

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
EASTERN DISTRICT OF NEW YORK

----- X

RACHELI COHEN AND ADDITIONAL :
 PLAINTIFFS LISTED IN RIDER A, :
 Plaintiffs, : 16-CV-5340 (NGG)

-against- : United States Courthouse
 Brooklyn, New York

FACEBOOK, INC., :
 Defendant. : September 27, 2016
 2:30 o'clock p.m.

----- X

TRANSCRIPT OF PRE-MOTION CONFERENCE
BEFORE THE HONORABLE NICHOLAS G. GARAUFI
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs: THE BERKMAN LAW OFFICE, LLC
 111 Livingston Street, Ste. 1928
 Brooklyn, NY 11201

BY: ROBERT J. TOLCHIN, ESQ.

For the Defendant: KIRKLAND & ELLIS LLP
 655 Fifteenth Street, N W
 Washington, DC 20005

BY: CRAIG S. PRIMIS, ESQ.
 SHIREEN A. BARDAY, ESQ.
 AULDEN BURCHER-DuPONT, ESQ.
 K. WINN ALLEN, ESQ.

Also Present: PAUL GREWAL

Court Reporter: Charleane M. Heading
 225 Cadman Plaza East
 Brooklyn, New York
 (718) 613-2643

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

1 THE CLERK: Counsel state your appearances for the
2 record, please.

3 MR. TOLCHIN: Good afternoon, Your Honor. Robert
4 Tolchin from the Berkman Law Office for the plaintiffs in both
5 cases.

6 THE COURT: Good afternoon.

7 MR. PRIMUS: Good afternoon, Your Honor. Craig
8 Primus from Kirkland & Ellis for the defendant Facebook.

9 MR. BURCHER-DuPONT: Good afternoon, Your Honor.
10 Aulden Burcher-DuPont for defendant Facebook.

11 MS. BARDAY: Shireen Barday for defendant Facebook.

12 MR. ALLEN: Winn Allen for defendant Facebook, Your
13 Honor.

14 THE COURT: Okay. Welcome everybody.

15 MR. PRIMUS: Thank you, Your Honor.

16 THE COURT: First of all, let me just say this. The
17 Court received a couple of letters asking for a pre-motion
18 conference from Ms. Barday --

19 MS. BARDAY: Yes, Your Honor.

20 THE COURT: -- some time ago.

21 I am glad to see you all here. Let me just say
22 that. Any inference that might have been achieved through the
23 media that I was ever upset at Mr. Burcher is totally
24 unfounded and for that, I apologize if that is the impression
25 that was given. I was much more concerned about the fact that

1 the firm, your firm, would take this matter seriously on
2 behalf of Facebook and I expected that either Ms. Barday or,
3 if she couldn't make it, someone would call and we would
4 reschedule it because I believe that we ought to have the face
5 of the firm, so to speak, in a situation like this.

6 It is only a pre-motion conference. I understand
7 that, but any time the Court makes itself available, the Court
8 may want to discuss things that aren't on your minds but on
9 the Court's mind. So I just wanted to point that out to you
10 and, hopefully, you know, we've crossed that bridge.

11 MR. PRIMUS: Your Honor, if I might.

12 THE COURT: Sure.

13 MR. PRIMUS: Craig Primus for Facebook. We hear you
14 loud and clear. We apologize as well and we appreciate the
15 Court's comments. I want you to know that we feel badly that
16 we didn't have a partner here and, like Your Honor said, we
17 would be happy to put this behind us.

18 I do want to mention one other thing. In light of
19 the Court's comments, we do have in the courtroom a
20 representative from Facebook. His name is Paul Grewal. He is
21 the vice president and deputy general counsel for global
22 litigation. He flew out here from California in case the
23 Court had any questions along the lines that came up last week
24 and I would also note that Mr. Grewal is a former United
25 States Magistrate Judge.

1 THE COURT: Oh, let's meet Mr. Grewal. Come on up.

2 MR. GREWAL: Good afternoon, sir.

3 THE COURT: You come up here, Your Honor.

4 MR. PRIMUS: And, Your Honor, I would just note --

5 THE COURT: I don't have any former clerks at
6 Facebook. I have them at Google. I have them at Apple. For
7 some reason, they have never made it over to Facebook and just
8 don't hold it against job applicants too that I took issue.

