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12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN JOSE DIVISION

16 FACEBOOK, INC.,

17 Plaintiff,

18 v.

19 POWER VENTURES, INC. a Cayman Island  
 20 Corporation; STEVE VACHANI, an  
 individual; DOE 1, d/b/a POWER.COM,  
 21 DOES 2-25, inclusive,

22 Defendants.

Case No. 5:08-cv-05780 JF (HRL)

**FACEBOOK INC.'S REPLY  
 MEMORANDUM IN SUPPORT OF  
 MOTION TO DISMISS AMENDED  
 COUNTERCLAIMS AND STRIKE  
 AMENDED AFFIRMATIVE  
 DEFENSES**

Date: February 26, 2010  
 Time: 9:00 a.m.  
 Judge: Hon. Jeremy D. Fogel  
 Courtroom: 3

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1 **I. INTRODUCTION**

2 This case is about one thing: Power wants to have access to Facebook’s website and its  
3 users without complying with Facebook’s Terms of Use. When Power first tried to fashion an  
4 antitrust claim out of its displeasure with Facebook’s right to control access to its site, this Court  
5 appropriately dismissed Power’s counterclaims. In response, Power has repeated the same  
6 argument – it wants access to Facebook’s site without complying with the Terms of Use – but  
7 now asserts that the Terms of Use are anticompetitive because other, unrelated websites allow  
8 third-party access different from Facebook’s and because Facebook enforces its policies. Those  
9 allegations cannot save these counterclaims; far from it. It is now clear that Power cannot state  
10 any antitrust or unfair competition claims against Facebook and the Court should grant  
11 Facebook’s motion to dismiss without leave to amend.

12 **II. ARGUMENT**

13 **A. POWER HAS FAILED TO STATE CLAIMS FOR MONOPOLIZATION**  
14 **OR ATTEMPTED MONOPOLIZATION UNDER SECTION 2 OF THE**  
**SHERMAN ACT**

15 **1. Power Has Not Alleged Facts That Plausibly Establish Facebook’s**  
16 **Practices To be Predatory.**

17 Since the filing of Facebook’s motion to dismiss, both Power and Facebook have brought  
18 cross-motions for judgment on the pleadings or, in the alternative, for summary judgment on  
19 Facebook’s claim that Power has improperly accessed, used, or induced others to access or use  
20 Facebook’s computer system, network or service in violation of California Penal Code Section  
21 502(c). *See* Dkt Nos. 56 and 62, respectively. If the Court determines that Power has violated  
22 Penal Code Section 502(c), then it follows that Facebook’s efforts to protect itself from those  
23 criminal attacks cannot plausibly be considered “predatory.” That alone should lead the Court to  
24 grant this motion to dismiss.

25 Even without the pending cross motions, Power’s allegations of “predation” are  
26 insufficient. First, Power claims that Facebook has engaged in a campaign to enforce its Terms  
27 of Use against “new entrants” into the social networking market so as to “stifle competition.”  
28 This conclusory statement is made without any supporting factual allegations whatsoever and

1 merely alleges that Facebook’s unspecified actions against unidentified other parties were  
2 “baseless.” If those actions are similar to Facebook’s actions against Power – acting to stop  
3 improper access to the Facebook site in violation of the Terms of Use – they are neither baseless  
4 nor predatory.

5 Second, Power asserts that Facebook must allow unfettered third-party access to its  
6 website simply because other websites might allow unfettered access to theirs. *See* Dkt. No. 63 at  
7 5:2-5. In essence, this is the core of Power’s complaint – it does not like Facebook’s Terms of  
8 Use and wants Facebook to adopt different ones. Under Power’s view of the world, Facebook is  
9 engaging in a predatory practice merely by enforcing a Term of Use that is different from that of  
10 some other website. That makes no sense and Power’s failure to cite any authority for this  
11 proposition speaks volumes. Nor has Power explained how Facebook’s policies have stopped  
12 Power from getting information directly from users, from other websites that allow third party  
13 access or even from Facebook, through the Facebook Connect program. In short, Facebook’s  
14 policy has not stopped Power from getting the information it needs; it has merely stopped it from  
15 getting that information by violating Facebook’s Terms of Use.

