

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
Before The Honorable William H. Orrick, Judge

FIELDS, )  
 )  
Plaintiff, )  
 )  
vs. ) No. C 16-00213-WHO  
 )  
TWITTER, INC., )  
 )  
Defendant. )  
 )

San Francisco, California  
Wednesday, June 15, 2016

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND  
RECORDING 2:07 - 2:46 = 39 MINUTES

APPEARANCES:

For Plaintiff:

Bursor & Fisher, PA  
888 Seventh Avenue  
New York, New York 10019  
BY: JOSHUA DAVID ARISOHN, ESQ.

For Defendant:

Wilmer, Cutler, Pickering,  
Hale & Dorr, LLP  
1875 Pennsylvania Avenue, NW  
Washington, DC 20006  
BY: PATRICK J. CAROME, ESQ.  
BY: SETH P. WAXMAN, ESQ.

Transcribed by:

Echo Reporting, Inc.  
Contracted Court Reporter/  
Transcriber  
echoreporting@yahoo.com

1 Wednesday, June 15, 2016

2:07 p.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: Calling civil matter 16-00213, Fields  
5 versus Twitter, Incorporated.

6 Counsel, please come forward and state your appearance.

7 MR. ARISOHN: Good afternoon, your Honor. Joseph  
8 Arisohn of Bursor and Fisher on behalf of the plaintiffs.

9 THE COURT: Good afternoon.

10 MR. WAXMAN: Hi, I'm Seth Waxman from Wilmer Hale  
11 on behalf of the defendant.

12 THE COURT: Good afternoon.

13 All right. Let me tell you what I think about this  
14 motion to help you focus your argument. I'm inclined to  
15 grant the motion to dismiss.

16 So as I get it, plaintiff's theory is that Twitter's  
17 provision of accounts, not the way that ISIS used them, is  
18 what provided the material support to ISIS. But the  
19 allegation -- the way that the complaint is framed, first of  
20 all, all the allegations seem content based, to me, and that  
21 the essence of the complaint seems to be that Twitter  
22 permits ISIS to spread its propaganda, raise funds and  
23 attract new recruits. It's all content based.

24 So the first problem is the link.

25 The second problem is that the material support theory

1 I think requires ISIS to use rather than just open accounts,  
2 and that makes the Communications Decency Act section  
3 230(c)(1) applicable.

4 Then finally, I just don't see any causation under the  
5 Anti-Terrorism Act, even using the substantial factor test.  
6 There's no allegation that ISIS recruited Zaid over Twitter,  
7 used Twitter to plan the attack or that Zaid ever viewed  
8 Twitter or had a Twitter account.

9 And even if there were those allegations, then you'd  
10 still sort of circle back to the content based problem, I  
11 think, with 230(c)(1). And then with respect to direct  
12 messaging, just because it's private messaging I think  
13 doesn't put this beyond the Communications Decency Act's  
14 reach.

15 So that's the -- those are the serious problems that I  
16 see with the complaint. So go ahead and explain the error  
17 of my ways.

18 MR. ARISOHN: I'm happy to address all of those  
19 points, your Honor.

20 First, in terms of the application of the CDA, that  
21 depends in large part on the claims actually being asserted,  
22 as you noted. So if we just take a step back and talk about  
23 what those are here.

24 And for the most part, you got it right. For years,  
25 defendant has knowingly provided ISIS with material support

1 in the form of Twitter accounts, and it did that despite  
2 knowing that ISIS was a designated terrorist group and  
3 despite knowing that ISIS used those accounts for raising  
4 funds and recruiting new members and spreading propaganda.

5 And the Anti-Terrorism Act, the ATA, prohibits  
6 providing precisely that kind of material support, because  
7 these kinds of fungible resources can be used to facilitate  
8 numerous terrorist attacks around the world and against  
9 American citizens in particular.

