

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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STUART FORCE, *et al.*,

Plaintiffs-Appellants, Docket No.: 18-397

-against-

FACEBOOK, INC.,

Defendant-Appellees.

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**DECLARATION IN SUPPORT OF PLAINTIFFS' MOTION
TO SUMMARILY VACATE THE JUDGMENT AND
REMAND THIS CASE FOR FURTHER PROCEEDINGS**

ROBERT J. TOLCHIN, declares the following statements to be true, subject to the penalties for perjury, pursuant to 28 U.S.C. § 1746:

1. I am an attorney admitted to practice before this Court and am an attorney with The Berkman Law Office, LLC, counsel for Plaintiffs-Appellants Stuart Force, *et al.* I make this declaration in support of the plaintiffs' motion to summarily vacate the judgment and remand this case for further proceedings.

2. By Order dated March 14, 2018, this Court (Winter, *J.*) held this appeal in abeyance pending the Supreme Court's decision in *United States v. Microsoft*, S. Ct. No. 17-2.

3. Recent unforeseeable intervening events give rise to this motion. Stated briefly: Facebook's CEO, Mark Zuckerberg, during two days of congressional testimony, severely contradicted critical factual positions taken by Facebook before the court below. Plaintiffs respectfully submit that remand is now appropriate so the court below may reconsider its holding in light of Zuckerberg's statements and admissions before three congressional committees.

A. Background

4. This case arises from Facebook's knowing provision of material resources to Hamas, a designated terrorist organization, in violation of the Anti-Terrorism Act, 18 U.S.C. § 2331, *et seq.* ("ATA"). These resources provided to Hamas enabled it to engage in terrorism against the plaintiffs, causing death and severe injury.

5. The plaintiffs, victims of Hamas' terrorism and their families, seek damages from Facebook under the ATA for its aiding and abetting, conspiracy, and provision of material support and resources to Hamas, all violations of the ATA.

6. The district court's principal opinion, attached hereto as Exhibit 1, holds that 47 U.S.C. § 230(c)(1), a provision of the Communications Decency Act, immunizes the defendant's conduct here. (Ex. 1 at 17-18, 23) ("Accordingly, the court finds that the Force Plaintiffs' claims against Facebook fall within the scope

of Section 230(c)(1)’s grant of immunity.”). It essentially asserted that an affirmative defense to liability barred the plaintiffs from asserting their claims.

7. Section 230(c)(1) provides that a “provider” of “an interactive computer service” (all parties agree this describes Facebook) may not be “treated as the publisher or speaker” of information that it receives from “another information content provider.” Section 230(f)(3) defines “information content provider” as an “entity that is responsible, in whole or in part, for the creation or development of information provided.”

8. Two prongs of this provision are significant. *First*, to be applicable, the plaintiffs’ claims must regard the defendant as a “publisher or speaker.” *Second*, the information complained of must be created or developed solely by other parties.

9. Quoting this Court, the district court found that a “publisher” is an entity that exercises “‘a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content’ that they did not themselves create.” (Ex. 1 at 19). Thus, to avoid liability under that prong, Facebook needed to show that it acts just as a traditional publisher—like, for example, Reed Elsevier or Oxford University Press.

10. To avoid liability under the second prong, Facebook had to demonstrate below that the content that it provided was both created and developed by another.

11. By implication, it also had to show that it played no role in the creation or development of that content. Indeed, as the Tenth Circuit has held, an interactive computer service that plays a role in the creation or the development of the content posted on its website is *not* entitled to the defense created by § 230(c)(1). *FTC v. Accusearch*, 570 F.3d 1187, 1197-1201 (10th Cir. 2009).

12. Facebook argued below, and the district court accepted, that Facebook satisfies both those tests because, *inter alia*, it had no responsibility for the content. Consider, for example, this statement by Facebook in one of its submissions below:

[T]he features of Facebook that plaintiffs criticize operate solely in conjunction with the content posted by Facebook users. Indeed, but for user-generated content, Facebook’s many technical tools, including its neutral algorithms, would not recommend the user connections or otherwise offer the benefits that plaintiffs complain about here. Nor would those tools cause any alleged harm to plaintiffs in the absence of the content to which they object. In short, there is nothing about Facebook’s software, standing alone, that is the subject of plaintiffs’ complaint. Plaintiffs instead ultimately challenge Facebook’s services insofar as they interact with and republish content posted by third parties.

(Ex. 2 at 5-6).

13. The district court plainly accepted that notion, finding, *inter alia*, that Facebook is “an open forum, available for registration and posting without prior approval from Facebook” and described that passive role as itself an “exercise of editorial discretion.” (Ex. 3 at 17-18). It implicitly found that Facebook employs

little no or criteria regarding who may obtain a Facebook account and post material to it. *Id.* at 18.

