The State of New Hampshire

Supreme Court

No. 2019-0328

Teatotaller, LLC

v.

Facebook, Inc.

Appeal By Plaintiff from Ruling of 7th Circuit Court – District Division under RSA Chapter 503 Litigation Of Small Claims

BRIEF FOR PLAINTIFF/APPELLANT

Teatotaller, LLC
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Provisions

TEXT OF RELEVANT AUTHORITIES

NH RSA 338-A Prohibited Contracts

338-A:1 Indemnification Agreements Prohibited.

Any agreement or provision whereby an architect, engineer, surveyor or his agents or employees is sought to be held harmless or indemnified for damages and claims arising out of circumstances giving rise to legal liability by reason of negligence on the part of any said persons shall be against public policy, void and wholly unenforceable.

NH RSA 358-A Regulation of Business Practices for Consumer Protection

358-A:2 Acts Unlawful.

It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state.

47 USC § 230 Protection for private blocking and screening of offensive material

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability No provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene,

lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

RSA CHAPTER 503 Litigation of Small Claims

503:1 Small Claim Defined.

I. A small claim is any right of action not involving the title to real estate in which the debt or damages, exclusive of interest and costs, does not exceed $10,000.

II. Any person may file a small claims action as provided in this chapter, unless trial by jury is claimed by the plaintiff when the debt or damages exceed $1,500 or when the defendant claims trial by jury as provided in paragraph III.

III. When the debt or damages claimed exceed $1,500, a defendant may claim trial by jury by filing a written request within 5 business days of the filing of the application and statement of the claim under RSA 503:3 or within such additional time as the municipal or district court may for good cause allow. If such a request is filed, the case shall be transferred at once to the superior court in the county in which the town or district is located and heard and tried as if originally entered in the superior court. The original entry fee shall be paid by the plaintiff, but is recoverable as a cost if the plaintiff prevails. The small claims transfer fee shall be paid by the defendant, but is recoverable as a cost if the defendant prevails.

IV. When the amount of debt or damages exceeds $5,000 and no claim is made for trial by jury under paragraph III, the parties to the action shall be required to participate in a mediation program in the district courts approved by the office of mediation and arbitration established under RSA 490-E. If mediation of such action does not result in resolution of the action, the case shall be presented to the judge under oath.

503:2 Procedure Established.

There is hereby established a simple, speedy, and informal procedure which a plaintiff or his authorized attorney may pursue in an action commenced before a justice of a district or municipal court for the determination of a small claim. Such procedure shall be alternative and not exclusive.

QUESTIONS PRESENTED

1. Although the Circuit Court accepted the Terms of Use (TOU)[1] as the basis of a contract between both parties and found the court has jurisdiction to preside over the case, an abridged provision was relied upon in the original Order on the Motion to Dismiss (OMD).[2] Did the circuit Court err in granting the Defendant's Motion to Dismiss by a limited reading of the contract on the basis that the Plaintiff "cannot state a claim... that gives rise to a cause of action?" [App. 25][3]

2. The purpose of small claims is to streamline the process of bringing a claim against another party. As such, discovery, pleadings, and testimony is limited and in some cases proscribed until trial. Did the Circuit Court err in granting the defendants motion to dismiss on the basis that the plaintiff "cannot...demonstrate any breach of contract that gives rise to a cause of action" by not allowing the Plaintiff to proceed to trial and present evidence and testimony establishing the existence of a contract between parties and the nature of the breach? [App. 25]

3. The Circuit Court denied the Motion to Reconisder and reaffirmed its order granting the motion to dismiss. This denial did not touch on the substance of the initial order or the response contained in the Motion to Reconsider. Instead, it rested its case on the immunity allegedly provided by Section 230 of the CDA.[4] Did the Circuit Court err in relying on the CDA to deny the plaintiff's Motion, effectively immunizing the Defendant from any breach of contract claim? [App. 26]

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[1] "TOU" refers to 2018 Instagram Terms of Use, also described as Terms of Service.
[2] "OMD" refers to the Order on the Motion to Dismiss dated March 20, 2019.
[3] "App" refers to Appendix
[4] "CDA" refers to the Communications Decency Act, specifically section 230.

4. The Defendant has asserted immunity on two grounds - first through the CDA and second on an abridged reading of the TOU between parties. Did the Circuit Court err in granting Defendant's Motion to Dimiss and **denying plaintiffs Motion to Reconsider on grounds that are contrary to** Public Policy as this ruling would effectively immunize the Defendant on any claim of breach of contract? [App. 25,26]

STATEMENT OF THE CASE AND FACTS

Teatotaller LLC entered a contract with Facebook as a business account holder of Instagram, a product offered by Facebook Inc., which included paying Facebook for services governed by the TOU. [Tr. 14, 22][5] In April of 2018, Facebook updated the contract governing use of its product, Instagram, and Teatotaller was notified of this upgrade and assented to the terms. [Tr. 12]

On June 6, 2018, Teatotaller LLC discovered that Facebook terminated Teatotaller's Instragram account, including all the content, data, and followers that had been accumulated through paid and unpaid activity. Teatotaller attempted to determine why the account was deleted and was first told that Teatotaller had deleted the account. When advised that Teatotaller had definitely not deleted the account either accidently or intentionally, Facebook responded that in fact it was Facebook who deleted the account. No reason was given by Facebook for the deletion of the account.

Following its contractual obligations [App. 32] and pursuant to state law (RSA Chapter 503. Litigation Of Small Claims) Teatotaller LLC filed a small claims action in the 7th Circuit Court – District Division, on June 28, 2018 alleging breach of contract.

On November 21, 2018, the Defendant filed a Motion to Dismiss on grounds that the court lacked jurisdiction over Facebook, that Instagram was not

[5] "Tr" refers to transcript of hearing held February 5th, 2019.

related to Facebook, and that the CDA, 47 USC Section 230 provides the Defendant immunity for the claim against Facebook or Instagram. [App. 34]

On February 5, 2019, a hearing was held on the Defendant's Motion to Dismiss. The Plaintiff argued that jurisdiction is covered by both state law and the TOU, binding both parties, and that Instagram is not a standalone corporate entity but a product of Facebook. Plaintiff further argued that the CDA only relates to claims stemming from content and the liability of companies engaging in traditional editorial functions of a publisher – not immunity related to breaching of an advertising or business contract. [Tr. 8-15]

In the order on the Motion to Dismiss on March 20, 2019, the court agreed with the Plaintiff on the jurisdictional issues – finding that the court does have jurisdiction over Facebook and that Facebook is the relevant party in this case. However, the court granted the Defendant's Motion to Dismiss based on a section of the Terms of Use that, as the court stated, suggests the "Plaintiff cannot state a claim." [App. 25]

The Plaintiff filed a Motion to Reconsider on April 9, 2019, arguing that a broader review of the TOU explicity acknowledges Facebook's liability in cases related to contracts and payments. [App. 54] On April 18, 2019, the Defendant objected to the Motion to Reconsider charging that the Plaintiff's motion "merely repeats arguments." [App. 57] On May 13, 2019, the Circuit Court denied the motion to reconsider on the grounds that it is "clear that the CDA protects the defendant from the acts that are alleged by the plaintiff." [App. 26]

SUMMARY OF THE ARGUMENT

1. The TOU, which the Circuit Court upheld to determine jurisdiction and grant the motion to dismiss, provides a clear and explicit basis to state a claim for a cause of action against the Defendant.

2. The Circuit Court could not make a ruling based on the absence of a "demonstration of breach of contract that gives rise to a cause of action" as this would require a hearing on the merits. Given the limitations of the small claims filing process, the documentation required to argue a breach of contract could not be presented prior to the motion to dismiss hearing and the Circuit Court should not have granted the motion to dismiss on this basis.

3. The Plaintiff's claim is distinguishable from all other cases cited involving CDA immunity and the Circuit Court erred in applying this immunity where it does not meet the necessary critera required by the CDA.

4. Accepting a provision in the TOU that appears to provide unlimited immunity to the Defendant runs contrary to Public Policy and is wholly unenforceable under NH law.

ARGUMENT

1. **The Circuit Court erred in granting the Defendant's Motion to Dismiss by a limited reading of the contract on the basis that the Plaintiff "cannot state a claim... that gives rise to a cause of action."**

The Terms of Use was accepted by the Circuit Court as the basis for a contract between parties: "The plaintiff agreed to the terms of service." [App. 25] In granting the motion to dismiss, the Circuit Court stated that the Plaintiff "cannot state a claim" and therefore the Defendant cannot be liable.