10 And that's what happened here. ISIS in large part due  
11 to the material -- to the enormous social media following  
12 that it was able to build on Twitter was able to grow into  
13 one of the world's most dangerous terrorist organizations in  
14 the world. And it's carried out thousands of the most  
15 gruesome terrorist attacks that have ever been documented.  
16 And one of those attacks was on November 9, 2015 at the  
17 International Police Training Center in Amman, Jordan in  
18 which Mr. Creach and Mr. Fields were killed, leaving their  
19 wives behind and leaving Mr. Creach's boys fatherless.

20 Now, the defendant argues that despite our allegation  
21 that they provided this material support to a designated  
22 terrorist organization, they should be protected by the  
23 Communications Decency Act, the CDA. But the limited  
24 purpose of the CDA is to protect interactive computer  
25 services from being held liable as a publisher or speaker of

1 offensive content. And as the Ninth Circuit has explained,  
2 that means -- publishing activity for purposes of the CDA  
3 means reviewing content or editing or deciding whether to  
4 issue or to withdraw content.

5 And here, plaintiff's allegations are not based on any  
6 of these activities. Plaintiffs don't seek to hold  
7 defendant responsible for the tweets of ISIS, and plaintiffs  
8 don't seek to hold defendant liable because of the way that  
9 it reviewed or edited ISIS's tweets or because it issued  
10 tweets or refused to withdraw tweets.

11 Rather, plaintiffs seek to hold defendant responsible  
12 for knowingly permitting ISIS to sign up for those accounts  
13 in the first place and --

14 THE COURT: And then you seek -- I mean every time  
15 you mention the accounts, you link them to the content,  
16 necessarily I think, because the problem is the horrific  
17 stuff that ISIS was doing. But that's a very different  
18 problem than opening up accounts.

19 And the idea of a company that opens millions of  
20 accounts being held as a terrorist organization because it's  
21 providing material support in having a few of those accounts  
22 being used by people -- it would be great if they weren't  
23 using them, but that's a different problem, it seems to me.

24 MR. ARISOHN: The complaint does refer to the  
25 content of tweets, and I'll tell you why, because there is a

1 difference -- and under Ninth Circuit precedent, there's a  
2 difference between the violation itself and the causal  
3 chain. And whether the CDA applies depends on the violation  
4 itself.

5 And if you provide material support to a terrorist  
6 organization in the form of a Twitter account, that by  
7 itself, before any tweet is even issued, is a violation of  
8 the criminal law -- the criminal section of the Anti-  
9 Terrorism Act and it thus gives rise to the private right of  
10 action.

11 Now, the Ninth Circuit has now held twice that the CDA  
12 does not bar a claim simply because publishing activity is  
13 part of the causal analysis. And to the extent that the  
14 complaint contains content, it's because of it's related to  
15 causation. And so just two weeks ago, in the Internet  
16 Brands case which is brought to the Court's attention, the  
17 court in that case noted that there was no causal link  
18 without considering the profile of the plaintiff which had  
19 been posted and which led to her rape.

20 The court noted that publishing activity is the cause  
21 of just about everything that an internet publishing company  
22 does, and that doesn't mean it's immunized from all  
23 liability. And the Ninth Circuit in Internet Brands for  
24 that proposition cited to the Barnes case, also a Ninth  
25 Circuit case from a few years earlier which stated that the

1 failure to remove the profile in that case, even -- that was  
2 content and it was the but-for cause of injury in that case.  
3 But that didn't mean that the CDA immunized Yahoo from all  
4 liability.

5 And in --

6 THE COURT: Don't you see a distinction? Barnes  
7 was a promissory estoppel case. The Internet Brands case is  
8 a failure to warn case. Don't you see a difference between  
9 those cases and yours?

10 MR. ARISOHN: Well, I actually think the Internet  
11 Brands case is very on point. In that case, there was the  
12 failure to warn case. And the duty to warn arose when the  
13 defendant became aware, obtained knowledge that these people  
14 were using its website as a rape scheme.

15 And similarly here, Twitter, once it learned that ISIS  
16 was using its accounts for spreading propaganda -- and it  
17 learns that through extraneous sources, not through its  
18 publishing activities -- at that point it had a duty under  
19 the Anti-Terrorism Act to not let them sign up for accounts,  
20 or at least try to stop them.

