minutes later, Mr. Atkinson posted a second message that stated, “Test post 2: Eric Ciaramella is a dirty lying rat for trying to take down the Trump administration.”<sup>44</sup> About five hours later, Facebook removed both posts. Mr. Atkinson then generated a third post that stated:

“I have conflicting thoughts about the naming of Eric Ciaramella, the alleged Ukraine whistleblower. Tattling in the dark shadows destroys public confidence in a matter of serious interest. On the other hand, the vitriolic nature of our society may very well raise concerns for his safety. However, it may also end up protecting his well-being. Regardless, I think that people should be open to debating the merits of this serious public question.”<sup>45</sup>

Again, after approximately five hours, Facebook removed Mr. Atkinson’s third post without notification or warning. As of the filing of the suit, Mr. Atkinson contends that he has not yet received any notification from Facebook indicating why the three posts were removed.<sup>46</sup>

According to Mr. Atkinson, Facebook’s censorship of his three posts panders to and placates the company’s critics.<sup>47</sup> Mr. Atkinson propounded that Facebook applied its community standards in a politically-motivated manner that quashed both left-wing and right-wing speech that endangered the narrative to impeach Donald Trump.<sup>48</sup> Facebook’s efforts to censor the discussion of Mr. Ciaramella’s whistleblowing was an act of bad faith. When the three messages were posted, Mr. Atkinson only had 664 “friends,” in contrast to the 2.3 billion total Facebook users. Mr. Atkinson said he was neither bullying nor harassing Mr. Ciaramella but expressing his opinions on government acts.<sup>49</sup>

As a result of Facebook’s actions, Mr. Atkinson claimed that he suffered an ascertainable loss that prevented him from expressing his view in a public forum.<sup>50</sup> Mr. Atkinson further asserted that Mr. Zuckerberg had political ambitions beyond his

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<sup>36</sup> Alexandra Ma, & Ben Gilbert, *Facebook Understood How Dangerous the Trump-Linked Data Firm Cambridge Analytica Could Be Much Earlier than It Previously Said. Here's Everything That's Happened Up Until Now*, BUSINESS INSIDER (Aug. 23, 2019), available at <https://www.businessinsider.com/cambridge-analytica-a-guide-to-the-trump-linked-data-firm-that-harvested-50-million-facebook-profiles-2018-3>.

<sup>37</sup> *Id.*

<sup>38</sup> Norman Pattis, *supra*, note 29.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

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chairmanship of Facebook. Mr. Atkinson observed that his speech was censored because of ill-will, malice, and a desire to avert attention from himself and his company's data-mining efforts for profit, where his users wrongly believe that they are receiving a free service dedicated to promoting their welfare.<sup>51</sup>

### DISCUSSION

The Discussion section is broken up into five subsections based on the motions contained in the complaint. All subsections deal with whether a particular count can be dismissed based on FRCP 12(b)(6). Each motion is discussed separately. The first motion is concerned with a potential violation of the Communications Decency Act (CDA). The second motion addresses possible First Amendment violations. The third motion involves fraud. The fourth motion is related to the Connecticut Unfair Trade Practices Act. Finally, the fifth motion focuses on the implied warranty of good faith and fair dealing.

### MOTION FOR AN FRCP 12(B)(6) DISMISSAL BASED ON THE COMMUNICATIONS DECENCY ACT

According to Mr. Atkinson, the CDA gives Facebook immunity from civil liability for its users' materials published on its website.<sup>52</sup> The reason for the immunity is to preserve and encourage speech on the Internet.<sup>53</sup> Facebook is immune from being sued under Section 230 of the CDA.

Mr. Atkinson argued that the immunity from civil liability transforms Facebook's editorial decision-making process into a constructive public trust. A constructive trust is not an actual trust. It is a legal fiction that is employed to remedy unjust enrichment. There is no trustee, and the constructive trust orders the entity that would be unjustly enriched to transfer property to the intended party.<sup>54</sup> The elements of a constructive trust are: (1) the existence of a *res*, or property or an interest in the property, (2) a complaining party that possesses a right to that *res*, and (3) a wrongful acquisition or detention of the *res* by a party that is not entitled to that *res*.<sup>55</sup>