This decision rests on one singular provision of the TOU referenced by the Circuit Court:

> "You agree we won't be responsible (liable) for any lost profits, revenues, information, or data, or consequential, special, indirect, exemplary, punitive, or incidental damages arising out of or related to these Terms, even if we know they are possible. This includes when we delete your content, information, or account." [App. 25]

While Plaintiff will later address the legality of this statement under NH law, there is one glaring omission from this list – "direct" damages. While the court may find that all of these limitations of liability referenced in the TOU hold water, the court failed to recognize that the Plaintiff has alleged **direct** damages from the actions of the Defendant, even if other forms of damages were also incurred. For this reason,the limitation of liability should not be applied in this case and the Circuit Court should allow Plaintiff's claim to go forward.

Morerover, the TOU supports the Plaintiff's claim when it states:

> "Our aggregate liability arising out of or relating to these Terms will not exceed the greater of $100 or the amount you have paid us in the past twelve months." [App. 32]

Even if the court were to not accept the further claim of a breach of contract, it should still find this statement sufficient to allow the claim to proceed to a hearing on the merits. For these reasons we contend the court erred in its decision that the Plaintiff 'cannot' state a claim by resting on the TOU, when a clear and full reading of the terms not only does not protect Defendant in this instance, but also identifies a direct avenue for liability.

2. **In granting the defendant's motion to dismiss on the basis that the plaintiff "cannot... demonstrate any breach of contract that gives rise to a cause of action," the Circuit Court erred by not allowing the Plaintiff to proceed to trial and present evidence and testimony establishing the existence of a contract between parties and the nature of the breach.**

The purpose of small claims is to limit the process of bringing a claim against someone in a, "simple, speedy, and informal procedure" [NH RSA 503:2]. In a small claims action, discovery, pleadings, and testimony are limited and in some cases prohibited until trial. The Defendant challenged the Plaintiff for not providing enough evidence of a breach of contract while raising immunity claims that would prevent the Plaintiff from sharing this evidence.

The hearing on the motion to dismiss has been the only venue for the Plaintiff to present its case – and the merits of the case were not germane to the motion to dismiss filed by the Defendant. As the court and Defendant know, the Small Claims process limits the word count of a claim and

prohibits evidence from being submitted prior to a hearing. [Tr. 8]

The Circuit Court did not address this argument in the Plaintiff's Motion to Reconsider, but it is instructive. The TOU provides an unambiguous basis to weigh the contract obligations, as the contract between both parties expressly states the grounds for account termination:
"We can remove any content or information you share on the Service if we believe that it violates these Terms of Use [or] our policies." [App. 31]

As part of the claim, the Plaintiff alleges that the account was *not* terminated for reasons based on the Terms of Use or Facebook policies, and thus the Defendant violated the contract held between both parties, all while collecting fees for service from the business account. This is equally enshrined in New Hampshire law, as Pro Done Inc. v. Basham, 172 N.H. 138,142 (2019) demonstrated: "a breach of contract occurs when there is a failure without legal excuse to perform any promise which forms the whole or part of a contract." While the small claims process provides limited means to demonstrate this failure, the Plaintiff submits that sufficient evidence and testimony was provided in the hearing to warrant a hearing on the merits to establish that an agreement was made and supported by consideration resulting in an enforcible contract between parties. The Defendant had no justification for deleting plaintiff's account and thus breached the agreement made to provide advertising in exchange for the fees paid by the Plaintiff. The arbitrary and unwarranted conduct of the Defendant clearly establishes a breach of contract. The Defendant denied the Plaintiff the very thing that was the object of the agreement.

3. **The Circuit Court erred in relying on the CDA to immunize the Defendant from the breach of contract claim.**

The Circuit Court relied upon the CDA and related cases in denying the Plaintiff's Motion to Reconsider. The Plaintiff asserts that the CDA is not applicable in this case. First, the CDA immunity requires three critera to be met, outlined in Sikh for Justice Inc v. Facebook, 144 F.Supp.3d 1088 (2015), and the Circuit Court did not apply them and the Defendant does not meet them in this case. Second the Circuit Court erred in treating this case as similar to other cases where immunity did apply and in fact the Plaintiff's claim is distinguishable from all cases pertaining to CDA immunity for particular, crucial and defining reasons.

1. Defendant did not determine that actions alleged in Plaintiff's claim meet the standards of CDA Immunity - and circuit court erred in applying this protection.

Since the law was written, courts have wrestled with the application of CDA immunity and recent internet and social-networking platforms have created new challenges in adjudicating claims. While many social media companies have argued blanket immunity in all instances; see Riggs v. MySpace, Inc. 444 Fed. Appx 986 (2011), Fair Housing Council of San Fernando Valley v. Roommate.com LLC, 521 F.3d 1157 (9th Cir. 2008) Young v. Facebook, 790 F.Supp.2d 1110 (2011), the courts have rightly been more cautious. As chief justice of the ninth circuit court of appeals remarked, "The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." [Fair Housing Council of San Fernando Valley v. Roommate.com LLC, 521 F.3d 1157 (9th Cir. 2008)] In recent history case law has produced coherent and identifiable standards with which to apply CDA immunity.

In Sikh for Justice Inc v. Facebook, 144 F.Supp.3d 1088 (2015), the court outlined three requirements that must be met by a Defendant in order for the 'good samartian' immunity to apply:

> (1) Defendant is a "provider or user of an interactive computer service;"
> (2) the information for which Plaintiff seeks to hold Defendant liable is "information provided by another information content provider;" and
> (3) Plaintiff's claim seeks to hold Defendant liable as the "publisher or speaker" of that information.

The Defendant never presented a cogent argument that Facebook and their actions meet the critera in this claim, and instead because some technical aspects of this case and other cases appear to be the same, they took at face value that the immunity must apply all the same. The Defendant does not satisfy the critera to be protected.

1. *Interactive Computer Service*

Plaintiff does not dispute that Defendant is an "interactive computer service" but as case law makes clear, this is necessary but not sufficient, as evidenced by Fraley v. Facebook Inc., 830 F. Supp. 2d 785 (2011), "A website operator can be both a service provider and a content provider.... [A]s to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider."

2. *The information for which Plaintiff seeks to hold Defendant liable is information provided by another information content provider;*

Here the Defendant's argument comes to a halt. For CDA immunity to

apply, the case must be about content that would otherwise be considered illegal or unlawful and the claim must stem from an attribution of the **content to the interactive computer service. Nothing about the Plaintiff's** claim stems from holding Facebook liable for the material or content on the platform – whether generated by Plaintiff, Defendant, or another party.

3. *Plaintiffs claim seeks to hold Defendant liable as the "publisher or speaker" of that information.*

Again this is wholly irrelevant. Plaintiff's claim does not arise out of holding the Defendant liable as the publisher or speaker of Plaintiff or any other account. Plaintiff claims that the Defendant broke a contract agreement. We have never alleged that there is anything unlawful, offensive, or illegal relating to content, accounts, or data - and so the Defendant cannot be immune from something that has not been claimed.

We are not alleging that the harm stems from the Defendant deleting the Plaintiff's account while not deleting others – the sort of actions the CDA is intended to protect (see, Fair Housing Council of San Fernando Valley v. Roommate.com LLC) – the cause of action stems from that deletion being a violation of a contract, both via the Terms of Use and paid activities. Here again case law recognizes this, as per Young v. Facebook, 790 F.Supp.2d 1110 (2011), "[i]t is at least conceivable that arbitrary or bad faith termination of user accounts, or even termination of user accounts with no explanation at all, could implicate the implied covenant of good faith and fair dealing,"

Though it is true that the CDA protects platforms from liability in particular instances of removing, excluding, or deleting objectionable or potential illegal content, it is not the case that if a claim involves removal or deletion that the CDA is therefore wholesale, uncritically applicable - and this is the

test the court erred in applying in their determination.

2. All examples in case law cited are distinguishable from Plaintiff's claim for crucial and defining reasons.

Throughout the motion to dismiss, and in the hearing, Defendant references multiple cases where courts have applied, in whole or in part, immunity to Defendents that are interactive computer services (including Facebook). While many of these cases contend that immunity is not unlimited (see Fair Housing Council of San Fernando Valley v. Roommate.com LLC, Fraley v. Facebook etc.), they all ultimately share resemeblances to one another that are not shared with Plaintiff's claim. First, all of them include a plaintiff claiming damages against the interactive compter service companies for actions of a third party (e.g. someone posting offensive, slanderous, or discrimintary content), which might be deemed unlawful. In all cases where immunity was granted, it was done so when the defendant was only applying "traditional editorial functions" of a publisher [Fair Housing Council of San Fernando Valley v. Roommate.com LLC]. This is not the basis of the Plaintiff's claim here. The claim raised by the Plaintiff alleges that the Defendant took action that rises above the traditional role of a publisher and this alone warrants a hearing on the merits.