21 And so I think it's very similar to the Internet Brands  
22 case on that point. And the Ninth Circuit repeated several  
23 times how important it was that the duty was based on  
24 Internet Brands' knowledge and knowledge that it acquired  
25 from outside of its publishing activities.

1 And I think it's really hard to distinguish that here,  
2 because that's exactly what we alleged in the complaint.

3 THE COURT: All right. And do you want to say  
4 anything with respect to the direct messaging argument?

5 MR. ARISOHN: Yeah, I'd like to talk about the  
6 direct messaging and then move on to other the proximate  
7 causation issue that --

8 THE COURT: Okay.

9 MR. ARISOHN: I think on the direct messaging  
10 issue, it's an even clearer case that the CDA should not  
11 apply, because these are private communications. And let me  
12 explain. The CDA does not define the term "publisher." It  
13 says you can hold defendant liable as a publisher, but it  
14 doesn't say what that means.

15 And as you know, when a term is used in the statute and  
16 not otherwise defined, it's to be given its ordinary  
17 meaning. That's a basic canon of statutory interpretation  
18 that we all learned in our first year of law school  
19 presumably.

20 And no matter what dictionary you look in, the common  
21 definition of "publisher" is one who disseminates  
22 information to the public. And if Congress wanted to use a  
23 broader definition of "publisher," it could have put that in  
24 the statute. There are plenty of statutes that include  
25 definitional sections.



1 THE COURT: But didn't the Ninth Circuit tell us  
2 in Barnes that we're to look at the defamation case law  
3 where a publication would just be one person to another  
4 talking something that's bad about the third person?

5 MR. ARISOHN: Well, the issue in Barnes is really  
6 about whether there's any difference between a distributor  
7 or publisher when claims are actually based on content. It  
8 didn't actually say clearly that you're supposed to always  
9 apply this defamation definition of "publisher" in all  
10 instances.

11 And to the extent that that broader definition should  
12 ever be applied, it really only makes sense in the context  
13 of defamation cases. I don't think it makes sense to take  
14 this broad definition from defamation law and to apply it to  
15 completely separate areas of the law like the Anti-Terrorism  
16 Act that have nothing to do with defamation. And at least  
17 one court has agreed with that theory.

18 And the FTC -- the Accusearch case which we cite in our  
19 opposition brief, there the defendant was selling private  
20 customer information, presumably to just single individuals.  
21 And they said that they should be immune under the CDA  
22 because even though they were selling it just in one-off  
23 instances, the defamation definition should apply.

24 And the court wasn't really having any of it. They  
25 said: But the FTCs do not sound in defamation. And if they

1 did, we'd be happy to apply that definition. But it's a  
2 strained interpretation of the CDA to apply that definition  
3 to a claim brought under the FTC Act.

4 And likewise here, it's a strained interpretation to  
5 apply that definition to a claim under the Anti-Terrorism  
6 Act. It just doesn't make sense.

7 THE COURT: Okay. I disagree with you, but go  
8 ahead.

9 MR. ARISOHN: In terms of --

10 THE COURT: Causation?

11 MR. ARISOHN: -- proximate causation -- so first  
12 of all, it should be pointed out that there's no but-for  
13 causation requirement under the ATA. And for the proximate  
14 causation requirement, there's no requirement that you show  
15 directness.

16 Now, the defendant pointed to this by-reason-of  
17 language which has been interpreted in other contexts, this  
18 requiring directness, but court after court to address that  
19 issue in the context of the ATA, has rejected that reasoning  
20 for two reasons.

21 The first is that proving directness in a terrorism  
22 case would be impossible and would make the ATA practically  
23 a dead letter. That's how the court in Strauss v. Credit  
24 Lyonnais put it.