Mr. Atkinson did not provide any support that Congress desired to impose the management of a constructive trust due to Section 230 immunity.<sup>56</sup> In Mr. Atkinson's Complaint, the elements of a constructive trust are neither expressly stated nor are there any facts provided to demonstrate that the elements are satisfied. Mr. Atkinson merely concluded that a constructive public trust exists and that Facebook, as the alleged trustee, has violated its fiduciary duty to the public. There is no evidence in the Congressional Record indicating that Congress intended to create a constructive public trust when it gave Internet service providers such as Facebook immunity.<sup>57</sup>

When applying the Willging criteria as expressed in Hamabe, it is evident that Mr. Atkinson's theory fails in several respects. First, the argument is an example of context (B) because there are questionable legal grounds to establish a claim.<sup>58</sup> Second, context (C) is present because there are seemingly no factual allegations supporting the essential elements of a constructive public trust.<sup>59</sup> Finally, context (D) is satisfied because Mr. Atkinson's argument is clearly conclusory.<sup>60</sup> Thus, for these reasons, the motion by Facebook for an FRCP 12(b)(6) dismissal based on the CDA is granted with prejudice.

### MOTION FOR AN FRCP 12(B)(6) DISMISSAL BASED ON THE FIRST AMENDMENT

According to Mr. Atkinson, Facebook has a dominant position in controlling access to the Internet because of its alleged "quasi-monopolistic power over a quintessential public forum."<sup>61</sup> In enhancing its quasi-monopolistic power, Mr. Atkinson alleged that Facebook had hired teams of social psychologists to evaluate how users interact with its site to maximize the time spent.<sup>62</sup> Mr. Atkinson observed that when a user increases their time on Facebook's site, the company acquires more data on the individual,

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998), available at <https://casetext.com/case/zeran-v-america-online>.

<sup>54</sup> *Constructive Trust*, LEGAL INFORMATION INSTITUTE (n.d.), available at [https://www.law.cornell.edu/wex/constructive\\_trust](https://www.law.cornell.edu/wex/constructive_trust).

<sup>55</sup> *Communist Party v 522 Valencia, Inc.*, 35 CA4th 980, 990 (1995), available at <https://law.justia.com/cases/california/court-of-appeal/4th/35/980.html>.

<sup>56</sup> Eric Goldman, *Facebook Isn't a Constructive Public Trust—Cameron Atkinson v. Facebook*, TECHNOLOGY & MARKETING LAW BLOG (Dec. 29, 2020), available at <https://blog.ericgoldman.org/archives/2020/12/facebook-isnt-a-constructive-public-trust-cameron-atkinson-v-facebook.htm>.

<sup>57</sup> *Id.*

<sup>58</sup> Yoichiro Hamabe, *supra*, note 12.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Norman Pattis, *supra*, note 29.

<sup>62</sup> *Id.*



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resulting in a greater ability to predict how that individual will behave due to the firm's predictive models.<sup>63</sup> Mr. Atkinson further argued that because Section 230 has granted Facebook immunity, Congress has transformed Facebook into a state actor.<sup>64</sup> Mr. Atkinson argued that the relationship between the federal government and the firm is exemplified by Facebook enforcing subpoenas from law enforcement but not subpoenas from private attorneys.<sup>65</sup>

Mr. Atkinson's argument is weak. Mr. Atkinson has failed to demonstrate that Facebook was so entangled with the government that its actions could be shown to be state actions.<sup>66</sup> In opposition to FRCP Rule 8, Mr. Atkinson provided no specific facts that the federal government pressured Facebook or a causal connection existed between the so-called pressure and Facebook's actions, presumably meaning its community standards.<sup>67</sup> In other words, no facts have been presented to generate a plausible inference that the United States government demanded that the company generate its community standards that could serve as an armament against the Trump administration.<sup>68</sup>

Concerning Willging's criteria as espoused by Hamabe, context (B) applies because Mr. Atkinson posited questionable legal grounds to verify his claim.<sup>69</sup> One could argue that context (C) is relevant because there are no factual allegations that purport to demonstrate a First Amendment violation.<sup>70</sup> Context (D) is also pertinent because Mr. Atkinson's remarks are conclusory or can be construed as a general allegation of an essential element of an alleged First Amendment violation.<sup>71</sup> Finally, even if Atkin's statements in his complaint are considered correct, they are highly improbable, meaning that context (E) is pertinent.<sup>72</sup> Thus, based on the arguments above, Facebook's motion for an FRCP 12(b)(6) dismissal based on the First Amendment is granted with prejudice.

