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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ORRICK

TAMARA FIELDS, et al,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	NO. C 16-0213 WHO
	)	
TWITTER, INC.,	)	
	)	San Francisco, California
Defendant.	)	Wednesday
	)	November 9, 2016
	)	2:00 p.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: ***Debra L. Pas, CSR 11916, CRR, RMR, RPR***
Official Reporter - US District Court
Computerized Transcription By Eclipse

P R O C E E D I N G S

November 9, 2016 **2:04 P.M.**

THE CLERK: Calling Civil Matter 16-213, Fields versus Twitter, Incorporated.

Counsel, please come forward and state your appearance.

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

THE COURT: Good afternoon.

MR. CAROME: Good afternoon, your Honor. Patrick Carome on behalf of defendant Twitter.

THE COURT: Good afternoon.

So, Mr. Arisohn, I have -- you're not going to be surprised -- the same problems that I've had before with your complaint.

The provision of -- I think I dealt with each of these issues in my prior order. I don't see that the provision of accounts theory is distinguishable from publishing activity as I found before, and it's protected by Section 230(c) of the Communications Decency Act.

I think the decision to furnish an account will prohibit one from using one's inherently publishing activity and I think the causation issue is still dispositive.

So, and I don't think the direct messaging theory works, again, for the same reasons. I think Section 230(c)(1) reaches private communications beyond simply defamation.

And I -- you know, I feel for your clients. And it's a tragic situation and ISIS is a horrible terrorist group, but that doesn't mean that Twitter was responsible for the death of Mr. Fields or Mr. Creach.

So that's my view. I will have two questions. One, I will let you explain to me why the second amended complaint is different than the first. But my second question will be: Do you have -- assuming that I don't change my mind on the tentative, are you ready to take this up or do you need another amendment to perfect your appeal?

MR. ARISOHN: Thank you, your Honor.

I understand your position. I understand I have an uphill battle here, but with your position I would like to go through the arguments and see where they go.

THE COURT: Go ahead.

MR. ARISOHN: We carefully studied the Court's order on the last motion to dismiss and considered them carefully in drafting the second amended complaint and I think we incorporated a lot of those thoughts and addressed the Court's concerns as best we could, particularly in the way that we organized the complaint to show the ways in which we were and were not relying on content here.

So the first point is that the cause of action here falls under 18 U.S.C. 2333(a), which creates a private right of action for violations of the Anti Terrorism Act, material

support provisions. And the ones alleged here are 2339(a) and (b), both of which, with different language, prohibit the provision of material support to terrorists.

And that is the gist of our allegations here; that Twitter violated these material support provisions when it gave ISIS Twitter accounts. And the way we have organized the complaint now sets it out more clearly, that those material support provisions were violated when the accounts were handed to ISIS, not when ISIS issued Tweets or content from those accounts. And the sections of the complaint setting out the violations of those material support statutes, in fact, now don't refer to content in any way, shape or form.

And so the question becomes: Is providing ISIS with a Twitter account in and of itself -- and not being tethered to content, can that be considered a publishing activity? And if you look at what the Ninth Circuit has said and how it has defined "publishing activity" in the *Barnes* decision, it described it as, "reviewing, editing or deciding whether to publish or withdraw content."

Providing someone with a Twitter account doesn't implicate any of those activities. Providing ISIS with a Twitter account is a different activity from deciding whether ISIS should be permitted to Tweet out specific content. It's -- providing an account is providing someone with a tool. It's a content neutral decision.

If you hand someone a typewriter, that's not a content-based publishing activity. If you start deciding what they can do with that typewriter and write and disseminate with that typewriter, it becomes content based. Our allegations here are only on the provision of the tool in the first place.

And the case that Twitter has relied on here, and I know the Court has cited it, is the *BackPage.com* case. But I think if you really look at what was going on in that case, *BackPage* is distinguishable because the allegations at issue in that case were tethered to specific content at the core of the allegations in a way that our case is not.

In the *BackPage* case, *BackPage* was providing classifieds for escorts on its website and the plaintiff said, their allegation was that *BackPage* had constructed its website in a way that it aided sex traffickers.

But what they were really saying was that they constructed their website in a way that they were making content-based decisions in the construction of their website. And so the key allegations there were that the defendant -- was that the defendant designed its website so that sex traffickers could hide sensitive information, including their phone numbers, and they allowed emails to be anonymized, and photos were stripped of metadata, and payments could be made anonymously.

And so the allegation was that making construction decisions about the website that went specifically to this

content was at the heart of the issue. So these were content-based decisions, even if they were made through the prism of a website construction.