25 And that's undoubtedly true. Unless you happen to have

1 some sort of inside information about the inner workings of  
2 the financials of these terrorist organizations, you're  
3 almost certainly not going to be able to connect the  
4 provision of a certain set of material support to a certain  
5 terrorist attack. That's very unlikely to occur, and that  
6 would be such a high barrier that there would be no more  
7 litigation in this field.

8         And the second reason that there's no directness  
9 requirement is that the provision of material support to  
10 terrorists is inherently fungible and as the Supreme Court  
11 put it in the Holder v. Humanitarian Law Project, any  
12 provision of material support to a terrorist organization  
13 facilitates terrorist activity because no matter what form  
14 it takes, such support frees up the resources that can be  
15 put to violent ends.

16         And as Judge Weinstein put it in the Gill case, even if  
17 a contribution is not used directly to carry out a terrorist  
18 attack, it's still used indirectly because it refills the  
19 terrorist coffers and --

20                 THE COURT: Don't all of the material support  
21 cases hinge on the donor consciously providing support to a  
22 specific organization that's going to do something that they  
23 know or should know is a terrorist -- will result in a  
24 terrorist act? Don't all those cases do that?

25                 MR. ARISOHN: Well, the cases are all alike in

1 that someone or an organization or a company gave resources  
2 to a terrorist organization that it knew to be a terrorist  
3 organization and knew that it was likely to carry out  
4 terrorist attacks. But what you don't have to show is that  
5 they knew that it was going to be used for a specific  
6 terrorist attack. It's enough that you give money to the  
7 terrorists --

8 THE COURT: Fair enough. Yeah, I agree with that.

9 MR. ARISOHN: -- on one hand and then they commit  
10 an attack on the other. And that's all required.

11 And here, that's what we allege. ISIS knew -- sorry.  
12 Twitter knew --

13 THE COURT: Here, what you're alleging is that  
14 Twitter allowed ISIS to open accounts as it allowed millions  
15 of people around the world to open accounts, and that that  
16 act is prohibited because it's material support. That's  
17 your argument.

18 MR. ARISOHN: Because they knowingly provided that  
19 support, yes.

20 And I don't think there's any doubt that that support  
21 was instrumental to the rise of ISIS. Twitter permitted  
22 ISIS to use its social network, as you noted, to spread its  
23 propaganda and raise funds and attract new recruits. And  
24 ISIS was permitted to maintain dozens of official accounts  
25 with thousands of followers and it was through the support

1 that ISIS was able to garner the resources to carry out  
2 numerous attacks, including the November 9th attack in which  
3 my clients were injured.

4 And we know specifically that ISIS was responsible for  
5 this attack for several reasons.

6 First of all, the facility where this training was  
7 taking place, they were training officers to fight ISIS  
8 specifically. The attack also took place on the 10th  
9 anniversary of ISIS bombings at luxury hotels in Amman,  
10 Jordan.

11 And then most notably, there were two claims of  
12 responsibility by ISIS, the first by Al Batah (phonetic)  
13 Media Foundation and the second by its Dabiq magazine. And  
14 the experts that we've spoken to consider these claims  
15 highly reliable and indicative of direct involvement in  
16 these attacks by ISIS.

17 THE COURT: But you haven't alleged that Mr. Zaid  
18 ever used Twitter, saw any of this information on Twitter.  
19 And I think you also said that ISIS referred to him as a  
20 "lone wolf," which means his actions may have been inspired  
21 by but not directed by ISIS.

22 So the link then to Twitter seems awfully attenuated,  
23 even if you drill down into this level of detail.

24 MR. ARISOHN: Well, first of all, the lone wolf  
25 is -- I don't think that detracts from our allegations that

1 ISIS was responsible for this attack.

2 First of all, the second claim of responsibility in  
3 Dabiq magazine, which is considered a more reliable source,  
4 doesn't refer to him as a lone wolf.

5 And second of all, ISIS often provides support of one  
6 kind of another, whether it's through arms or training or  
7 other resources to so-called lone wolves.