### MOTION FOR AN FRCP 12(B)(6) DISMISSAL BASED ON FRAUD

Mr. Atkinson asserted that Facebook holds itself out as encouraging people to communicate with one another.<sup>73</sup> Facebook offers its connection service to its users free of charge, but harvests the personal information of the participants, analyzes the data, and packages it for sale to third parties.<sup>74</sup> Mr. Atkinson claimed that its community standards are a "thinly veiled marketing device, eliminating content deemed unpopular by political parties, and interest groups to which [Facebook] implicitly support[s]."<sup>75</sup> Mr. Atkinson contended that political interest groups and politicians had exerted substantial public pressure to require Facebook to employ its community standards to censor specific speech, particularly speech from political conservatives.<sup>76</sup> Because the community standards are opaque and secretive, Mr. Atkinson concluded that Facebook could not promote free speech simultaneously, mainly when the company removes user posts without notice, an opportunity to be heard, or a review with a user.<sup>77</sup>

Thus, according to Mr. Atkinson, Facebook has committed fraud. In other words, Facebook is not "motivated by any broader concern with public policy, but [the company's actions are] instigated by a craven profiteering and marketing strategy" to maximize its marketing revenue.<sup>78</sup> Finally, according to Mr. Atkinson, Facebook's community standards are nothing more than a *bait-and-switch* to gather personal user information to sell the processed content at a profit.<sup>79</sup>

In this instance, Plaintiff has established a conceivable set of facts that seem to support the notion that Facebook may have committed fraud. In other words, in terms of the Willging criteria, as stated by Hamabe, context (F) applies.<sup>80</sup> However, Mr. Atkinson's complaint does not argue with sufficient particularity that fraud has occurred.<sup>81</sup> In other words, more facts are needed to

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> MetNews Staff Writer, *No Cause of Action Lies Against Facebook for Barring Posts*, METROPOLITAN NEWS-ENTERPRISE (Nov. 23, 2021), available at [http://www.metnews.com/articles/2021/Facebook\\_11232021.htm](http://www.metnews.com/articles/2021/Facebook_11232021.htm).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Yoichiro Hamabe, *supra*, note 12.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Norman Pattis, *supra*, note 29.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Yoichiro Hamabe, *supra*, note 12.

<sup>81</sup> Adam N. Hirsch, *It's All in the Details: The Importance of FRCP Rule 9 in Fraud Cases*, FINANCIAL POISE (Sep. 24, 2020), available at <https://www.financialpoise.com/frcp-rule-9-fraud/>.

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establish the existence of fraud. Thus, Facebook's motion for an FRCP 12(b)(6) dismissal based on fraud is granted without prejudice. Plaintiff may refile his complaint by providing the court with additional facts showing that fraud occurred.

### **MOTION FOR AN FRCP 12(B)(6) DISMISSAL BASED ON THE CONNECTICUT UNFAIR TRADE PRACTICES ACT**

Mr. Atkinson's Complaint stated that Facebook "holds [itself] out to the world as fostering a means by which the people of the world can communicate with one another without censorship."<sup>82</sup> Using previous assertions in the Complaint, Mr. Atkinson concluded that Facebook's behavior constituted unfair or deceptive acts or practices under the Connecticut Unfair Trade Practices Act.<sup>83</sup>

The problem with Mr. Atkinson's Complaint is that he does not explicitly state what parts of Connecticut's Unfair Trade Practices Act did Facebook violate. There were no additional facts provided to support his assertion. On its face, it appears that this motion is a defective form of pleading, and context (G) applies.<sup>84</sup> Thus, with prejudice, Facebook's motion for an FRCP 12(b)(6) dismissal based on the Connecticut Unfair Trade Practices Act is granted.

### **MOTION FOR AN FRCP 12(B)(6) DISMISSAL BASED ON THE IMPLIED WARRANTY OF GOOD FAITH AND FAIR DEALING**

According to Mr. Atkinson, he and other users have entered into contracts with Facebook regarding the terms and conditions under which they would use Facebook's website.<sup>85</sup> Mr. Atkinson claimed that he honored those terms and conditions of his contract.<sup>86</sup> Mr. Atkinson further opined that Facebook has administered these contracts in an "entirely self-serving manner, by changing the terms and conditions of the contracts without notice to the plaintiffs, and by otherwise behaving in an unconscionable manner for enormous financial gain."<sup>87</sup>