9 MR. GREWAL: Your Honor, my name is Paul Grewal. It
10 is a pleasure to be before you in this courtroom.

11 THE COURT: Thank you.

12 MR. PRIMUS: And, Your Honor, one more thing.

13 THE COURT: Yes.

14 MR. PRIMUS: We are very mindful of the Court's
15 protocol and I want to note Mr. Grewal was not able to get a
16 pro haec vice application on file due to the timing, but we
17 have one handy if the Court requires him to speak today.

18 THE COURT: Why don't you file it so we have crossed
19 all the T's and dotted all the I's and, in addition, there is
20 a fee involved so I think the Clerk's Office would be pleased
21 if I suggested he file.

22 MR. PRIMUS: We're aware of that. We'll pay the fee
23 as well.

24 THE COURT: That's fine.

25 So I would like to start over. What I did the last

1 time, I am sure you have seen the transcript as has the entire
2 world thanks to the media, I asked plaintiffs' counsel to tell
3 me something about the case.

4 I want to say one other thing and that is that I
5 have no opinion on what the law is in this case. I know what
6 the plaintiff said the law was or why certain laws might not
7 apply. I have no opinion on that. I am, in effect, a clean
8 slate here, but I am concerned about the underlying problems
9 that are reflected in the complaints so as are we all, I am
10 sure, as citizens of this country and citizens of the world.
11 So, I just wanted to make it clear that in asking questions, I
12 was not representing my point of view on the law or how the
13 law might play out on these facts in this case. All right?

14 MR. PRIMUS: Understood, Your Honor.

15 THE COURT: So I just wanted you to know that as
16 well.

17 So, having said that, there are two cases. In a
18 nutshell, just tell me again what they are, what you allege.

19 MR. TOLCHIN: Skipping the procedural history I gave
20 you last time.

21 THE COURT: Yes, please skip it.

22 MR. TOLCHIN: The Cohen case is an action seeking an
23 injunction and that is brought under Israeli law. The Force
24 case is an action seeking damages for personal injury and
25 death caused by aid and support given to a terrorist

1 organization, namely Hamas, and also contains causes of action
2 under Israeli law.

3 THE COURT: All right. And Facebook wishes to make
4 a motion to dismiss both cases, correct?

5 MR. PRIMUS: Yes, Your Honor.

6 THE COURT: Okay. So, I have two brief letters, but
7 tell me a little bit more, put a little meat on the bone, so
8 to speak, before we set a schedule.

9 MR. PRIMUS: Certainly, Your Honor, and what I would
10 propose to do, with the Court's permission, is I would briefly
11 outline our grounds for the motion to dismiss and I would like
12 to give Mr. Grewal the opportunity to address the valid
13 questions the Court had about what Facebook does to address
14 the issues raised in Mr. Tolchin's complaint.

15 THE COURT: It might be helpful to do it to fill in
16 some of the blanks since these claims are of such
17 significance. Whether or not this Court is the right place
18 for them, like I said the last time, I don't know, but your
19 having come here demonstrates your concern about this and I
20 appreciate that. So we will take step one and then step two.

21 MR. PRIMUS: Thank you, Your Honor.

22 We have three grounds on which to move to dismiss
23 both of the complaints. Two of the grounds overlap between
24 the complaints.

25 The first is one Your Honor recognized at the last

1 conference, the Communications Decency Act which immunizes
2 platforms like Facebook which provide forums for speech to
3 other people. The Communications Decency Act has been
4 enforced in courts across the country and most recently in the
5 D.C. Circuit in a case brought against Facebook making very
6 similar allegations with regard to terrorist use of the
7 Facebook platform to disseminate information and coordinate
8 among terrorists.

9 I should just say, we can get tied up in the
10 procedural posture here not relevant to the motion to dismiss,
11 but Facebook strongly opposes and has a zero tolerance follow
12 see for the use of its platform for terrorist ends or any
13 sorts of violence. It's prohibited in its terms of service
14 and Facebook works night and day to remove that type of
15 information from its platform. More on that to come.