And so *BackPage* doesn't stand for the proposition that just giving someone an account on a website is publishing activity. It stands for something much more narrow, which is that if you construct a website in a way to tailor content, that that's the same as making a content-based publishing decision and that's not what we're -- that's not what we're alleging here.

I think such a ruling would extend the CDA far beyond where any Court has taken it to date. And I think that the Court should be wary of doing that because the Ninth Circuit has now warned on several occasions that Courts should not extend the CDA beyond the narrow scope that Congress set out.

Now, as to how we are using content, it is limited to one area of our claim and that is to show proximate causation. But I think if you look at Ninth Circuit precedent, in particular the *Barnes* and the *Internet Brands* decisions, those cases stand for the proposition that if you are relying on content just to show causation as part of proving or alleging the causal chain, that that by itself does not implicate the protections of the CDA.

And so in *Barnes* that was the case, where the promissory --

THE COURT: I remember.

MR. ARISOHN: And based on Yahoo's failure to remove an offensive profile that was posted by the plaintiff's ex-boyfriend.

So the theory of liability there was based on Yahoo's promise to remove the profile and plaintiff's reliance. And the claim, nevertheless, had to refer on published content because she had to show that the failure to remove the profile injured her because the contents in that profile was offensive and having it out there in the wider world caused her injury. The Ninth Circuit allowed her claim to go forward despite reliance on this content as part of the causal chain and held that the CDA didn't apply.

And it was the same thing in the *Internet Brands* case. That was the failure to warn case where plaintiff alleged that the defendant's website knew that rapists were using its website to lure victims. And there the theory of liability was a special relationship, foreseeable harm and failure to warn a potential victim.

And, again, the claim required reference to content that was on the website, but the claim was allowed to go forward because the reference to the content was limited to the causal analysis. They had to show that the rapists were only able to contact the plaintiffs because their information was available on the website. And the Ninth Circuit said that that alone is

not sufficient for the CDA to apply because publishing activity is the but-for cause of just about everything that these internet companies do.

So, in other words, just because publishing activity is referenced, solely referenced to the causal analysis, that doesn't mean that the CDA applies.

And I would say that the same thing is what's happening here. Ms. Fields and Ms. Creach and their family are alleging that Twitter knowingly provided Twitter accounts to ISIS, and that's the basis of their claim. And they are only referencing contents of Tweets to show that ISIS used these accounts to gain finances and recruits for themselves so they could go out and perpetrate attacks like the one in which Mr. Fields and Mr. Creach were killed.

THE COURT: Even though Abu Zaid, there was no evidence that he ever used Twitter, that ISIS ever said anything with respect to this particular event, and there are no facts alleging that the attack was in any way aided by ISIS's social media presence.

MR. ARISOHN: Well, I'll turn to proximate causation, because that seems to be what you're getting to.

So the key thing for proximate causation under the Anti Terrorism Act is that there is no directness requirement. That is the opinion that's being expressed by numerous Courts.

So you don't have to trace material support to a specific

attack. It's enough, in case after case, many cases that I've worked on myself, if you show that material support was provided to a terrorist organization and then that terrorist organization separately perpetrated an attack, that is sufficient. And the reason behind that is that material support, whether it's financial or otherwise, is fungible.

And so as Judge Posner noted in one of his decisions under the ATA, even if a contribution is not used directly by a terrorist organization, it can be used indirectly because it opens up funds elsewhere within the organization. And so the fungibility of material support means that there is no directness requirement. All you have to show is that you provided the support to the terrorist organization and that the terrorist organization committed the attack.

And we have done that here. I think we've shown that Twitter provided material support to ISIS. These accounts were very valuable and it helped them raise funds and recruit people. And then that allowed funds to open up and resources to open up that helped them carry out this attack.

And we've adequately alleged that ISIS was responsible for this attack. We cite to evidence that the perpetrator, Abu Zaid, was a member of an ISIS cell, and we refer to two claims of responsibility by ISIS. I don't think we could possibly require more in terms of how to properly allege proximate causation.

And, you know, the CDA part of the argument, I think that's, you know, new ground to a certain extent, but this -- these proximate causation allegations fall squarely within where other cases have gone. And I think a ruling that proximate causation hasn't been adequately alleged here would fall far outside the mainstream of where other Courts have gone in that.

THE COURT: All right.

Mr. Carome.

MR. CAROME: Thank you, your Honor.

Twitter certainly shares the Court's view that what happened to the plaintiffs here is ghastly, horrible and that ISIS is horrible.