Furthermore, Mr. Atkinson argued that Mr. Zuckerberg is contemptuous of public oversight, regarding fines as the cost of doing business.<sup>88</sup> For example, Mr. Atkinson cited that Facebook set aside \$5 billion to pay an expected fine from the Federal Trade Commission (FTC) for its breaches of consumer privacy and other regulatory offenses in the United States and Europe.<sup>89</sup> Finally, Mr. Atkinson stated that punitive damages are necessary for this instance.<sup>90</sup>

Here, Mr. Atkinson claimed that Facebook's editorial decision to remove his three postings regarding Mr. Ciaramella was beyond the scope of Facebook's task to review material submitted for publication.<sup>91</sup> Mr. Atkinson's claim is fashioned as a contract cause of action, but what Mr. Atkinson is doing is accusing Facebook of invoking its community standards to decide whether to publish his posting.<sup>92</sup> Facebook's actions are well within a publisher's authority and responsibility.<sup>93</sup>

Given the Willging criteria, as stated by Hamabe, it is clear that Mr. Atkinson is employing questionable legal grounds to establish his claim.<sup>94</sup> In other words, context (B) applies.<sup>95</sup> Also, Mr. Atkinson's contention seems conclusory and a defective pleading, meaning that contexts (D) and (G) are relevant.<sup>96</sup> Thus, Facebook's motion for an FRCP 12(b)(6) dismissal based on an implied warranty of good faith and fair dealing is granted with prejudice.

### **CONCLUSION**

Accordingly, the essay recommends that four of the five motions for an FRCP 12(b)(6) dismissal be granted with prejudice. The motion by Facebook to dismiss a fraud claim based on FRCP 12(b)(6) be dismissed without prejudice. The parties to this action may object and seek review at the appellate level but are required to act within ten (10) days of service of a copy hereof as provided in 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right to appeal.<sup>97</sup> Filing some objections that raise some issues but fail to raise other issues with specificity will not preserve all of a party's objections to this

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<sup>82</sup> Norman Pattis, *supra*, note 29.

<sup>83</sup> *Id.*

<sup>84</sup> Yoichiro Hamabe, *supra*, note 12.

<sup>85</sup> Norman Pattis, *supra*, note 29.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Eric Goldman, *supra*, note 56.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Yoichiro Hamabe, *supra*, note 12.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Thomas v. Arn*, 474 U.S. 140 (1985), available at <https://supreme.justia.com/cases/federal/us/474/140/>.

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ruling.<sup>98</sup> The other party may file a response within ten (10) of service of any party's timely filed objections. The response can be no more than twenty (20) pages in length unless the court extends the page limit by motion and order. The response shall address each issue in the same order that the issue is raised.

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### Abbreviations:

The following abbreviations are used in this manuscript:

| Abbreviation   | Description                      |
|----------------|----------------------------------|
| CDA            | Communications Decency Act       |
| Facebook       | Facebook, Inc.                   |
| FRCP           | Federal Rules of Civil Procedure |
| Mr. Atkinson   | Cameron L Atkinson               |
| Mr. Ciaramella | Eric Ciaramella                  |
| Mr. Zuckerberg | Mark Zuckerberg                  |

### REFERENCES

- 1) *Amadasu v. The Christ Hospital*, 514 F.3d 504, 506 (6th Cir. 2008), quoting *Columbia National Res., Inc. v. Tatum*, 58 F3d 1101, 1109 (6th Cir. 1995).
- 2) Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing, Legal Information Institute (n.d.), available at [https://www.law.cornell.edu/rules/frcp/rule\\_12](https://www.law.cornell.edu/rules/frcp/rule_12).
- 3) *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), available at [https://scholar.google.com/scholar\\_case?case=913703117340005992&q=Bell+Atlantic+Corp.+v.+Twombly&hl=en&as\\_sdt=400006&as\\_vis=1](https://scholar.google.com/scholar_case?case=913703117340005992&q=Bell+Atlantic+Corp.+v.+Twombly&hl=en&as_sdt=400006&as_vis=1).
- 4) *Association of Cleveland Firefighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007), available at <https://casetext.com/case/assoc-of-cleveland-v-cleveland>,
- 5) *Bell Atlantic Corp. v. Twombly*, supra, note 3 at 1965-65.
- 6) *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), available at <https://supreme.justia.com/cases/federal/us/355/41/>.
- 7) *Bell Atlantic Corp. v. Twombly*, supra, note 3 at 1969.
- 8) Sua Sponte, LEGAL INFORMATION INSTITUTE (n.d.), available at [https://www.law.cornell.edu/wex/sua\\_sponte](https://www.law.cornell.edu/wex/sua_sponte).
- 9) Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing, supra, note 2 at 12(d).
- 10) *Employers Insurance of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 104-05 (6th Cir. 1995), available at <https://casetext.com/case/employers-of-wausau-v-petroleum-specialties>.
- 11) Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing, supra, note 2 at 12(c).
- 12) Yoichiro Hamabe, Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach, 15 CAMPBELL L. REV. 2, 128-29 (Spring 1993), available at <https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1249&context=clr>.
- 13) FLEMING JAMES JR. ET AL., CIVIL PROCEDURE at 148 (Little Brown & Co Law 4th ed. 1992).
- 14) THOMAS E, WILLGING, USE OF RULE 12(B)(6) IN TWO DISTRICT FEDERAL COURTS, 16 (Federal Judicial Center 1989).
- 15) Yoichiro Hamabe, supra, note 12.