Perhaps more importantly, one other factor ties all other cases together. In each case, none of the plaintiffs were engaged in a fee for service contract with defendants. This strikes at the heart of this case. The Plaintiff here has directly paid Defendant for services which, as would be argued in a merits hearing, the Defendant has failed to fulfill.

This is a distinguishable case. Defendant has not responded to the claim that by accepting payment they have entered into a contract - a promise supported by consideration, and the Circuit Court should not have applied

CDA immunity to these actions.

4. **In referencing a provision of the TOU that appears to provide unlimited immunity, the Circuit Court erred in granting Defendant's Motion to Dimiss on grounds that are contrary to Public Policy as this ruling would effectively hold the Defendant harmless on any claim of breach of contract.**

Facebook is the largest social networking platform in the world. While it is free-to-use, it offers a range of services and products to interact with other people, including Instagram. Its primary source of revenue is built on massive advertising opportunities derived from the sheer number of people that use it as their primary source for online engagement. It even claims responsibility for creating important forms of human interaction offline, as a 2018 commercial for the platform stated, "the most important thing on Facebook isn't on Facebook." As such, we should expect this digital town square to take up the mantle of responsibility to ensure users feel as though they understand how their participation with Facebook works. Rules of the road should be transparent and issues and problems that arise from the use of Facebook ought to have proper channels to seek redress. The current Terms of Use that governs all Facebook and Instagram activity provide incredibly limited recourse to seek a claim against the company. While the Plaintiff is not alleging here that the entire TOU are too narrow to be enforceable, we would expect that if a user goes through the painstaking process to bring a claim against the company following the incredibly narrow channels defined by Facebook, that they would, at the very least, have their day in court. Instead, this case illuminates how even the narrowest provision for recourse is being denied. That the Plaintiff, a small business in New Hampshire, was

asked to spend considerable time just proving how the Dover District Small Claims court has jurisdiction over Facebook – when this was the very avenue defined by the Defendant – speaks to the deceptive nature of this contract. While the average person would find this reprehensible, we argue that it is also legally prohibited.

Defedant referenced the provision in the TOU that "eliminates the claim for damages" [Tr. 15], which was relied on by the Circuit Court in granting the motion to dismiss. While earlier we argued the inapplication of this clause (argument 1 of this brief), it is now worth considering the legal viability all together. Under NH Law, RSA 358-A, Prohibited Contracts, it is clear that courts should not enforce provisions in contracts that undermine the very basis of a contract – a promise supported by consideration.

> "Any agreement or provision whereby an architect, engineer, surveyor or his agents or employees is sought to be held harmless or indemnified for damages and claims arising out of circumstances giving rise to legal liability by reason of negligence on the part of any said persons shall be against public policy, void and wholly unenforceable." [RSA 338-A:1]

If any contract can contain complete liability limitations that can be used to justifiy claim dismissals and bar Plaintiffs from seeking recourse, there is no basis for a contract whatsoever. By accepting fees for service, the Defedant entered into a promise with consideration, while at the same time defining away the rights of the Plaintiff to seek redress in the instance of negligence or breach of contract.

Had the Plaintiff known there would be no redress in the event that Defendant failed to hold its promise, and that such a claim would be dismissed in the first instance, and not in regards to its merits, Plaintiff

would not have entered into the contract. As such, Plaintiff was deceived into entering a bare promise and this is a violation of NH law.

> "It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." [NH RSA 358-A:2]

When the Defedant put up a shingle to accept fees for service, they **developed the TOU to govern how account holders would use, interact, and** seek redress in the event of a claim. Here we have seen an instance where Facebook deceived a paying customer, Teatotaller, into assuming it would fulfill services rendered and that promise would be protected by consideration.

Here is where application of CDA immunity is particularly pernicious. This allows the Defendant to create a contract that could include a "promise" of not deleting ones account, but claiming immunity if they do. It is telling that when the Plaintiff sought to raise language outlining this promise, the Defendant objected to this discussion on the grounds that "we're getting into the merits there."[Tr. 15] Yet this is the case at hand and the Court should be wary of upholding a bare promise and unenforceable contract that is essentially a catch-22.

As it turns out, the TOU were used to deceive the Plaintiff into a faulty arrangement – one where the recourse that already appeared to be so narrow, turned out to be no recourse at all. The Circuit Court should not have enforced a contract that is uneforcable under state law and runs contrary to public policy and the basis of all contract law.

CONCLUSION

For the foregoing reasons, Teatotaller LLC respectfully requests that this Court reverse the Order on the Motion to Dismiss and remand to the Circuit Court for mandatory mediation and a hearing on the merits as required by NH RSA 503.

I hereby certify that the decision being appealed is in writing and is appended to this brief.

Dated: December 16, 2019

By: _____

Emmett Soldati, Registered Agent, *Pro Se*
Teatotaller, LLC

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Teatotaller LLC requests 15 minutes of oral argument before the full court.

I hereby certify that on December 16, 2019, two copies of the foregoing will be forwarded via U.S. Mail service first class to: Stephen Soule, Esq, Paul Frank + Collins P.C., 1 Church St. P.O. Box 1307 Burlington VT 05402

Dated December 16, 2019

By: _____

Emmett Soldati, Registered Agent, *Pro Se*
Teatotaller, LLC

APPENDIX

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

NH CIRCUIT COURT

STRAFFORD COUNTY **7th CIRCUIT- DISTRICT DIVISION- DOVER**

In the Matter of:
Teatotaller, LLC
v.
Facebook, Inc.

Case No. 432-2018-SC-00298

ORDER on Motion to Dismiss

The plaintiff, Teatotaller, LLC filed a complaint against the defendant, Facebook, Inc. for damages arising from the defendant's removal of the plaintiff's Instagram business account without notice. The plaintiff claims that due to the defendant's negligence, they have lost business and customers, and are seeking damages. The plaintiff is represented by the sole proprietor, Emmett Soldati, and the defendant is represented by counsel, Stephen Soule, Esquire.

The defendant has filed a Motion to Dismiss on a number of grounds to include, lack of a cause of action against Facebook versus their subsidiary Instagram, this court's lack of jurisdiction, and immunity under the Communications Decency Act Section 230(c)(1).

The plaintiff has filed an Objection to the Motion, and cites to the updated April 19, 2018 Instagram Terms of Use that specifically indicates that Instagram is one of the Facebook Products, and that the terms of use constitutes an agreement between the user and Facebook, Inc. The plaintiff also cites the defendant's provision, in part, that "Instead of using arbitration, you or we can bring claims in your local "small claims" court, if the rules of that court will allow it..." As such, plaintiff suggests that the defendant is expressly availing itself of protection and jurisdiction under New Hampshire law. Additionally, the plaintiff argues that personal jurisdiction is established if the non-resident defendant has minimum contacts with the forum, and that Facebook and Instagram's user and customer base in New Hampshire is close to 900,000.

The defendant argues that in their Reply that the plaintiff reliance on the 2018 Instagram Terms of Service for jurisdictional purposes supports the defendant's position. The 2018 Instagram Terms of Service specifies the following:

"You agree we won't be responsible (liable) for any lost profits, revenues, information, or data, or consequential, special, indirect, exemplary, punitive, or incidental **damages arising out of or related to these Terms, even if we know they are possible.** This includes when we delete your content, information, or account."

By subscribing to the service and using Instagram, the plaintiff agreed to the Terms of Service. Although the court finds that it has jurisdiction given the language in the 2018 Instagram Terms of Service, the plaintiff cannot state a claim or demonstrate any breach of contract that gives rise to a cause of action, and the court grants the defendant's Motion to Dismiss.

So Ordered.

March 20, 2019
Date

Hon. Sawako Gardner, Judge

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

STRAFFORD COUNTY — **7th CIRCUIT- DISTRICT DIVISION- DOVER**

In the Matter of:

Teatotaller, LLC
v.
Facebook, Inc.

Case No. 432-2018-SC-00298

ORDER

The plaintiff filed a Motion to Reconsider the court's decision of March 20, 2019. The defendant objects to the Motion. The court declines to find that it has overlooked or misconstrued any points of fact or law. It is clear that the Communications Decency Act, 47 USC Section 230 protects the defendant from the acts that are alleged by the plaintiff. "Any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." Fair Housing Council of San Fernando Valley v. Roommates.com LLC, 521 F3d 1157, 1170-1171 (9th Cir. 2008)(en banc); see Riggs v. MySpace, Inc., 444 Fed. Appx. 986 (2011); Sikh for Justice, Inc. v. Facebook, 144 F. Supp. 3d 1088 (2015).