Obviously, what this case is about is whether a liability could be extended all the way to Twitter for its having simply done for -- allegedly for some number of people associated with ISIS what it has done for hundreds of millions of other people around the world, simply providing them with a service open to all.

I don't think that plaintiff has made any new arguments. I think this is essentially a motion for reconsideration.

The reorganization of the complaint is really completely irrelevant to the provision of accounts theory, which is the theory he's relying on.

Also, many Courts repeatedly, including the Ninth Circuit,

have said that Section 230 immunity depends on the inherent nature of the claim, not on how it's cosmetically pled, not on artful pleading or creative pleading, not on the labels you put on your claim or on the sections of the complaint. And that is all that is different here.

Moreover, by having a section of his complaint that says -- labeled "Proximate Cause" that is replete with all of -- virtually all of the allegations about the content that were there before had really just confirmed that this is a complaint that is based on the content, both in terms of the nature of the claim -- we wouldn't be having a case at all if it were not for -- if members of ISIS or associates of ISIS had opened accounts and done nothing with them. Obviously, we're only here today solely based on claims as to how those accounts were used.

And simply, you know, proximate cause is an essential element of the Section 2333(a) claim. And they have doubled down. I mean, they have relied fully on content. This is all about, really, a claim that Twitter failed to block content appearing on the service.

This is really -- and as your Honor has noted in your August 10th decision, there -- the decisions about who may open or keep a Twitter account are themselves decisions about what content may appear. There is no way to distinguish those two things.

In fact, the opening of a Twitter account itself is content. It is a message that, you know, follow me with this screen name that I've created. You cannot open a Twitter account -- you can't separate out the opening of a Twitter account from the publishing of content.

The new allegation about Mr. Zaid, Abu Zaid allegedly having been part of an ISIS sleeper cell back when he was in college at some indefinite period of time doesn't change anything in terms of any connection between Twitter and what Twitter did and -- and the attack, the horrible attack in Jordan.

And, in fact -- and this is really directed perhaps more to proximate cause than to anything else. Your Honor, in your August 10th opinion, spelled out that the only arguable connection alleged in the first amended complaint, the prior complaint between Abu Zaid and Twitter, was an allegation about his brother, Abu Zaid's brother, having commented to someone that Mr. Zaid had been inspired by some other ISIS atrocity involving the killing of a Jordanian pilot.

And why was that even an arguable connection? At least there was an allegation in the prior complaint, the first amended complaint, that that killing of the Jordanian pilot had somehow been Tweeted about or publicized, among other ways, through Twitter.

So there was at least there in the prior complaint some

hyper-attenuated attempt to draw some possible connection. That allegation is completely gone. The Court referred to that as the only arguable connection between Abu Zaid and Twitter and that was extraordinarily breathtakingly attenuated.

And so, in fact, I would say that while the sleeper cell allegation perhaps might suggest some possible basis to assume some connection between Mr. Zaid and ISIS, it has absolutely nothing to do in terms of any connection whatsoever between Twitter or Tweets on Twitter and the horrible attack in Jordan.

I have not heard Mr. Arisohn say anything about a further amendment. I think that that's appropriate. He has now had three bites at the apple. We have now had to move to dismiss a version of this complaint three times. There has been no substantive change whatsoever.

It is clear that however he attempts to label his theory, it is a theory that seeks to hold Twitter liable for decisions relating to go what content flows through its service. And the only way he could possibly ever -- he doesn't even try now any more. The only way he could possibly ever tie anything related to Twitter to the attack in Jordan would be through the content of Tweets, which he still alleges.

And so I think in light of -- particularly in light of Section 230 and its strong policy to avoid imposition on internet platforms of -- protracted and the burdens of litigation, it is now time to end the proceeding here in the

District Court. And if Mr. Arisohn, his clients want to take it to the Ninth Circuit, perfectly fine, but I think we've come to an end here in this court.

THE COURT: All right.

Mr. Arisohn, last words.

MR. ARISOHN: If I could just address a few of those points.

So, first, Mr. Carome said that -- you know, that the argument about limiting content to proximate causation can't win because proximate causation is an essential element under the ATA. But the same is true in every case. It was true in *Barnes* and it was true in *Internet Brands*. And so I don't think that that argument can really win the day.

And then in terms of opening an account being the creation of content itself, I just don't think that's true. There are plenty of people who sign up for Twitter accounts and they don't post a picture and they never issue a Tweet. Any content that comes out of their account, it might never come. And if it come out, it's a separate decision whether to allow that or not.

In terms of the connection for proximate causation, if Twitter had given ISIS a billion dollars in cash and then ISIS went out and committed an attack, they could make the same argument: Well, we haven't connected what they did to the attack.