16 So, the Communications Decency Act does provide a
17 bar and it's based on a judgment by Congress that having
18 platforms like Facebook and other internet computer service
19 providers to allow a forum for speech should not result in
20 liability or even really litigation because companies that are
21 providing these platforms will become enmeshed in expensive
22 litigation and it would hinder the progress of the internet
23 and that's been recognized by virtually every Circuit.

24 THE COURT: Congress has passed such law obviously
25 at the request of these platforms to cabin these kinds of

1 claims, right?

2 MR. PRIMUS: I can't say it was at the request of
3 the platforms per se but certainly --

4 THE COURT: Well, somebody asked for it. I'm sure
5 that you didn't object or your client didn't object to it.
6 Let's put it that way.

7 MR. TOLCHIN: Trial lawyers.

8 MR. PRIMUS: I'm not sure that Facebook existed when
9 the Communications Decency Act was passed.

10 THE COURT: That may be.

11 MR. PRIMUS: But, Your Honor, yes, there was a
12 policy made that free speech on the internet was a value worth
13 promoting and these companies were protected from litigation
14 and companies like Facebook and Google, Twitter, Twitter
15 recently just this spring in a very similar case to this in
16 the Northern Division of California have prevailed. That's
17 not to say that the use of these platforms by terrorist groups
18 is a good thing. It's just to say there's a statute that
19 immunizes the conduct.

20 THE COURT: All right. Go ahead.

21 MR. PRIMUS: The second ground common to both cases
22 is that this is not the right forum to bring this because
23 there's not personal jurisdiction over Facebook in New York.
24 That's based on the recent Supreme Court decision in Daimler
25 as it relates to general jurisdiction and with regard to

1 specific jurisdiction, the events just didn't occur here. The
2 plaintiffs are all in Israel. The events occurred in Israel.

3 Then, finally, there's one separate ground for each
4 case. With regard to the Cohen case, it's a standing ground.
5 Cohen is a case brought by 20,000 individual plaintiffs and
6 there's a generalized harm-type argument made and we believe
7 that doesn't meet the requirements for constitutional
8 standing. Then with regard to the Force case, that is brought
9 under the Anti-Terrorism Act and we just don't believe that
10 the terms of that statute, material support of terrorists,
11 applies to companies like Facebook and we believe we can
12 prevail on that as a matter of law as well.

13 THE COURT: Okay. Before I move on, I don't really
14 need oral argument right now. We will do that later.

15 MR. TOLCHIN: Sure.

16 THE COURT: So, is there anything you would like to
17 point out necessarily before I move on?

18 MR. TOLCHIN: Only what would be useful to the
19 Court. I mean we have responses to each of the arguments.

20 THE COURT: Right.

21 MR. TOLCHIN: Some of them I alluded to last time.

22 THE COURT: Yes, and you will have full opportunity
23 to respond to the motion to dismiss.

24 MR. TOLCHIN: Sure.

25 THE COURT: So I think we needn't go into that in

1 any more detail.

2 Let me just ask this first question. There is a
3 difference between acting as a platform, isn't there, and
4 being a developer of instrumentalities that facilitate the
5 communication and the joining together of people who have an
6 interest in terrorism and people who are in the business of
7 terrorism. So the statute, the Communications Decency Act,
8 does that cover developers of these algorithms that would
9 bring together these different people or groups with these
10 mutual interests?

11 MR. PRIMUS: Your Honor, you're looking at
12 Mr. Grewal. I'm happy to answer that question.

13 THE COURT: Well, he came all the way from
14 California, he's making the airlines rich, so I think it's
15 time for him to help the Court.

16 MR. GREWAL: I appreciate the opportunity to help
17 this court, Your Honor. Thank you.

18 THE COURT: Okay.

19 MR. GREWAL: Again, my name is Paul Grewal on behalf
20 of Facebook.

21 Your Honor, you're absolutely correct that there is
22 an important difference between a platform and a developer of
23 tools, to use the language you just provided. Facebook is
24 very much a platform. We are a general purpose platform.
25 Your Honor may be somewhat familiar with how our service works

1 but to the extent -- are you?