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<sup>98</sup> *Willis v. Sullivan*, 931 F.2d 390, 401 (6th Cir. 1991), available at <https://casetext.com/case/willis-v-sullivan>.



## A Federal Rules of Civil Procedure Rule 12(b)(6) Simulated Ruling Using *Atkinson v. Facebook et al.* as the Basis for the Simulation

- 16) Norman Pattis, *Atkinson v. Facebook: Here's the Writ*, THE BLOG OF NORMAN PATTIS (Nov. 12, 2019), available at <https://www.pattisblog.com/blog/7090/atkinson-v.-facebook-heres-the-writ/>.
- 17) Alexandra Ma, & Ben Gilbert, *Facebook Understood How Dangerous the Trump-Linked Data Firm Cambridge Analytica Could Be Much Earlier than It Previously Said. Here's Everything That's Happened Up Until Now*, BUSINESS INSIDER (Aug. 23, 2019), available at <https://www.businessinsider.com/cambridge-analytica-a-guide-to-the-trump-linked-data-firm-that-harvested-50-million-facebook-profiles-2018-3>.
- 18) Norman Pattis, *supra*, note 29.
- 19) *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998), available at <https://casetext.com/case/zeran-v-america-online>.
- 20) Constructive Trust, LEGAL INFORMATION INSTITUTE (n.d.), available at [https://www.law.cornell.edu/wex/constructive\\_trust](https://www.law.cornell.edu/wex/constructive_trust).
- 21) *Communist Party v 522 Valencia, Inc.*, 35 CA4th 980, 990 (1995), available at <https://law.justia.com/cases/california/court-of-appeal/4th/35/980.html>.
- 22) Eric Goldman, *Facebook Isn't a Constructive Public Trust—Cameron Atkinson v. Facebook*, TECHNOLOGY & MARKETING LAW BLOG (Dec. 29, 2020), available at <https://blog.ericgoldman.org/archives/2020/12/facebook-isnt-a-constructive-public-trust-cameron-atkinson-v-facebook.htm>.
- 23) Yoichiro Hamabe, *supra*, note 12.
- 24) Norman Pattis, *supra*, note 29.
- 25) MetNews Staff Writer, *No Cause of Action Lies Against Facebook for Barring Posts*, METROPOLITAN NEWS-ENTERPRISE (Nov. 23, 2021), available at [http://www.metnews.com/articles/2021/Facebook\\_11232021.htm](http://www.metnews.com/articles/2021/Facebook_11232021.htm).
- 26) Yoichiro Hamabe, *supra*, note 12.
- 27) Norman Pattis, *supra*, note 29.
- 28) Yoichiro Hamabe, *supra*, note 12.
- 29) Adam N. Hirsch, *It's All in the Details: The Importance of FRCP Rule 9 in Fraud Cases*, FINANCIAL POISE (Sep. 24, 2020), available at <https://www.financialpoise.com/frcp-rule-9-fraud/>.
- 30) Norman Pattis, *supra*, note 29.
- 31) Yoichiro Hamabe, *supra*, note 12.
- 32) Norman Pattis, *supra*, note 29.
- 33) Eric Goldman, *supra*, note 56.
- 34) Yoichiro Hamabe, *supra*, note 12.
- 35) *Thomas v. Arn*, 474 U.S. 140 (1985), available at <https://supreme.justia.com/cases/federal/us/474/140/>.
- 36) *Willis v. Sullivan*, 931 F.2d 390, 401 (6th Cir. 1991), available at <https://casetext.com/case/willis-v-sullivan>.



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