Accordingly, the Motion for Reconsideration is Denied.

So Ordered.

May 13, 2019
Date

Hon. Sawako Gardner, Judge

Clerk's Notice
Document sent to parties
on 05/13/2019

Instagram Terms of Use

How can we help?

Source: https://help.instagram.com/581066165581870

Help Center

- Using Instagram
- Managing Your Account
- Instagram for Business
- Troubleshooting and Login Help
- Privacy and Safety Center

Terms of Use

Welcome to Instagram!

These Terms of Use govern your use of Instagram and provide information about the Instagram Service, outlined below. When you create an Instagram account or use Instagram, you agree to these terms.

The Instagram Service is one of the Facebook Products, provided to you by Facebook, Inc. These Terms of Use therefore constitute an agreement between you and Facebook, Inc.

ARBITRATION NOTICE: YOU AGREE THAT DISPUTES BETWEEN YOU AND US WILL BE RESOLVED BY BINDING, INDIVIDUAL ARBITRATION AND YOU WAIVE YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT OR CLASS-WIDE ARBITRATION. WE EXPLAIN SOME EXCEPTIONS AND HOW YOU CAN OPT OUT OF ARBITRATION BELOW.

The Instagram Service

We agree to provide you with the Instagram Service. The Service includes all of the Instagram products, features, applications, services, technologies, and software that we provide to advance Instagram's mission: To bring you closer to the people and things you love. The Service is made up of the following aspects (the Service):

- **Offering personalized opportunities to create, connect, communicate, discover, and share.**
  People are different. We want to strengthen your relationships through shared experiences you actually care about. So we build systems that try to understand who and what you and others care about, and use that information to help you create, find, join, and share in experiences that matter to you. Part of that is highlighting content, features, offers, and accounts you might be interested in, and offering ways for you to experience Instagram, based on things you and others do on and off Instagram.
- **Fostering a positive, inclusive, and safe environment.**
  We develop and use tools and offer resources to our community members that help to make their experiences positive and inclusive, including when we think they might need help. We also have teams and systems that work to combat abuse and

violations of our Terms and policies, as well as harmful and deceptive behavior. We use all the information we have-including your information-to try to keep our platform secure. We also may share information about misuse or harmful content with other Facebook Companies or law enforcement. Learn more in the Data Policy.

- **Developing and using technologies that help us consistently serve our growing community.**
  Organizing and analyzing information for our growing community is central to our Service. A big part of our Service is creating and using cutting-edge technologies that help us personalize, protect, and improve our Service on an incredibly large scale for a broad global community. Technologies like artificial intelligence and machine learning give us the power to apply complex processes across our Service. Automated technologies also help us ensure the functionality and integrity of our Service.

- **Providing consistent and seamless experiences across other Facebook Company Products.**
  Instagram is part of the Facebook Companies, which share technology, systems, insights, and information-including the information we have about you (learn more in the Data Policy) in order to provide services that are better, safer, and more secure. We also provide ways to interact across the Facebook Company Products that you use, and designed systems to achieve a seamless and consistent experience across the Facebook Company Products.

- **Ensuring a stable global infrastructure for our Service.**
  To provide our global Service, we must store and transfer data across our systems around the world, including outside of your country of residence. This infrastructure may be owned or operated by Facebook Inc., Facebook Ireland Limited, or their affiliates.

- **Connecting you with brands, products, and services in ways you care about.**
  We use data from Instagram and other Facebook Company Products, as well as from third-party partners, to show you ads, offers, and other sponsored content that we believe will be meaningful to you. And we try to make that content as relevant as all your other experiences on Instagram.

- **Research and innovation.**
  We use the information we have to study our Service and collaborate with others on research to make our Service better and contribute to the well-being of our community.

The Data Policy

Providing our Service requires collecting and using your information. The Data Policy explains how we collect, use, and share information across the Facebook Products. It also explains the many ways you can control your information, including in the Instagram Privacy and Security Settings. You must agree to the Data Policy to use Instagram.

Your Commitments

In return for our commitment to provide the Service, we require you to make the below commitments to us.

Who Can Use Instagram. We want our Service to be as open and inclusive as possible, but we also want it to be safe, secure, and in accordance with the law. So, we need you to commit to a few restrictions in order to be part of the Instagram community.

- You must be at least 13 years old.
- You must not be prohibited from receiving any aspect of our Service under applicable laws or engaging in payments related Services if you are on an applicable denied party listing.
- We must not have previously disabled your account for violation of law or any of our policies.
- You must not be a convicted sex offender.

How You Can't Use Instagram. Providing a safe and open Service for a broad community requires that we all do our part.

- **You can't impersonate others or provide inaccurate information.** You don't have to disclose your identity on Instagram, but you must provide us with accurate and up to date information (including registration information). Also, you may not impersonate someone you aren't, and you can't create an account for someone else unless you have their express permission.
- **You can't do anything unlawful, misleading, or fraudulent or for an illegal or unauthorized purpose.**
- **You can't violate (or help or encourage others to violate) these Terms or our policies, including in particular the Instagram Community Guidelines, Instagram Platform Policy, and Music Guidelines.** Learn how to report conduct or content in our Help Center.
- **You can't do anything to interfere with or impair the intended operation of the Service.**
- **You can't attempt to create accounts or access or collect information in unauthorized ways.** This includes creating accounts or collecting information in an automated way without our express permission.
- **You can't attempt to buy, sell, or transfer any aspect of your account (including your username) or solicit, collect, or use login credentials or badges of other users.**
- **You can't post private or confidential information or do anything that violates someone else's rights, including intellectual property.** Learn more, including how to report content that you think infringes your intellectual property rights, here.
- **You can't use a domain name or URL in your username without our prior written consent.**

Permissions You Give to Us. As part of our agreement, you also give us permissions that we need to provide the Service.

- **We do not claim ownership of your content, but you grant us a license to use it.** Nothing is changing about your rights in your content. We do not claim ownership of your content that you post on or through the Service. Instead, when you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings). You can end this license anytime by deleting your content or account. However, content will continue to appear if you shared it with others and they have not deleted it. To learn more about how we use information, and how to control or delete your content, review the Data Policy and visit the Instagram Help Center.
- **Permission to use your username, profile picture, and information about your relationships and actions with accounts, ads, and sponsored content.** You give us permission to show your username, profile picture, and information about your actions (such as likes) or relationships (such as follows) next to or in connection with accounts, ads, offers, and other sponsored content that you follow or engage with that are displayed on Facebook Products, without any compensation to you. For example, we may show that you liked a sponsored post created by a brand that has paid us to display its ads on Instagram. As with actions on other content and follows of other accounts, actions on sponsored content and follows of sponsored accounts can be seen only by people who have permission to see that content or follow. We will also respect your ad settings. You can learn more here about your ad settings.
- **You agree that we can download and install updates to the Service on your device.**

Additional Rights We Retain

- If you select a username or similar identifier for your account, we may change it if we believe it is appropriate or necessary (for example, if it infringes someone's intellectual property or impersonates another user).
- If you use content covered by intellectual property rights that we have and make available in our Service (for example, images, designs, videos, or sounds we provide that you add to content you create or share), we retain all rights to our content (but not yours).
- You can only use our intellectual property and trademarks or similar marks as expressly permitted by our Brand Guidelines or with our prior written permission.
- You must obtain written permission from us or under an open source license to modify, create derivative works of, decompile, or otherwise attempt to extract source code from us.

Content Removal and Disabling or Terminating Your Account

- We can remove any content or information you share on the Service if we believe that it violates these Terms of Use, our policies (including our Instagram Community Guidelines), or we are permitted or required to do so by law. We can refuse to provide or stop providing all or part of the Service to you (including terminating or disabling your account) immediately to protect our community or services, or if you create risk or legal exposure for us, violate these Terms of Use or our policies (including our Instagram Community Guidelines), if you repeatedly infringe other people's intellectual property rights, or where we are permitted or required to do so by law. If you believe your account has been terminated in error, or you want to disable or permanently delete your account, consult our Help Center.
- Content you delete may persist for a limited period of time in backup copies and will still be visible where others have shared it. This paragraph, and the section below called "Our Agreement and What Happens if We Disagree," will still apply **even after your account is terminated or deleted.**

Our Agreement and What Happens if We Disagree

Our Agreement.