16 **2. Power Still Has Not Alleged Facts Sufficient To Identify A Relevant**  
17 **Product Market In Which Facebook Has Monopoly Power.**

18 Although Power claims the relevant market is limited to “social networking websites,” *id.*  
19 at 3:13-14, that is not what the counterclaims say. In fact, the Amended Answer and  
20 Counterclaim defines the market to include “websites that allow users to create personal profiles,  
21 manage contacts, and provide a variety of ways for users to interact with contacts.” Dkt. No. 54 ¶  
22 172; *see also* Dkt. 63 at 2:16-21. As Facebook noted in its opening brief, this definition  
23 encompasses *at least* photo sharing websites, email websites and dating websites, in addition to  
24 sites like Facebook and MySpace. Because it is impossible to determine which websites are  
25 included within this alleged market, it is impossible to assess the plausibility of Power’s  
26 allegation that Facebook possesses illegitimate monopoly power. Courts routinely grant Rule  
27 12(b)(6) motions to dismiss when a plaintiff’s definition of the relevant market is found to be  
28 overly broad or narrow “with respect to its identification of the relevant product pool.” *See*

1 *Streamcast Networks, Inc. v. Skype Techs., S.A.*, No. CV 06-391 FMC (Ex), 2006 U.S. Dist.  
2 LEXIS 97392, at \*29-30 (C.D. Cal. Sep. 14, 2006). That description certainly applies to these  
3 counterclaims.

4 **3. Power Does Not Compete With Facebook In A Relevant Market.**

5 Even if Power has adequately alleged a relevant product market, the allegations of the  
6 Amended Counterclaims show that Power does not compete in that market and that it thus lacks  
7 standing to bring its antitrust claims. The “boundaries of a relevant market ... are determined by  
8 reasonable interchangeability of use,” which refers to “consumers’ practicable ability to switch  
9 from one product or service to another.” *America Online, Inc. v. GreatDeals.Net*, 49 F.Supp.2d  
10 851, 858 (E.D. Va. 1999) (“*America Online*”), citing, *ABA Section of Antitrust Law Developments*  
11 400 (4th ed. 1997). Power’s Opposition never so much as mentions “reasonable  
12 interchangeability,” let alone argues that the services offered by Power fill the same consumer  
13 need as the websites included within the alleged product market.

14 In *Cargill Inc. v. Budine, et al.*, No. CV-F-07-349-LJO, 2007 U.S. Dist. LEXIS 67526, at  
15 \*15 (E.D. Cal. Aug. 30, 2007), the Eastern District of California dismissed plaintiff’s Sherman  
16 Act claims because its allegations did not establish that it competed in the relevant market as the  
17 plaintiff had defined it. The Court should dismiss Power’s counterclaims for the same reasons.  
18 As the Court has already noted, Power merely operates a “website designed to integrate various  
19 social networking or email accounts into a single portal.” Dkt. 38 at 3:12-13. Rather than  
20 operating a competing social networking site, Power admits that it only provides “users with  
21 tools necessary to access Facebook through Power.com.” Dkt. No. 54 at ¶ 64. In his recently  
22 filed declaration, Power CEO Steven Vachani stated that “Power offered Facebook users a  
23 different and potentially superior browser through which they could access their Facebook  
24 accounts to copy, update, and/or port their own ‘User Content.’” Dkt. 65 at ¶ 2, defining Power  
25 as a “browser” not a social networking website. There can be no dispute: Power does not operate  
26 a social networking website.

27 Power tries to avoid this problem by alleging, without more, that “Power.com is a  
28 competitor in the market for social networking websites.” Dkt. 63 at 5:21. But such a bare,

1 conclusion is not sufficient. Power admits that it has provided no support for this allegation and  
2 instead, argues incorrectly that it “is not obligated to explain how it seeks to compete with  
3 Facebook. It need only allege that it does.” *Id.* at 5:28-6:1. That argument clearly violates  
4 federal pleading requirements requiring more than a mere “blanket assertion of entitlement to  
5 relief.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555; *see also Cargill*, 2007 U.S. Dist.  
6 LEXIS 67526, at \*5-6 (“Although Courts assume the facts alleged as true, courts do not ‘assume  
7 the truth of legal conclusions merely because they are cast in the form of factual allegations.’”)  
8 (quoting *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Here, there are no  
9 factual allegations that plausibly demonstrate how Power competes with Facebook. On the  
10 contrary, the facts alleged show that Power seeks to exploit Facebook, not compete with it.