And just because we're not talking about cash here, we're talking about a powerful communications tool, it's not really any different. They gave a terrorist organization a communications tool and that freed up resources for them and it helped them garner new resources to carry out many more terrorist attacks.

And can I just address the direct messaging issue quickly, your Honor?

THE COURT: Yes. Maybe I cut you off before, so go ahead and do that.

MR. ARISOHN: That's okay.

We have addressed this before, but I just want to emphasize a few points here, if I can.

As you know, the CDA says that you can't treat an interactive computer service as a publisher. And the problem for us in trying to figure out what that means is that the statute doesn't define what a "publisher" is.

And so the Supreme Court and the Ninth Circuit has said that if a statutory term is not defined, you need to use and interpret the term according to its ordinary meaning. And if you look up "publisher" in the dictionary, it says -- it's defined as "one who disseminates information to the public." And so a private message cannot be published material under this definition.

And the important thing to note here is that Congress

easily could have defined the term. There are plenty of statutes, including the ATA itself, that has a "Definition" section and they define terms when they want them to mean something other than their ordinary meaning. Congress knows how to do that. Congress did not do that here. And so we're bound by the ordinary meaning used in the statute, whether we like it or not.

And the Supreme Court said in --

THE COURT: And by the Ninth Circuit.

MR. ARISOHN: I'm sorry?

THE COURT: And by the Ninth Circuit. Like *Barnes*, for example, which deals directly with that issue, doesn't it?

MR. ARISOHN: I would say that to the extent that *Barnes* applied a version of a definition of "publish" that was different from the ordinary meaning, that that Court respectfully was mistaken.

THE COURT: And I shouldn't follow the Ninth Circuit?

MR. ARISOHN: Well, you might be obligated to, but it might be something I have to bring up with them.

But, in any event, I think that might be limited to defamation cases because it might make sense, given the history and the purpose of the CDA, to use a definition of "publish" in defamation cases when you're dealing with a defamation case.

But I think it's hard to imagine -- it's hard to -- and rationalize using the defamation definition of "publish" when

you're dealing with a terrorism case.

And because the statute says what it says and it has this term that's not defined, we have to follow what the Supreme Court has said time and time again, which is that:

"Courts must presume that a legislature says in the statute what it means and means in the statute what it says."

And, again, I'll go back to the fact that the Ninth Circuit has warned against expanding the CDA beyond what's in -- written there. *Internet Brands* specifically says, and this is a quote:

"Congress could have written the statute more broadly, but it did not."

And so as written the CDA does not apply to private communications and so it can apply the direct messages here.

And just a few more points and then I will --

THE COURT: Okay. Don't make any ones that you've already made though.

MR. ARISOHN: I will not.

In Twitter's reply they raised the issue of JASTA, Justice Against Sponsors of Terrorism Act. We have not had a chance to brief that, so this is new ground.

THE COURT: Okay.

MR. ARISOHN: And the defendant tries to argue that because JASTA adds secondary liability to the ATA, that somehow

changes the landscape of primary liability claims under the material support provisions, like the one asserted here.

And I would just add that JASTA was intended to broaden the ATA, not to narrow it. And it doesn't expressly address any of the preexisting parts of the ATA. And when that happens, Courts say they presume that no changes to those preexisting parts and the underlying case law was intended.

And, indeed, the cosponsor of the bill, Senator Cornyn, said that:

> "While JASTA clarifies the rule for secondary liability, it doesn't impact other aspects of the ATA such as direct liability based on the material support provisions."

In terms of amending, I don't think there is anything that we could do at this point with regards to the CDA. So if that's going to be a basis for dismissal, I'm happy to take that to a higher court, if necessary.

On the proximate causation standard, I believe that because JASTA does add secondary liability, that does change the landscape there somewhat because we could add additional claims now based on either aiding and abetting or conspiracy, which changes the analysis somewhat.

THE COURT: But not with respect to the CDA.

MR. ARISOHN: Correct.

THE COURT: All right. Thank you both. I am quite

inclined -- although I will issue a written order, I'm quite inclined to stick with where I have been.

I think the second amended complaint restructures what you had in the first amended complaint and I don't think it changes the analysis, but I will take one more look at it.

And assuming that I do that and that I rest on the Communications Decency Act, I take what you say as not wanting to amend further and so I would probably do it without leave. Okay.

MR. ARISOHN: Understood.

THE COURT: Thank you both.

MR. CAROME: Thank you, your Honor.

MR. ARISOHN: Thank you, your Honor.

(Proceedings adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Friday, December 2, 2016