14. At least one other court, *Fields v. Twitter*, 217 F. Supp. 3d 1116 (N.D. Cal. 2016), quoted and relied upon by the court below, likewise found that Facebook employs a “hands-off policy,” even with regard to making Facebook available to terrorists and terrorist organizations. *Id.*

B. Zuckerberg’s Testimony

15. Zuckerberg was summoned to Capitol Hill to testify on April 10 before a joint session of the Senate Judiciary Committee and Commerce Committee (together comprising roughly half of the Senate) and on April 11 before the House Energy Committee. (Exs. 4 & 5). In his congressional testimony, Zuckerberg struck a tone remarkably different from what was argued below in this case by Facebook’s lawyers.

16. In his opening marks before the Senate committees he stated:

[I]t’s clear now that we didn’t do enough to prevent [Facebook] from being used for harm[.] And that goes for fake news, for foreign interference in elections, and hate speech, as well as developers and data privacy.

* * *

We didn’t take a broad enough view of our responsibility, and that was a big mistake. And it was my mistake. And I’m sorry.

(Ex. 4).

17. He stated in no uncertain terms that Facebook plays a role that goes far beyond mere editorial responsibility:

It's not enough to just connect people. We have to make sure that those connections are positive. It's not enough to just give people a voice. We need to make sure that people aren't using it to harm other people or to spread misinformation.... Across the board, we have a responsibility to not just build tools, but to make sure that they're used for good. It will take some time to work through all the changes we need to make across the company, but I'm committed to getting this right.

(Ex. 4). He repeated throughout his testimony that Facebook has "responsibility" to ensure that its tools are "used for good." *Id.* He repeated the word "responsibility" 22 times during his Senate testimony alone. *Id.* To offer one more example:

I view our responsibility as not just building services that people like, but building services that are good for people and good for society as well.

Id.

18. On the notion of Facebook's "responsibility," Zuckerberg repeatedly admitted that *Facebook is "responsibl[e] for the content" on its website. Id.* (emphasis added). For example:

[SEN.] CORNYN: ... Do you agree now that Facebook and other social media platforms *are not neutral platforms, but bear some responsibility for the content?*

ZUCKERBERG: I agree that we're responsible for the content....

(Ex. 4) (emphasis added).

19. Senator Cruz quoted from Zuckerberg's prepared written testimony: "We have to make sure people aren't using their voice to hurt people or spread misinformation. We have a responsibility, not just to build tools, to make sure those tools are used for good." (Ex. 4). The Senator then inquired whether Facebook has the duty to assess its users. Zuckerberg answered:

Senator, I think that there are a number of things that we would all agree are clearly bad. Foreign interference in our elections, *terrorism*, self-harm.... *I think that you would probably agree that we should remove terrorist propaganda from the service.* So that, I agree. I think it is—is clearly bad activity that we want to get down.

(Ex. 4) (emphasis added).

20. Senator Cruz pushed further inquiring whether Facebook views itself as a First Amendment "speaker" expressing its own views or as a neutral public forum. Zuckerberg responded that Facebook is committed to providing a broad platform while, at the same time, keeping off Facebook "anything that makes people feel unsafe," including "[h]ate speech, *terrorist content*, [and] nudity," the first and last of which are clearly protected under the First Amendment. (Ex. 4) (emphasis added).

21. Senator Cruz stated on the record his view that for Facebook to qualify for “immunity” under § 230, it must be a “neutral public forum” and not a “First Amendment speaker.” *Id.*

22. Senator Cruz continued, noting that there is extensive evidence that Facebook is in fact acting as a political censor, “purposely and routinely suppress[ing] conservative stories from trending news, including stories about CPAC, including stories about Mitt Romney, including stories about the Lois Lerner IRS scandal, including stories about Glenn Beck.” *Id.* He added:

Facebook has initially shut down the Chick-fil-A Appreciation Day page, has blocked a post of a Fox News reporter, has blocked over two dozen Catholic pages, and most recently blocked Trump supporters Diamond and Silk’s page.

Id. Zuckerberg admitted that employees in Facebook have used the Facebook platform to *censor* speakers with whom those employees disagree. *Id.*

23. Zuckerberg claimed that Facebook does, as a matter of official policy, actively censor “terrorist propaganda” and “hate speech.” *Id.* He did so despite later expressly acknowledging that terrorist propaganda is protected First Amendment speech. (Ex. 5).¹ He retorted: “I just don’t think that it is the kind of thing that we want to spread on the Internet.” *Id.*

¹ Presumably, Mr. Zuckerberg was referencing pure propaganda that is not also a call to arms or incitement to immediate violence.

24. Zuckerberg expressly acknowledged that Facebook uses algorithms to remove terrorist and other content, *id.*, and did not reject Representative Blackburn's suggestion that Facebook regularly "manipulate[s]" those algorithms to achieve those results. (Ex. 5). Additionally, it employs thousands of people to facilitate "content review":

[REP. BILL] JOHNSON: How is your content filtered and determined to be appropriate, or not appropriate, and policy-compliant? Is it an algorithm that does it? Or is there a team of a gazillion people that sit there and look at each and every ad, that make that determination?