8 Also, I should note that just in the last week or so,  
9 we've now come across evidence from Israeli military  
10 intelligence that the shooter in this case, Anwar Abu Zaid,  
11 was part of an ISIS sleeper cell operating out of al-Mutah  
12 University and that the cell helped the shooter acquire the  
13 arms and smuggle them into the facility where the shooting  
14 took place.

15 And so we're able to draw a link. The Twitter accounts  
16 that ISIS provided allowed ISIS to collect resources and  
17 then ISIS was directly involved in this attack at issue.

18 And if we need to amend to add those allegations, we're  
19 happy to do that but I do think that the allegations in the  
20 complaint sufficiently set out ISIS's involvement in this  
21 instance.

22 THE COURT: All right. Thank you.

23 Mr. Waxman.

24 MR. WAXMAN: Very happy and anxious to answer any  
25 questions that your Honor has. I won't give my stump speech

1 in light of your Honor's comments. I'll just make a couple  
2 of comments in response to Mr. Arisohn.

3 First, on the section 230 ground. The notion that the  
4 complaint doesn't turn on -- or doesn't try to assess  
5 liability against Twitter as a publisher is a complete  
6 nonstarter.

7 As your Honor I think referenced, there isn't even a  
8 coherent theory of causation, however attenuated. If the  
9 only thing that happened in this case was that Twitter  
10 allowed ISIS supporters to open accounts, which they then  
11 never used or used to send cat videos to each other -- and  
12 so either the complaint requires reference to the content in  
13 order to establish even an attenuated form of causation or  
14 the -- in which case it falls within the heartland of  
15 section 230.

16 Now, the Barnes case -- I think as your Honor has  
17 suggested, the Barnes case, first of all, specifically  
18 defines publishing with reference to Prosser and Keeton and  
19 the restatement as simply the -- any communication  
20 intentionally or by a negligent act to a third party. And  
21 that certainly derives from, as the Barnes court  
22 acknowledged and other circuits have acknowledged, the  
23 origin of the section 230 prohibition which was -- you know,  
24 originally arose in a defamation context.

25 Second of all, with respect to the invocation of the

1 alternative definition as a way to essentially extract the  
2 direct messaging, direct messaging is covered under the  
3 Barnes definition and the restatement in Prosser and Keeton  
4 definition. And logically it would have to be. Otherwise,  
5 every organization that provides either email or direct  
6 messaging capability would be, ipso facto, liable  
7 notwithstanding section 230.

8         And I'm not aware of any case that has ever suggested  
9 that section 230 wouldn't be applied to an email  
10 communication, particularly since it is uniquely difficult  
11 for Google, Apple, AOL, or anybody else who provides direct  
12 messaging capability through email or otherwise, to see  
13 what's actually being communicated.

14         Even if somehow under some attenuated view of causation  
15 you could jump from -- all we're complaining about is that  
16 you allowed ISIS supporters to open accounts and nothing  
17 more -- could possibly form the basis for any level of  
18 causation, however you define it.

19         I think it's important to understand, first of all,  
20 what's involved in opening an account, which does involve  
21 publishing content. I could say I waited -- I didn't find  
22 it necessary to actually open a Twitter account until this  
23 weekend. And my experience in doing it was very revealing.

24         When you open a -- you don't just write to them or  
25 something and say, "Give me a private account number." You



1 have to provide content, which then, in the process of  
2 opening the account, is published.

3 I was frankly astonished to discover after I opened  
4 this account on Saturday -- I haven't tweeted anything, I'm  
5 not following anything, I didn't put my picture up -- I have  
6 a whole bunch of followers. People are following -- I'm not  
7 leading but people are following me on Twitter because of  
8 the content that I have posted simply by the act of opening  
9 an account.

10 Even if that weren't true --

11 THE COURT: Just because of your name? Is that --  
12 what is the content that you posted that people were  
13 following?

14 MR. WAXMAN: I posted, yes, my name. I mean I  
15 also had to post my email. I had to provide my email  
16 address and a telephone number. And Twitter of course  
17 doesn't check on whether it is actually is really my name or  
18 really my email address or really my telephone number.