- Your use of music on the Service is also subject to our Music Guidelines, and your use of our API is subject to our Platform Policy. If you use certain other features or **related services, you will be provided with an opportunity to agree to additional** terms that will also become a part of our agreement. For example, if you use payment features, you will be asked to agree to the Community Payment Terms. If any of those terms conflict with this agreement, those other terms will govern.
- If any aspect of this agreement is unenforceable, the rest will remain in effect.
- Any amendment or waiver to our agreement must be in writing and signed by us. If we fail to enforce any aspect of this agreement, it will not be a waiver.
- We reserve all rights not expressly granted to you.

Who Has Rights Under this Agreement.

- This agreement does not give rights to any third parties.
- You cannot transfer your rights or obligations under this agreement without our consent.
- Our rights and obligations can be assigned to others. For example, this could occur if our ownership changes (as in a merger, acquisition, or sale of assets) or by law.

Who Is Responsible if Something Happens.

- Our Service is provided "as is," and we can't guarantee it will be safe and secure or will work perfectly all the time. TO THE EXTENT PERMITTED BY LAW, WE ALSO DISCLAIM ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT.
- We also don't control what people and others do or say, and we aren't responsible for their (or your) actions or conduct (whether online or offline) or content (including

unlawful or objectionable content). We also aren't responsible for services and features offered by other people or companies, even if you access them through our Service.

- Our responsibility for anything that happens on the Service (also called "liability") is limited as much as the law will allow. If there is an issue with our Service, we can't know what all the possible impacts might be. You agree that we won't be responsible ("liable") for any lost profits, revenues, information, or data, or consequential, special, indirect, exemplary, punitive, or incidental damages arising out of or related to these Terms, even if we know they are possible. This includes when we delete your content, information, or account. Our aggregate liability arising out of or relating to these Terms will not exceed the greater of $100 or the amount you have paid us in the past twelve months.
- You agree to defend (at our request), indemnify and hold us harmless from and against any claims, liabilities, damages, losses, and expenses, including without limitation, reasonable attorney's fees and costs, arising out of or in any way connected with these Terms or your use of the Service. You will cooperate as required by us in the defense of any claim. We reserve the right to assume the exclusive defense and control of any matter subject to indemnification by you, and you will not in any event settle any claim without our prior written consent.

How We Will Handle Disputes.

- Except as provided below, you and we agree that any cause of action, legal claim, or dispute between you and us arising out of or related to these Terms or Instagram ("claim(s)") must be resolved by arbitration on an individual basis. Class actions and class arbitrations are not permitted; you and we may bring a claim only on your own behalf and cannot seek relief that would affect other Instagram users. If there is a final judicial determination that any particular claim (or a request for particular relief) cannot be arbitrated in accordance with this provision's limitations, then only that claim (or only that request for relief) may be brought in court. All other claims (or requests for relief) remain subject to this provision.
- Instead of using arbitration, you or we can bring claims in your local "small claims" court, if the rules of that court will allow it. If you don't bring your claims in small claims court (or if you or we appeal a small claims court judgment to a court of general jurisdiction), then the claims must be resolved by binding, individual arbitration. The American Arbitration Association will administer all arbitrations under its Consumer Arbitration Rules. You and we expressly waive a trial by jury.

  The following claims don't have to be arbitrated and may be brought in court: disputes related to intellectual property (like copyrights and trademarks), violations of our Platform Policy, or efforts to interfere with the Service or engage with the Service in unauthorized ways (for example, automated ways). In addition, issues relating to the scope and enforceability of the arbitration provision are for a court to decide.

  This arbitration provision is governed by the Federal Arbitration Act.

  You can opt out of this provision within 30 days of the date that you agreed to these Terms. To opt out, you must send your name, residence address, username, email address or phone number you use for your Instagram account, and a clear statement that you want to opt out of this arbitration agreement, and you must send

them here: Facebook, Inc. ATTN: Instagram Arbitration Opt-out, 1601 Willow Rd., Menlo Park, CA 94025.

- Before you commence arbitration of a claim, you must provide us with a written Notice of Dispute that includes your name, residence address, username, email address or phone number you use for your Instagram account, a detailed description of the dispute, and the relief you seek. Any Notice of Dispute you send to us should be mailed to Facebook, Inc., ATTN: Instagram Arbitration Filing, 1601 Willow Rd. Menlo Park, CA 94025. Before we commence arbitration, we will send you a Notice of Dispute to the email address you use with your Instagram account, or other appropriate means. If we are unable to resolve a dispute within thirty (30) days after the Notice of Dispute is received, you or we may commence arbitration.
- We will pay all arbitration filing fees, administration and hearing costs, and arbitrator fees for any arbitration we bring or if your claims seek less than $75,000 and you timely provided us with a Notice of Dispute. For all other claims, the costs and fees of arbitration shall be allocated in accordance with the arbitration provider's rules, including rules regarding frivolous or improper claims.
- For any claim that is not arbitrated or resolved in small claims court, you agree that it will be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County. You also agree to submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim.
- The laws of the State of California, to the extent not preempted by or inconsistent with federal law, will govern these Terms and any claim, without regard to conflict of law provisions.

Unsolicited Material.

We always appreciate feedback or other suggestions, but may use them without any restrictions or obligation to compensate you for them, and are under no obligation to keep them confidential.

Updating These Terms

We may change our Service and policies, and we may need to make changes to these Terms so that they accurately reflect our Service and policies. Unless otherwise required by law, we will notify you (for example, through our Service) before we make changes to these Terms and give you an opportunity to review them before they go into effect. Then, if you continue to use the Service, you will be bound by the updated Terms. If you do not want to agree to these or any updated Terms, you can delete your account, here.

Revised: April 19, 2018

THE STATE OF NEW HAMPSHIRE
CIRCUIT COURT

7th Circuit – District Division – Dover Docket No. 432-2018-SC-00298

TEATOTALLER LLC

v.

FACEBOOK, INC.

MOTION TO DISMISS

NOW COMES Defendant, Facebook, by and through its attorneys, Paul Frank + Collins PC and moves the Court to dismiss Plaintiff's Complaint.

1. INTRODUCTION

Plaintiff Teatotaller LLC's Complaint against Facebook, Inc. should be dismissed for two, independent reasons.

First, Plaintiff does not and cannot establish that the Court has personal jurisdiction over Facebook. Facebook has virtually no presence in New Hampshire, and Plaintiff does not allege any sort of connection between Facebook and this state, much less a connection that has anything to do with this case.

Second, even if Plaintiff could establish jurisdiction over Facebook, it has not pled any cause of action against Facebook. Indeed, it has not alleged any misconduct by Facebook whatsoever. Rather, Plaintiff's claims relate solely to issues it is allegedly having with its account on Instagram, which is a Facebook subsidiary. As a matter of black-letter law, a corporation cannot be held liable for the alleged misconduct of its subsidiary absent a showing of corporate abuse that justifies piercing the corporate veil—and Plaintiff has not alleged anything of the sort.

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BURLINGTON, VERMONT 05401

2. BACKGROUND

Facebook is a free-to-use social networking platform. Facebook is incorporated in Delaware and has its principal place of business in California. Declaration of Michael Duffey ("Duffey Decl.") ¶ 2. It has no offices, data centers, or servers in New Hampshire. Duffey Decl. ¶¶ 4, 6. Facebook does it have any accounts with New Hampshire banks. *Id.* ¶ 5. Of its approximately 33,600 employees, just two work—remotely—from New Hampshire. *Id.* ¶ 7. Instagram, LLC is also a free-to-use social networking platform. Instagram is incorporated in Delaware and is a wholly owned subsidiary of Facebook. *Id.* ¶ 8.

Plaintiff filed its Small Claims Complaint against Facebook on June 28, 2018. Plaintiff initially obtained default judgment, but, on October 15, 2018, the Court granted Facebook's motion to reopen for lack of proper service.

Plaintiff alleges that its Instagram account was deleted in June 2018, in violation of "Instagram['s] . . . duty of care to protect our business from algorithmic deletion." Complaint at 3 (Claim Description). Plaintiff further alleges that it "ha[s] and continue[s] to lose business and customers due to their negligence." *Id.* Plaintiff's Complaint is only against Facebook. Plaintiff does not name Instagram as a defendant.

3. ARGUMENT

a. Plaintiff Fails to Establish Personal Jurisdiction Over Facebook

The Complaint must be dismissed because Plaintiff has not established and cannot establish a basis for the Court to exercise personal jurisdiction over Facebook.