#### 11 **4. Power Has Not Suffered Antitrust Injury**

12 Finally, Power cannot just assert that it has suffered cognizable antitrust injury without  
13 providing facts that plausibly support that allegation. Antitrust injury “stems from a competition-  
14 *reducing* aspect or effect of the defendant’s behavior,” *Atlantic Richfield v. USA Petroleum*, 495  
15 U.S. 328, 344 (1990) (citations omitted) (emphasis in original), and “requires the plaintiff to have  
16 suffered its injury in the market where competition is being restrained.” *Am. Ad. Mgmt. v.*  
17 *General Telephone Co. of California, et al.*, 190 F.3d 1051, 1057 (9th Cir. 1997). The “injury”  
18 Power claims to have suffered – not being able to have its users access Facebook through the  
19 Power website – is an injury caused by Power’s refusal to comply with Facebook’s Terms of Use.  
20 That is not the kind of injury that the antitrust laws were designed to prevent. *See Brunswick*  
21 *Corp. v. Pueblo Bowl-o- Mat, Inc.*, 429 U.S. 477 (1977). The allegations added in the Amended  
22 Counterclaims and stressed by Power in its Opposition are merely other ways of saying that  
23 Facebook seeks to enforce its Terms of Use and protect its intellectual property. Those actions do  
24 not become antitrust violations nor supply the antitrust injury necessary for standing merely by  
25 Power’s bald assertion that they were designed to “stifle competition.” There are still no facts  
26 alleged that even hint at that purpose and certainly none that can plausibly be interpreted in that  
27 way. As in *LiveUniverse, Inc. v. MySpace, Inc.*, No. CV 06-6994 AHM, 304 Fed. Appx. 554, 557  
28 2008 U.S. App. LEXIS 27141 (9th Cir. Dec. 22, 2008), where plaintiff claimed that consumers

1 could not access its website through the MySpace site because of MySpace’s policies, the “failure  
2 to allege causal antitrust injury . . . serves as an independent basis for dismissal.”<sup>1</sup>

3 **B. POWER CANNOT STATE A CLAIM UNDER CALIFORNIA BUSINESS**  
4 **AND PROFESSIONS CODE SECTION 17200**

5 If Power’s antitrust claims fail, so do its unfair competition claims because a  
6 “determination that the conduct is not an unreasonable restraint of trade necessarily implies that  
7 the conduct is not ‘unfair.’” *See Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001).  
8 Facebook’s opening brief cites other opinions, including some by this Court, that reach the same  
9 conclusion. *See* Dkt. 58 at 8:19-28. Power’s Opposition brief does not deal with this precedent  
10 and instead points to the broad reach of the UCL. But that argument has been rejected time and  
11 again. *See, e.g., Apple Inc. v. Psystar Corp.*, 586 F. Supp 2d 1190, 1204 (N.D. Cal. 2008) (“Apart  
12 from its conclusory allegations regarding the ‘sweeping nature of *section 17200*,’ Psystar fails to  
13 explain a relevant distinction in the standards.”)

14 Power argues that “[a] business practice need not violate the antitrust law to be found an  
15 ‘unfair competition practice’ under 17200.” Dkt. 63 at 6: 10-13. That is certainly true. However,  
16 *Chavez* makes it clear that where a party claims its opponent’s actions violate the antitrust laws  
17 but they do not, those same actions cannot be deemed “unfair” under 17200. Power does not, and  
18 cannot, deny that it challenges the same actions in both its antitrust and Section 17200 claims.

19 As discussed above, there is a separate and independent ground to dismiss Power’s UCL  
20 claim. If Facebook is within its right to “prevent. . . [Facebook]. . . users from porting their own  
21 data to other websites,” like Power.com, then it cannot be unfair for Facebook to stop Power  
22 from obtaining that data by violating Facebook’s Terms of Use.<sup>2</sup> Nor can it be unfair for  
23 Facebook to enforce its Terms of Use against others attempting to do the same thing. And finally,  
24 it is not “unfair” for Facebook to have Terms of Use that are different from other websites.

25 \_\_\_\_\_  
26 <sup>1</sup> Power’s Opposition does not contain any argument or analysis directed at its attempted  
27 monopolization claim against Facebook. The claim should be dismissed for the reasons set forth  
28 in Facebook’s opening brief. *See* Dkt. No. 58 at 7:24-8:4.

<sup>2</sup> Similarly, if Power’s attempts to violate Facebook’s Terms of Use also violate California Penal  
Code Section 502(c), then Facebook’s efforts to curb those violations cannot possibly be deemed  
an “unfair” business practice. *See* Section II.B. below.