19 But I mean I'm feeling some pressure to say something.  
20 But the point is that the act of opening an account is an  
21 act of providing content.

22 And even if that weren't the case, the decision about  
23 who to give access to the Twitter publishing medium or not,  
24 that is whether to screen or what criteria you use, is a  
25 consummate publishing decision.

1           If I decide I have a mimeograph machine -- I'm dating  
2 myself. I had a mimeograph machine --

3           THE COURT: That's the last piece of technology  
4 that I knew how to operate.

5           MR. WAXMAN: I'm not sure I actually ever really  
6 did know how to operate it. But if I send out an  
7 announcement saying "I have a printing press" or "I have a  
8 mimeograph machine," and it's either available to anybody  
9 who wants to use it or it's available if I decide to let you  
10 use it or not, that is a consummate publishing decision,  
11 that is who to allow access to the publishing medium or not.

12           That was very, very close to what was at issue in the  
13 Fifth Circuit's decision in the Doe v. MySpace case. And  
14 it's actually pretty close to what was ultimately at issue  
15 or what was being complained about in the First Circuit's  
16 decision in the Backpage case that was decided a month or  
17 two ago.

18           So section 230 absolutely immunizes Twitter's conduct  
19 even if there were some cause of action simply for allowing  
20 people -- knowingly allowing people to open accounts.

21           I mean the whole allegation of knowing is Twitter  
22 doesn't know who is opening the account or who owns the  
23 account except by reference to content that's posted on the  
24 account.

25           I mean even the -- the complaint says well, we know

1 because there were newspaper articles or some terrorism  
2 expert or another has said so. All of that information  
3 comes from content that is posted by a particular user on a  
4 Twitter account. It's a reason why Twitter has closed  
5 approximately 125,000 accounts.

6 But that decision about who to allow to have an active  
7 account and not is a publishing decision that's immunized.

8 Now, the Internet Brands case, I'm very happy to hear  
9 Mr. Arisohn say that it's very close and it's directly on  
10 point.

11 In Internet Brands, as your Honor observed, the Ninth  
12 Circuit was very careful to say that the liability attached  
13 in that case not because Internet Brands allowed the models  
14 to post whatever they wanted to post or even that it would  
15 have attached if the creditors had contacted the models  
16 through use of the website.

17 The liability attached because there was an independent  
18 freestanding cause of action that in no way depended on  
19 Internet Brands acting as a publisher or speaker. And in  
20 fact the Ninth Circuit, Judge Cliftons, wrote that the  
21 failure to warn claim had, quote, nothing to do with  
22 Internet Brands' efforts or lack thereof to edit, monitor or  
23 remove user-generated content. That was the distinction in  
24 the case.

25 It was also the distinction in the Fair Housing Council

1 v. Roommates case that was decided in an en banc opinion by  
2 Judge Kosinski.

3 And we would urge the Court to resolve this case on the  
4 section 230 immunity grounds. I mean we obviously would  
5 rather win than lose, but it would be inconsistent, I want  
6 to suggest, to resolve this on the obvious failure of  
7 causation rather than immunity, particularly because as the  
8 en banc Ninth Circuit has said, it is -- section 230 is an  
9 immunity statute and it was designed to protect providers of  
10 interactive computer services from being -- from, quote,  
11 death by 10,000 duck bites.

12 And, you know, just yesterday we got notice that yet  
13 another lawsuit was filed against Twitter, this time also  
14 Facebook and Google, in this Court alleging that we're  
15 liable to the relatives and victims of terrorism because  
16 we've allowed people to open accounts.

17 THE COURT: I hear what you just said, but would  
18 you take on the material support allegation briefly --

19 MR. WAXMAN: Yeah.

20 THE COURT: -- and the notion that opening an  
21 account for ISIS or any other terrorist organization makes  
22 you responsible for providing terrorists support under the  
23 Anti-Terrorism Act.