Before the Court can exercise jurisdiction over Facebook, "the requirements of the Federal Due Process Clause must be satisfied." *Metcalf v. Lawson*, 802 A.2d 1221, 1224 (N.H. 2002). The due-process requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985).

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When a party is haled into court, it "must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgment." *Id.* at 808. It may also "be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with some other form of remedy imposed by the court should it lose the suit." *Id.* These burdens are "substantial," and so "the Due Process Clause prevents the forum State from unfairly imposing them." *Id.*

Plaintiff "bears the burden of demonstrating facts sufficient to establish personal jurisdiction." *Vt. Wholesale Bldg. Prods., Inc. v. J.W. Jones Lumber Co.*, 914 A.2d 818, 821 (N.H. 2006). "To make a *prima facie* showing [of personal jurisdiction], the plaintiff ordinarily cannot rest upon the pleadings, but is obliged to adduce evidence of specific facts." *State v. N. Atl. Ref. Ltd.*, 999 A.2d 396, 403 (N.H. 2010).

Here, Plaintiff fails to meet this burden, for the reasons detailed below.

i. The Court lacks general personal jurisdiction over Facebook.

Two types of personal jurisdiction exist. The first is "general or all-purpose jurisdiction." *Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014). General jurisdiction exists only when the party's "affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State," *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). For a corporation, "at home" generally means one of two places: "the place of incorporation and principal place of business." *Daimler AG*, 571 U.S. at 137. New Hampshire is neither of these places for Facebook. Duffey Decl. ¶ 2.

Accordingly, general jurisdiction would be proper only if Plaintiff could show this is an "exceptional" case—*i.e.*, one where Facebook's operations in New Hampshire were "so substantial and of such a nature as to render [Facebook] at home in that State." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017). Plaintiff has not made such a showing and cannot do so here.

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Plaintiff fails to allege any sort of Facebook presence in New Hampshire, much less offer specific evidence of it. As a matter of fact, Facebook has no offices, servers, or bank accounts in New Hampshire, and just two of its approximately 33,600 employees work remotely from this state. Duffey Decl. ¶ 7. In sum, Facebook has virtually ***no*** operations in New Hampshire, let alone "substantial" operations that make it effectively "at home" here and subject to general jurisdiction.

Plaintiff, a company, does not even allege that it used Facebook in New Hampshire or anywhere else, for that matter. Plaintiff's allegations are only based on its use of Instagram. *See* Complaint at 6. Even if Plaintiff had alleged that it used Facebook, the fact that people and organizations use Facebook in New Hampshire is not sufficient, as a matter of law, to give rise to general jurisdiction, as that would describe Facebook's relationship with ***any*** state. *See Daimler AG*, 571 U.S. at 139 n.20 ("[A] corporation that operates in many places can scarcely be deemed at home in all of them.").

Plaintiff thus cannot establish general personal jurisdiction over Facebook.

ii. The Court lacks specific personal jurisdiction over Facebook.

The second form of personal jurisdiction is "specific or conduct-linked jurisdiction." *Daimler AG*, 571 U.S. at 122. Specific jurisdiction is "narrower in scope" than general jurisdiction. *Pritzker v. Yari*, 42 F.3d 53, 60 (1st Cir. 1994). Specific jurisdiction would be proper only if "(1) [Facebook's] contacts [with New Hampshire] relate[d] to the cause of action; (2) [Facebook] ha[d] purposefully availed itself of the protection of New Hampshire's laws; and (3) it would be fair and reasonable to require [Facebook] to defend the suit in New Hampshire." *Vt. Wholesale*, 914 A.2d at 822. "***All three*** factors must be satisfied in order for the exercise of jurisdiction to be constitutional." *Id.* Here, Plaintiff's allegations fail to satisfy any of the three factors.

First, Plaintiff does not allege any contacts between Facebook and New Hampshire, much less contacts that are tied to Plaintiff's cause of action. Indeed, Plaintiff's cause of action of action

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is based on Instagram's alleged conduct, and Plaintiff does not even allege that Instagram has jurisdictional contacts with New Hampshire. Furthermore, even if Plaintiff had alleged that Facebook was somehow involved in Instagram's alleged conduct, that would not be enough to give rise to specific personal jurisdiction. It is well-established "an individual's contract with an out-of-state party alone" cannot establish the minimum contacts necessary for personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985); *accord Nicholas v. Buchanan*, 806 F.2d 305, 307 (1st Cir. 1986) (same).

Second, Plaintiff does not allege that Facebook did anything to purposefully avail itself of the protection of New Hampshire's law.

Third, Plaintiff cannot establish that it would be fair or reasonable to force Facebook to litigate this case in New Hampshire. To the contrary, Facebook has effectively no connection with the state or with Plaintiff's claim.

Plaintiff will likely argue that specific jurisdiction exists because it used Instagram in New Hampshire. Even if the Court were to equate Facebook with Instagram (and it should not, as discussed below), the law is clear that this is insufficient. Specific personal jurisdiction cannot rest on a party "simply operating an interactive website that is accessible from the forum state." *be2 LLC v. Ivanov*, 642 F.3d 555, 558–59 (7th Cir. 2011) (collecting cases); *see also Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (personal jurisdiction in Virginia based on website postings improper where defendants did not "manifest an intent to target and focus on Virginia readers"). Indeed, courts applying this rule have specifically held "that personal jurisdiction over Facebook may not exist simply because a user avails himself of Facebook's services in a state other than the states in which Facebook is incorporated and has its principal place

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of business." *Ralls v. Facebook*, 221 F. Supp. 3d 1237, 1244 (W.D. Wash. 2016); *see also Gullen v. Facebook.com*, Inc., No. 15 C 7681, 2016 WL 245910, at *2 (N.D. Ill. Jan. 21, 2016).

Because there is no basis for specific personal jurisdiction over Facebook in this matter, the Due Process Clause bars Plaintiff from suing Facebook in this dispute in New Hampshire. The Court should dismiss the Complaint for this reason alone.

b. Plaintiff Does Not State Any Claim Against Facebook

Even if Plaintiff could establish personal jurisdiction over Facebook, the Court should dismiss the Complaint for a second, independent reason: Plaintiff does not state a cause of action against Facebook.

Plaintiff's claim is based solely on allegations of wrongdoing by Instagram. Complaint at 6. Plaintiff alleges that "Instagram had a duty of care" and breached that duty by not preventing Plaintiff's Instagram account from its "algorithmic deletion." *Id.* Plaintiff does not allege any facts that somehow tie Facebook to the deletion of its Instagram account. Plaintiff does not even allege that it ever used Facebook.

Plaintiff might argue that Instagram is a wholly owned subsidiary of Facebook, so anything done by Instagram should be imputed to Facebook. The law is to the contrary. By default, a plaintiff ***cannot*** hold a parent corporation liable for the alleged actions of its subsidiary, even if the subsidiary is wholly owned by the parent; to do so, a plaintiff must establish that there is some impropriety—that is, an abuse of the corporate structure—that would justify piercing the corporate veil and treating parent and subsidiary as one. *U.S. v. BestFoods*, 524 U.S. 51, 61-64 (1998). Here, Plaintiff offers no justification whatsoever for piercing the corporate veil. Thus, Plaintiff cannot sue Facebook for what it claims Instagram did.

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Moreover, even if Plaintiff could somehow equate Facebook and Instagram by piercing the corporate veil (which it has not and cannot), its purported claim against Facebook is barred under Section 230(c)(1) of the Communications Decency Act ("CDA"), which immunizes Facebook from claims that seek to hold it liable for "deciding whether to publish, withdraw, postpone or alter content." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Courts have repeatedly dismissed under Section 230(c)(1) claims such as this one, that seek to hold an interactive computer service provider such as Facebook liable for blocking or removing a plaintiff's posts or suspending a plaintiff's account. *E.g.*, *Riggs v. MySpace, Inc.*, 444 F. App'x 986, 987 (9th Cir. 2011) (Section 230(c)(1) immunizes "decisions to delete [plaintiff's] user profiles"); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095 (N.D. Cal. 2015) (dismissing claims based on Facebook's removal of plaintiff's page under Section 230(c)(1)); *Lancaster v. Alphabet Inc.*, 2016 WL 3648608, at * 2-3 (N.D. Cal. July 8, 2016) (dismissing claims based on removal of plaintiff's videos under Section 230(c)(1)); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (decisions such as "whether to print or retract a given piece of content" go to "the very essence of publishing" under Section 230(c)(1)). The CDA would similarly immunize Instagram from Plaintiff's claim if it had brought the claim against Instagram.

4. CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court dismiss the Complaint.

Dated: November 21, 2018

BY: */s/ Stephen J. Soule*

Stephen Soule, Esq., Bar No. #4858
Paul Frank + Collins P.C.
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Burlington, VT 05402
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Schedule for a Hearing

Referee Patrick W. Ryan
12/03/2018

The Recommendation of the Master/Referee is Approved

Judge Edwin W. Kelly
12/06/2018

Clerk's Notice
Document sent to parties on 12/19/2018

Any motion for reconsideration must be filed within 10 days of the date of this notice. Any appeal to Supreme Court must be filed within 30 days of the date of this notice.

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THE STATE OF NEW HAMPSHIRE
CIRCUIT COURT

7th Circuit – District Division – Dover **Docket No. 432-2018-SC-00298**

TEATOTALLER LLC

v.

FACEBOOK, INC.

DECLARATION OF MICHAEL DUFFEY IN SUPPORT OF FACEBOOK, INC.'S MOTION TO DISMISS

I, Michael Duffey, declare as follows:

1. I am an eDiscovery and Litigation Project Lead in the Legal Department of Facebook, Inc. ("Facebook").

2. Facebook is a Delaware corporation headquartered in California. Facebook's principal place of business is located at 1601 Willow Dr., Menlo Park, California.

3. The Facebook website (www.facebook.com) and mobile application are available for users to access anywhere in the country (or the world) where there is an internet connection. Individuals in all fifty states have set up Facebook accounts.

4. Facebook has no offices located in the state of New Hampshire.

5. Facebook has not had any bank accounts located within the state of New Hampshire, has not borrowed any money from any bank within the state of New Hampshire, and has not applied for or guaranteed any loan from any bank located within the state of New Hampshire.

6. Facebook has no data centers or servers located in the state of New Hampshire.

7. As of September 30, 2018, Facebook has 33,606 employees worldwide. Of these, just two work— remotely—from New Hampshire.

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8. Instagram, LLC is incorporated in Delaware. It is a wholly owned subsidiary of Facebook.

I declare under penalty of perjury under the laws of the state of New Hampshire that the foregoing is true and correct. Executed on November 20, 2018 at Menlo Park, California.

MICHAEL DUFFEY

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THE STATE OF NEW HAMPSHIRE
CIRCUIT COURT

7th Circuit – District Division – Dover **Docket No. 432-2018-SC-00298**

TEATOTALLER LLC
V
FACEBOOK, INC.

OBJECTION TO MOTION TO DISMISS

NOW COMES Teatotaller LLC and objects to the motion to dismiss civil action in above-captioned civil action.

1. FACTUAL BACKGROUND
   Teatotaller, a limited liability company in the State of New Hampshire, and based in Somersworth New Hampshire, operated a business account on a Facebook Inc. product, Instagram. The business account was managed, paid for, and operated exclusively from Somersworth New Hampshire to reach its customers – other Instagram users – in Somersworth New Hampshire and surrounding communities. The "Instagram Terms of Use" were updated on April 19th, 2018 and agreed upon between both parties – the Plaintiff, Teatotaller LLC and Defendant, Facebook Inc.

   On June 28th, Teatotaller LLC submitted a small claim against Facebook, Inc. using Dover District Court's Turbocourt platform.

2. ARGUMENT
   Mr. Stephen Soule, on behalf of Paul Frank + Collins, argues that this case should be dismissed for two reasons – that it cannot be established that the court has personal jurisdiction over Facebook and that Facebook is not liable for misconduct arising out of the Plaintiff's use of Instagram.

   Both arguments do not stand up against New Hampshire court precedent and, more saliently, the agreement set forth by Facebook Inc. Details are below in reverse order:

   a – Plaintiff has legitimate claim against Facebook

   On the argument that Facebook cannot be liable for Instagram's misconduct - the Terms of Use to operate an account on Instagram expressly states:

   "The Instagram Service is one of the Facebook Products, provided to you by Facebook, Inc. **These Terms of Use therefore constitute an agreement between you and Facebook, Inc.**" (EXHIBIT A – emphasis added)

It is understood then that by using Instagram's platform, the Plaintiff is utilizing a Facebook product, not simply interacting with a 'subsidiary.' If Facebook is allowed to control the terms in which a user interacts with, or may seek a claim against, the use of this product, then Facebook must also bear the liability for doing so.

The terms "parent corporation" nor "subsidiary" exist within the Terms of Use. Perhaps there as a point in time when this was the case, but as of the executed agreement, it is not. The 'corporate veil' can either be said to not exist or has already been 'pierced' by the Defendant in controlling the Terms of Use for their product. The Terms of Use require that we hold the Defendant, Facebook Inc., liable for damages caused by use and misconduct of their product.

Defendant continues this argument to defend itself by referencing immunity granted under their interpretation of the Communications Decency Act. This point is not germane to their argument for dismissal, but instead an attempt to argue their case. There is no reason the court should *prima facie* accept that the "CDA would similarly immunize Instagram from Plaintiff's claim" – something the Defendant provides no evidence for - and we look forward to arguing why the opposite is true in a hearing on our action.

b – Defendant establishes personal jurisdiction in Dover District Court.

Second – on the argument that the Dover district court does not have jurisdiction over Facebook in this matter, Facebook's own Terms of Use again provide evidence to the contrary:

"Instead of using arbitration, **you or we can bring claims in your local "small claims" court, if the rules of that court will allow it.** If you don't bring your claims in small claims court (or if you or we appeal a small claims court judgment to a court of general jurisdiction), then the claims must be resolved by binding, individual arbitration." EXHIBIT A – emphasis added)

The account owned by the Plaintiff was opened, used, maintained, and - when applicable - paid for, in Somersworth, New Hampshire, which is within the Dover District Court's jurisdiction. The alleged misconduct – and subsequent damages – took place in Somersworth NH. The Terms of Use refer to the Plaintiff's location of operation and use when they state "your local small claims court." Any reasonable person would deem this to be the Dover District Court in this action. Furthermore, by including "we" (referring to Facebook Inc.), Facebook is expressly and purposefully availing itself of the protection of New Hampshire's law.

It would be a Catch-22 for the Defendant to execute a binding agreement – restricting a user to only certain forms of legal recourse to recover damages – to then argue that those limited recourses are out of the scope of jurisdiction.

New Hampshire case law and court precedent provide ample guidance to establish both general and specific jurisdiction in this matter: "Under the Federal Due Process Clause, a court may exercise personal jurisdiction over a non-resident defendant if the defendant has minimum contacts with the forum, 'such that the maintenance of the suit does not **offend traditional notions of fair play and substantial justice.**' ***Monet Credit, LLC v. George J.F. Werner, Esq.,*** quoting *Sweeney*, 167 N.H. at 33.

Plaintiff has already evidenced the ways in which Facebook Inc. has, at least, 'minimum contacts with the forum' that satisfy the Federal Due Process Clause. This includes Facebook and Instagram's user and paying customer base in the State, which is almost 900,000 (EXHIBIT B). However, this is more analysis than the court needs to conduct as jurisdiction was already established contractually by Defendant. While we disagree with the interpretation of much of the case law referenced in Defendant's motion – namely ***Ralls v. Facebook*** – **it should be noted that this and all other cases referenced pre-date** the agreement made (April 2018) between both parties - which expressly includes the provision of filing a claim in a local district court.

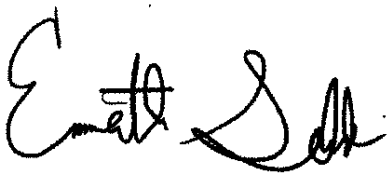
According to the agreement set forth by Facebook Inc. in the Instagram Terms of Use, the Defendant outlines where personal jurisdiction falls for claims of this kind, specifically the local small claims court of the user, in this case the Dover District Court for the Plaintiff, Teatotaller LLC.

3. CONCLUSION

WHEREFORE, for the foregoing reasons, Teatotaller LLC respectfully requests the Court:

A: Deny the Motion to Dismiss
B: Schedule for a hearing on the merits of Plaintiffs action

DATED: November 27th, 2018



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THE STATE OF NEW HAMPSHIRE
CIRCUIT COURT

7th Circuit – District Division – Dover **Docket No. 432-2018-SC-00298**

TEATOTALLER LLC

v.

FACEBOOK, INC.

REPLY IN SUPPORT OF MOTION TO DISMISS

1. INTRODUCTION

To try to avoid the fatal jurisdictional and pleading defects identified in Facebook's motion to dismiss, Plaintiff asserts for the first time in its opposition brief that Plaintiff and Facebook are bound by the 2018 Instagram Terms of Service. That contract does not save Plaintiff's claim. To the contrary, if that contract applies, as Plaintiff now asserts, then Plaintiff's claim is ***explicitly barred***, under the plain language of that contract.