ZUCKERBERG: Congressman, it's a combination of both. So, at the end of the day, we have—we have community standards that are written out, and try to be very clear about what's—what is acceptable.

And we have a large team of people. As I said, by the end of this year, we're going to have about 20,000—more than 20,000 people working on security and content review across the company.

But, in order to flag some content quickly, we also build technical systems in order to take things down. So, if we see terrorist content, for example, we'll flag that, and we can—we can take that down.

Id.; *see also* (Ex. 4) ("By the end of this year...we're going to have more than 20,000 people working on security and content review.... So, when content gets flagged to us, we have those people look at it. And, if it violates our policies, we take it down.").

25. Senator Sasse expressed great concern over Facebook's censorship of "hate speech" and asked Zuckerberg to define that term. (Ex. 4). Zuckerberg immediately admitted that doing so is "really hard." He did not explain how Facebook determines whether something is hate speech or merely "vigorous debate" on a contentious issue. *Id.*

26. Representative Hudson asked a similar question: "[W]hat standards do you apply to try to determine what's hate speech versus what's just speech you may disagree with?" (Ex. 5). Again Zuckerberg struggled to answer the question, calling it "nuanced." *Id.*

27. Zuckerberg's testimony makes it clear that Facebook employs its own subjective assessment when deciding whether to censor content. *See id.*

28. In his testimony before the House Energy Committee, Zuckerberg repeated that Facebook does "not allow hate groups." (Ex. 5).

29. Regarding terrorism, Senator Graham questioned Zuckerberg about a recently leaked memo written by a Andrew Bosworth, Facebook's VP of Consumer Hardware, in which Bosworth wrote:

[W]e connect more people. Maybe someone dies in a terrorist attack coordinated on our tools. The ugly truth is that we believe in connecting people so deeply that anything that allows us to connect more people, more often, is de facto good.

30. (Exs. 4 & 6). A Washington Post story covering Bosworth's memo notes that it was written "almost immediately after a man was shot to death while streaming live video of himself with Facebook Live, and a few days before a Palestinian teenager was accused of killing an Israeli girl after praising terrorists on Facebook" and remained on "Facebook's internal platform" for nearly two years. One former Facebook executive reported that the memo was "super popular internally." (Ex. 6).

31. Consistent with Bosworth's sentiment, Representative Brooks pointed out that as recently as March 29, 2018, ISIS content was discovered on Facebook, including an execution video. She noted as well that on April 9, just a few days before Zuckerberg's hearing, five Hezbollah pages were available on Facebook. (Ex. 5).

32. Senator Coons criticized Facebook's behavior: "[P]olicies aren't worth the paper they're written on if Facebook doesn't enforce them." (Ex. 4).

33. It appears that Facebook's actual policy is to *sometimes* censor terrorist content and sometimes not, for reasons now known only to Facebook.

C. Next Steps

34. It is clear from Zuckerberg's testimony that Facebook takes an active role in forming the content appearing on its website. Facebook is not a neutral forum

where anyone can post whatever they want. Facebook constantly prunes and curates to limit the content of postings. The posts that remain are those selected posts that, Facebook believes, *ought* to be on Facebook.

35. Plainly, Facebook did not take this work as seriously during the period when ISIS was making extensive use of Facebook to recruit fighters in Syria, and Hamas was using Facebook to promote what has been called “the Facebook intifada.” See Micah Lakin Avni,² *The Facebook Intifada*, N.Y. Times, Nov. 3, 2015, at A29 (opinion). (Ex. 7).

36. What emerges from Zuckerberg’s testimony is a picture differing markedly from the one painted before the district court. Zuckerberg’s Facebook is one that actively engages in censorship—expecting to increase its staff of professional censors to 20,000 by the end of this year—censoring material not required to be censored by law, according to the very amorphous principle of doing “good” and making people feel “safe.” Unsurprisingly, it censors inconsistently and unpredictably.

37. What’s more, Facebook sees itself as a moral actor with personal responsibility for the content appearing on Facebook. It is *not* simply a “hands off” publisher of other people’s content.

² Avni is a plaintiff in this action.

38. Zuckerberg's Facebook is the real Facebook. He is its CEO and actively runs the business. In his own words: "I started Facebook, I run it, and I'm responsible for what happens here." (Ex. 4).

39. The district court was presented with, and made its decision based on, fake news. Unsurprisingly, it made factual errors—it has no responsibility for those errors, but they are errors nonetheless.

40. The district court should have the first opportunity to assess this case in light of the actual facts. Its judgment, issued under false assumptions, should be vacated and this case returned to the district court for factual development—perhaps Zuckerberg's deposition would be helpful—and further briefing so that the district court can assess the real facts of this case and revisit its decision.

WHEREFORE, plaintiffs respectfully request that this judgment of the district court be summarily vacated and this case remanded for further proceedings.

Dated: Brooklyn, New York
April 16, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2018, I filed the foregoing using the ECF system, which is expected to serve electronically all counsel of record.

/s/ Meir Katz
Meir Katz