24 MR. WAXMAN: Sure. So I think we need to  
25 distinguish between the criminal material support provisions

1 and the separate terrorist civil remedy provision, because  
2 the material support statutes don't require any proof of  
3 causation and they have no intent requirement other than  
4 knowing.

5       The Terrorism Civil Remedy statute does require  
6 proximate causation and I will address why the standard is  
7 in fact -- that by reason of requires some direct link. But  
8 whatever standard you have, it is a proximate causation  
9 standard, whereas the material support statute doesn't  
10 require that. If the government prosecutes, they don't have  
11 to show proximate causation and they don't have to prove  
12 intentionality, which section 2333(a), the Terrorism Civil  
13 Remedy provision, requires.

14       And therefore, for example, if you look at perhaps  
15 their strongest case under the material support statute, the  
16 Seventh Circuit's decision in the Boim case, Judge Posner's  
17 decision, he contrasts what he found to state a cause of  
18 action there with, for example, the type of services that  
19 the Red Cross and Doctors Without Borders and NGOs provide  
20 when they provide a general service, not directly terrorism  
21 related, in areas where they know to a certainty that they  
22 are providing either social services or medical services to  
23 terrorists.

24       And the point is that there is -- in that context, as  
25 here, where you are providing a general purpose service that

1 is offered to all -- here, it's a platform for freedom of  
2 expression -- there is no objective intent to intimidate or  
3 coerce a civilian population. The intent is to provide that  
4 service.

5       And so I think it's quite important to distinguish  
6 between what the government might allege someday to be the  
7 provision of material support on the one hand and what  
8 actually provides a civil remedy cause of action. And on  
9 the whole notion of whether we are or aren't leaving aside  
10 the Terrorism Civil Remedy, I think it's pretty revealing  
11 that these platforms have been around for a long time and  
12 the material support statute dates back to 1998.

13       To my knowledge, no one associated with federal law  
14 enforcement, from the Attorney General on down, has ever  
15 suggested that Facebook or YouTube or Twitter or Apple or  
16 any of these other sort of social media services are  
17 providing the material support to terrorism.

18       Quite the contrary, all of these services, and  
19 certainly Twitter, has a very active ongoing relationship  
20 with federal law enforcement. There is a 24/7 dedicated  
21 office at Twitter for interacting with and providing  
22 information to law enforcement.

23       I would make an argument that even if you leave aside  
24 the absence of intent to intimidate or coerce a civilian  
25 population or the lack of causation, I think a good argument

1 can be made that this isn't providing material support to  
2 terrorism. I mean providing accounts, this is a valuable  
3 service to them -- and this goes back to the section 230 and  
4 causation grounds. This is a valuable service only if  
5 they're using it.

6 If the gravamen here is you let somebody open an  
7 account and trade cat videos, that's not valuable to them.  
8 And so I think it's indicative of how weak a criminal direct  
9 violation of the material support statute is the fact that  
10 no one in and out of administrations has ever suggested that  
11 these companies are in fact engaging in the provision of  
12 material support.

13 MR. ARISOHN: May I add something, your Honor?

14 THE COURT: I'm going to give you the last word.  
15 I just want to make sure Mr. Waxman was finished.

16 Was there anything else that you --

17 MR. WAXMAN: Well, the other thing I wanted to say  
18 is I don't think anything turns on this because the  
19 causation, or lack thereof, alleged in this case would fail  
20 any standard, whether it was the substantial fact of  
21 reasonable foreseeability or not.

22 And you only have to look at the Second Circuit's  
23 decision in the Al Rajhi case or the Rothstein case to see.  
24 This is far more attenuated than what was alleged in those  
25 cases and it failed even that lower standard.

1           What I would say is I'm not aware of -- the only court  
2 that I'm aware of in a reported decision that has directly  
3 addressed the Supreme Court's very robust interpretive  
4 jurisprudence on by reason of, looking at it in the Sherman  
5 Act and then the Clayton Act which took it from the Sherman  
6 Act or RICO which took it from Clayton Act and here, the  
7 only one that I know of that has addressed it in a terrorism  
8 context, that is under the Terrorism Civil Remedy, is the  
9 Second Circuit's decision in Rothstein where the court  
10 was -- that's the only case I know of where it's actually  
11 been -- I'm not even sure it was briefed and argued.