2 THE COURT: No. I'm not on Facebook. I'm not on
3 anything. If you knew my docket, you would know why.

4 MR. GREWAL: I suspect I know exactly what you're
5 referring to, sir.

6 THE COURT: Okay.

7 MR. GREWAL: To answer your question, Your Honor,
8 because we are a platform, as counsel has indicated, we are
9 squarely within CDA 230. We think our motion papers will
10 elaborate on that, unless Your Honor wants to hear more about
11 that --

12 THE COURT: No, go ahead.

13 MR. GREWAL: -- I'm happy to let that wait for
14 another day.

15 It's important, Your Honor, to understand that as a
16 platform, Facebook has ever interest in keeping terrorist
17 content off. We have a specific concrete social need and
18 obligation to keep our platform safe for our users and the way
19 that we do this, Your Honor, I think this will be helpful for
20 you to have perhaps a broader context for these issues is that
21 we have community standards. These are standards which we
22 follow that guide and direct how we permit certain content on
23 the platform to proliferate. These community standards
24 specifically bar content that either glorifies violence or
25 terrorism or incites it.

1 We have a specific team, organization, within the
2 company, Your Honor, that is global in nature. We have people
3 all over the world working 24/7 on reports of content that may
4 violate these community standards. So, when we are provided
5 with reports that a particular post or a particular person's
6 content may be, may be in use as a way of inciting or
7 encouraging violence or terrorism, we act promptly on that,
8 Your Honor, and we don't just wait for these reports and act
9 on those reports alone. Having identified particular posts or
10 accounts as terrorist related, we then move on to understand
11 who are these account holders' friends, what are these account
12 holders' expressing interest in on the platform, and from
13 there we go and shut down that content as well.

14 This is an important issue. It's something the
15 company takes very seriously. It's something we dedicate
16 substantial resources to. I think it's important for Your
17 Honor to understand that we are not simply relying on a legal
18 argument here to avoid responsibility. We embrace that
19 responsibility each and every day.

20 THE COURT: Well, let me go back to Mr. Tolchin.

21 Mr. Tolchin, you have two cases now. One was
22 brought here, one was --

23 MR. TOLCHIN: Brought in from the Southern District.

24 THE COURT: From Judge Kaplan.

25 MR. TOLCHIN: And one was removed from 360 Adams

1 Street.

2 THE COURT: From Brooklyn Supreme.

3 MR. TOLCHIN: Right.

4 THE COURT: Do you have a plan or desire to
5 consolidate these two cases or to amend your complaints in
6 either one of these two cases before we have motion practice?

7 MR. TOLCHIN: I hadn't planned to request that. I
8 am content, if the Court is, in simply having the two cases
9 before Your Honor since they are related but they are distinct
10 cases.

11 The fact that the Force case concerns multiple dead
12 murder victims and their damages are completely different and
13 they're proceeding under the Anti-Terrorism Act which has some
14 different arguments really means that it is a different case
15 than the Cohen case even though there are some overlaps on the
16 defenses that Facebook intends to raise. I mean, I understand
17 they intend to raise the Communications Decency Act, but
18 they're distinct enough that at least pretrial, and we will
19 see what there is when it comes down to trial, I think it
20 makes more sense for them to remain simply parallel rather
21 than formally consolidated or made into one case.

22 THE COURT: All right. Well, will you prepare and
23 submit one brief for all of the claims in both cases?

24 MR. PRIMUS: Yes, we're happy to do that, Your
25 Honor.

1 THE COURT: All right. And if that works, the Court
2 would prefer if we had just one set of briefs.

3 MR. TOLCHIN: The only thing I would request is
4 additional pages.

5 THE COURT: Well, that's fine.

6 MR. PRIMUS: No objection.

7 THE COURT: Of course, you may ask for additional
8 pages too.

9 MR. TOLCHIN: I just don't think --

10 THE COURT: Which is fine.

11 MR. TOLCHIN: I just don't think the regular page
12 limit would be enough to address two cases.

13 THE COURT: All right. Well, you all should decide
14 after you spent a little time working on the matter whether
15 you need more briefing pages. Don't do it now because we are
16 not there yet.