1 Actions do not become unfair merely because Power uses words like “scheme” and “stifle  
2 competition” to describe them.

3 **C. POWER’S AFFIRMATIVE DEFENSES SHOULD ONCE AGAIN BE**  
4 **STRICKEN**

5 Power does not dispute that “affirmative defenses are governed by the same pleading  
6 standard as complaints.” *Quabon.com, Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1049 (N.D.  
7 Cal. 2004). Despite that rule, Power has not made any factual allegations that would give rise to a  
8 fair use or copyright misuse defense. Accordingly, the Court should strike these affirmative  
9 defenses as it did previously.

10 **1. Power Has Provided No Facts to Support Its Fair Use Defense**

11 Power claims that it has provided “a detailed statement of its fair use defense.” Dkt. No.  
12 63 at 8:1-28. Power may have described its view of what the fair use doctrine should be, but its  
13 description does not reflect how the fair use defense has been analyzed by any court. A defendant  
14 does not raise a cognizable fair use defense merely by asserting that its copying of plaintiff’s  
15 protectable expression was “ephemeral” or “momentary.” Dkt. 63 at 8:17-22 (citing Dkt. No. 54  
16 ¶¶ 161- 64). In other words, it is not a “fair use” just because it is a brief one. The specific  
17 elements of the fair use doctrine – the purpose and character of the use, the commercial nature of  
18 the use, the nature of the copyrighted work, the amount and substantiality of the portion used in  
19 relation to the copyrighted work, the amount and substantiality of the portion used in relation to  
20 the copyrighted work as a whole or the effect of the use upon the potential market for or the value  
21 of the copyrighted work – must be pled and supported by facts. *See* Dkt. 58 at 11:8-16 (citing  
22 *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 576-77 (1994)).<sup>3</sup> Power has failed to meet this  
23 standard.

24  
25 <sup>3</sup> *See also* Dkt. No. 38 at 6:15-19 (“Defendants correctly assert that Facebook does not have a  
26 copyright on user content, which ultimately is the information that Defendants’ software seeks to  
27 extract. However, if Defendants first have to make a copy of user’s entire Facebook profile page  
28 in order to collect that user content, such action may violate Facebook’s proprietary rights”) (citing *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 204 (9th Cir. 1989)) (holding that a collection of non-copyrighted material arranged in an original way is subject to copyright protection).

1                   **2. Power’s Copyright Misuse Defense Should Be Stricken.**

2                   The defense of copyright misuse is typically reserved for cases in which a copyright  
3 holder licenses rights to a third-party on the condition that the third-party will not also use a  
4 competitor’s products. *See* Dkt. No. 58 at 10:1-15. Indeed, both cases that Power relies upon in  
5 asserting its defense involved license agreements. *See* Dkt. No. 63 at 9:2-6. For instance, the  
6 court in *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001), held that “most of  
7 the cases that recognize the affirmative defense of copyright misuse involve unduly restrictive  
8 licensing schemes” (citations omitted). Similarly, the court in *Altera Corp. v. Clear Logic, Inc.*,  
9 424 F.3d 1079, 1090 (9th Cir. 2005), dealt with allegations that Apple Computer had misused its  
10 end user license agreements. In the face of this precedent, Power has made a completely different  
11 claim: that Facebook has used its copyright “to restrict users ability to access their own content.”  
12 *Id.* at 10:1-3 (quoting Dkt. No. 54 ¶ 168). Power has provided no support for claiming that  
13 Facebook’s policies constitute copyright misuse. This affirmative defense should be stricken.

14                   **III. THE COURT SHOULD NOT PERMIT ANOTHER AMENDMENT TO THE**  
15                   **COUNTERCLAIMS.**

16                   Power has already been granted one opportunity to amend its counterclaims and it should  
17 not be given another chance. Power may have added more words to its pleading, but its claim is  
18 the same: It does not want to comply with Facebook’s Terms of Use. That is not the basis for an  
19 antitrust or unfair competition counterclaim.

20 Dated: January 29, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

21  
22                   \_\_\_\_\_  
23                   /s/ Jessica S. Pers  
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26                   FACEBOOK, INC.  
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**CERTIFICATE OF SERVICE**

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on January 29, 2010.

Dated: January 29, 2010

Respectfully submitted,

\_\_\_\_\_  
/s/ Jessica S. Pers  
JESSICA S. PERS

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