12           But that's the only decision that has taken this on and  
13 said, yes, this means the same thing as the Supreme Court  
14 said that it meant in Hemi Group and Holmes and Anza. And  
15 the district court decisions that Mr. Arisohn is referring  
16 to, largely in the Eastern District of New York, I'm not  
17 aware that the Supreme Court provenance of this language was  
18 addressed. But if it was, they're just wrong.

19           THE COURT: Mr. Arisohn.

20           MR. ARISOHN: It's interesting to hear Mr. Waxman  
21 talk about ISIS issuing cat videos, because that's something  
22 that has actually happened and it was a phenomenon on the  
23 internet and there was actually a very slick way that ISIS  
24 was able to attract new recruits.

25           And I think it goes to the point just how fungible



1 these assets and resources that are given to ISIS really  
2 are. You can give money to a charitable arm of a terrorist  
3 organization, for instance, and they're going to use that to  
4 win the hearts and minds of people and to get new members  
5 and to further their terrorist agenda.

6 And, you know, just looking at the statute of the  
7 material support provisions of the ATA here, they prohibit  
8 providing a designated terrorist organization with any  
9 property, tangible or intangible, or any service such as  
10 communications equipment.

11 And the moment you provide a terrorist organization  
12 with any of that kind of material support -- I don't think  
13 there is any doubt that a powerful communications tool like  
14 a Twitter account constitutes material support -- given  
15 everything that can be done with it, you have violated the  
16 act.

17 And that's before they have issued even a single tweet.  
18 And that's before Twitter has engaged in any editing  
19 functions because editing functions as -- the Court has set  
20 it out as editing, monitoring, removal or issuing of content  
21 and that's not here. And the Ninth Circuit in Internet  
22 Brands a few weeks ago warned that unless you're engaged in  
23 those kinds of activities, you're not being treated as a  
24 publisher and barring claims that do not seek to hold a  
25 defendant liable as a publisher would stretch the CDA beyond

1 its narrow language and its purpose.

2 And the Ninth Circuit added that we must be careful not  
3 to exceed the scope of the immunity provided by Congress and  
4 that Congress has not provided an all-purpose get-out-of-  
5 jail-free card for businesses that just happen to publish on  
6 the internet.

7 And that's what I think defendant is arguing here. But  
8 if you look at these Ninth Circuit cases, I think they  
9 reject that contention.

10 THE COURT: All right. Thank you both for your  
11 argument.

12 I will get an order out fairly quickly.

13 I will give you leave to amend assuming that I stick  
14 with my tentative, which I am very much inclined to do. But  
15 I'll give you one more shot. I know that there has been --  
16 this would be a second amended complaint. And I will allow  
17 that.

18 And I assume that you have the information you need so  
19 that once I issue my order, 20 days would be sufficient.

20 MR. ARISOHN: 20 days from your order?

21 THE COURT: Yes.

22 MR. ARISOHN: I think that should be fine.

23 THE COURT: Okay.

24 MR. ARISOHN: Maybe 30 just to be safe?

25 THE COURT: Well, maybe the -- I'll give you

1 somewhere in the 20- to 30-day range but I think you know  
2 where I see weaknesses. And so I'd start thinking about  
3 that. And I don't see any reason to have a case management  
4 conference. I want to -- this case will only go forward if  
5 you're able to state a claim, and otherwise, I think you  
6 want to get your complaint in the shape that you'd like it  
7 for more receptive ears if mine don't work out the way that  
8 you want them to.

9 All right.

10 MR. WAXMAN: Thank you, your Honor.

11 THE COURT: Thank you all.

12 MR. ARISOHN: Thank you, your Honor.

13 (Proceedings adjourned at 2:46 p.m.)  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.



Echo Reporting, Inc., Transcriber  
Thursday, June 23, 2016