17 So, have you agreed on a briefing schedule?

18 MR. TOLCHIN: Yes, Your Honor.

19 MR. PRIMUS: Yes, Your Honor.

20 THE COURT: I think that would be --

21 MR. TOLCHIN: I think Shireen has it.

22 MR. GREWAL: Your Honor, if I may, may I let my
23 colleague brief you on the schedule of the briefs.

24 THE COURT: Yes, which is where we are last time. I
25 thought I could get you to smile. Go ahead.

1 MR. BURCHER-DuPONT: Facebook will file its motion
2 to dismiss on October 24th in light of the Jewish holidays.
3 Plaintiffs will then serve their opposition on November 23rd
4 and Facebook will file its reply in further support on
5 December 7, 2016.

6 THE COURT: Okay. And we will have oral argument on
7 this.

8 MR. TOLCHIN: I'm sure we will.

9 MR. PRIMUS: Understood, Your Honor.

10 THE COURT: You said December 16th so why don't we
11 schedule oral argument for Wednesday December 21st. Are you
12 available?

13 MR. PRIMUS: Your Honor, that's one thing I wanted
14 to raise, if I may. Mr. Allen and I both expect to be in
15 trial through most of December.

16 THE COURT: Oh, where are you going to be on trial?

17 MR. PRIMUS: In Portland, Maine.

18 THE COURT: Oh, in a federal court or state court?

19 MR. PRIMUS: Federal court.

20 THE COURT: Which judge?

21 MR. PRIMUS: It's a special master.

22 THE COURT: Special master? Oh, well, we can do
23 this in January. Would that be better?

24 MR. PRIMUS: That would be preferable to us if it's
25 okay with Mr. Tolchin.

1 MR. TOLCHIN: It's fine with me as long as the date
2 is available.

3 THE COURT: Okay. That's fine with the Court.

4 MR. PRIMUS: Thank you.

5 MR. GREWAL: Thank you.

6 THE COURT: How about Thursday, January 19th?

7 MR. PRIMUS: I'm confident that's fine.

8 THE COURT: All right. At 2:00 p.m. for oral
9 argument. If we need to adjust the schedule, you will let me
10 know. Just try to resolve it collaboratively. If you need to
11 change the date of oral argument, check with Mr. Reccoppa, my
12 courtroom deputy, and he will make the arrangements.

13 MR. TOLCHIN: I'm sorry, Your Honor. What time did
14 you say on that date?

15 THE COURT: 2:00 p.m.

16 MR. PRIMUS: Your Honor, I would note
17 parenthetically that to date, Mr. Tolchin and Ms. Barday have
18 been working out virtually every scheduling.

19 THE COURT: I understood there was a proposed
20 schedule last time but we didn't quite get there.

21 MR. PRIMUS: Understood.

22 MR. GREWAL: Understood.

23 THE COURT: Okay.

24 MR. TOLCHIN: We had actually signed stipulations to
25 be so ordered. Is that necessary or we said it on the

1 record --

2 THE COURT: It is on the record. It is so ordered.
3 It will be on ECF. So that will take care of that. We don't
4 need more paper but thank you.

5 All right. Mr. Tolchin, is there anything else from
6 the plaintiffs for today?

7 MR. TOLCHIN: Not at this time, Your Honor. Thank
8 you.

9 THE COURT: Anything else from the defense?

10 MR. PRIMUS: No, Your Honor.

11 THE COURT: Okay. Thank you for coming in. Have a
12 nice day. Have a good trip back.

13 MR. GREWAL: I appreciate that, sir.

14 THE COURT: Where were you a Magistrate Judge?

15 MR. GREWAL: For just under six years, I served in
16 the U.S. District Court for the Northern Division of
17 California in San Jose.

18 THE COURT: San Jose?

19 MR. GREWAL: Yes.

20 THE COURT: That's tough duty.

21 MR. GREWAL: It was a privilege. Thank you, Your
22 Honor.

23 THE COURT: Thank you. Thank you very much.

24 MR. PRIMUS: Thank you.

25 (Matter concluded.)