Regardless, Plaintiff's claim is also barred by the Communications Decency Act ("CDA"). Courts routinely and consistently dismiss precisely this sort of claim under Section 230(c)(1) of the CDA, and Plaintiff does not identify any factual or legal basis for it to avoid that immunity here.

Thus, the Court should dismiss Plaintiff's claim against Facebook.

2. ARGUMENT

a. Plaintiff's Claim is Explicitly Barred by the Contract on Which it Now Relies.

Plaintiff does not dispute that Facebook has virtually no presence in New Hampshire, nor does it identify any alleged misconduct by Facebook, as opposed to its subsidiary, Instagram. Instead, Plaintiff tries to manufacture a basis for personal jurisdiction and/or a claim against Facebook by pointing to the 2018 Instagram Terms of Service. Plaintiff did not mention that

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contract—or any other contract—in its Complaint. Nor did Plaintiff allege any facts to support the conclusion that Plaintiff entered into that contract with Facebook. For example, Plaintiff does not allege when it registered for Instagram or when it most recently used Instagram, all of which is important because prior versions of the Instagram Terms of Service, unlike the one relied on by Plaintiff, made no mention of Facebook. A motion to dismiss is decided on the allegations in the Complaint, not new assertions made in an opposition brief, so Plaintiff's argument fails for that reason alone. *See Royer Foundry & Mach. Co. v. N.H. Grey Iron, Inc.*, 118 N.H. 649, 651 (1978).

And, in any event, far from saving Plaintiff's claim, that contract provides another, independent reason why Plaintiff's claim fails. In that contract, Plaintiff ***expressly waived*** the very claim that it now seeks to assert:

> You agree that ***we won't be responsible ("liable") for any lost profits***, revenues, information, or data, or consequential, special, indirect, exemplary, punitive, or incidental damages arising out of or related to these Terms, even if we know they are possible. ***This includes when we delete your content, information, or account.***

Pl.'s Opp. Br., Ex. A, at 6 (emphasis added). In other words, Plaintiff claims Facebook is liable because its Instagram account was wrongfully deleted, Compl. at 6, but the contract that Plaintiff now claims it agreed to with Facebook explicitly provides that Plaintiff will not seek to hold Facebook (or Instagram) liable in any way for such deletion, Pl.'s Opp. Br., Ex. A, at 6.

The contract that Plaintiff relies on further provides Instagram with the right to remove any content, or to stop providing its service, at its discretion:

> We can remove any content or information you share on the Service if we believe that it violates these Terms of Use [or] our policies . . . . We can refuse to provide or stop providing all or part of the Service to you (including terminating or disabling your account) immediately to protect our community or services, or if you create risk or legal exposure for us [or] violate these Terms of Use or our policies . . . . If you believe your account has been terminated in error, . . . consult our Help Center.

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Pl.'s Opp. Br., Ex. A, at 5. This provision is also fatal to Plaintiff's claim.

In short, Plaintiff cannot have it both ways: if Plaintiff seeks to invoke the 2018 Instagram Terms of Service to avoid Facebook's jurisdictional and pleading arguments, then Plaintiff must abide by the terms of that contact, and those terms explicitly bar its claim.

b. Plaintiff Fails to Rebut Facebook's CDA Immunity, which Applies at the Pleading Stage.

In its opposition, Plaintiff fail to rebut a second, independent reason why its claim fails, which is that Section 230(c)(1) of the CDA immunizes Facebook from claims like this. As set forth in Facebook's motion, courts have consistently dismissed under Section 230(c)(1) claims that seek to hold an interactive computer service provider such as Facebook liable for blocking or removing a plaintiff's posts or suspending a plaintiff's account. *E.g.*, *Riggs v. MySpace, Inc.*, 444 F. App'x 986, 987 (9th Cir. 2011) (Section 230(c)(1) immunizes "decisions to delete [plaintiff's] user profiles"); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095 (N.D. Cal. 2015) (dismissing claims based on Facebook's removal of plaintiff's page under Section 230(c)(1)); *Lancaster v. Alphabet Inc.*, 2016 WL 3648608, at * 2-3 (N.D. Cal. July 8, 2016) (dismissing claims based on removal of plaintiff's videos under Section 230(c)(1)); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (decisions such as "whether to print or retract a given piece of content" go to "the very essence of publishing" under Section 230(c)(1)).

Plaintiff does not address any of these cases, nor does it cite any cases to the contrary. Plaintiff also does not identify any legal or factual reason why Section 230(c)(1) immunity should not apply in this case.

Instead, Plaintiff's only argument in response is that the Court cannot consider CDA immunity on a motion to dismiss and must instead decide the issue at trial. Pl.'s Opp. Br. at 2. The

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law is to the contrary. CDA immunity, "like other forms of immunity, is generally accorded effect at the first logical point in the litigation process," because "immunity is an ***immunity from suit*** rather than a mere defense to liability." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (emphasis in original). Thus, courts routinely grant motions to dismiss based on Section 230(c)(1), including, for example, in the cases cited above and in Facebook's opening brief, which Plaintiff failed to address. *E.g.*, *Riggs*, 444 F. App'x at 987; *Sikhs for Justice*, 144 F. Supp. 3d at 1095; *Lancaster*, 2016 WL 3648608, at * 2-3; *Klayman*, 753 F.3d at 1359.

Thus, the Court can and should end this case now based on Facebook's CDA immunity.

3. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's Complaint against Facebook.

Dated: November 29, 2018

BY: Stephen Soule

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THE STATE OF NEW HAMPSHIRE
CIRCUIT COURT

7th Circuit – District Division – Dover **Docket No. 432-2018-SC-00298**

TEATOTALLER LLC
V
FACEBOOK, INC.

REPLY IN SUPPORT OF OBJECTION TO MOTION TO DISMISS

NOW COMES Teatotaller LLC and objects to the motion to dismiss civil action in above-captioned civil action and objects to the request for a hearing and instead requests the court rule on (and deny) the motion to dismiss on written pleadings.

1. INTRODUCTION

Mr. Stephen Soule, on behalf of Paul Frank + Collins, replied to the Defendant's Motion to Dismiss with arguments not germane to the Motion but instead as an attempt to argue the merits of the case – which would be appropriate in mandatory mediation and a hearing. Plaintiff looks forward to a hearing on the merits to mount its case regarding the misconduct alleged in the small claim.

However, it is not in the Plaintiff's best interest to allow the Defendant to "have its cake and eat it too," so herein lies a brief response to the claims made in Defendants reply:

2. ARGUMENT

Defendant re-stated or made claims related to the Motion to Dismiss that either ignore discovery or analysis presented by Plaintiff, or do not hold water. In no particular order, they are:

According to Defendant's reply: **"Plaintiff does not dispute that Facebook has virtually no presence in New Hampshire,"**

This is incorrect. This was disputed in the Objection to our Motion. Exhibit B referred directly to this. Managing the accounts of almost 900,000 users and customers can hardly be said to be "virtually no presence." While we don't feel the affidavit from Michael Duffey relates to the issue of jurisdiction, it's worth noting that the Defendant is ignoring our stated case. What is more relevant is that the agreement set forth by Facebook Inc. explicitly settles the issues of jurisdiction related to the small claims court in Plaintiff's locality. Defendant has not responded to this claim.

However, in an attempt to put the matter of "presence" to rest and to prevent Defendant from continually obfuscating the court with references to number of data centers operating in the state of NH and so forth, Plaintiff introduces EXHIBIT C here, which shows one way Facebook directly targets and conducts business in New Hampshire. If Facebook Inc. wants to claim passive activity in the state of New Hampshire where users "**simply operate an interactive website**" they might want to speak to the actions of their company that specifically targets citizens of New Hampshire for its own internal research and benefit.

According to Defendant's reply: **"nor does [Plaintiff] identify any alleged misconduct by Facebook, as opposed to its subsidiary, Instagram."**

Again, the Plaintiff has made it clear that the misconduct was executed by Facebook Inc. through one of its products, not a Facebook "subsidiary."

According to Defendant's reply: **"Plaintiff did not mention that contract—or any other contract—in its Complaint."**

As the court, and likely the defendant knows, the small claims process and Turbocourt platform is meant to streamline – and thus reduce time spent and costs incurred by both parties – the process of filing a claim. The limited line count allowed in the claim, as well as barring parties from submitting discovery in their initial case ("do not file your evidence when you first file your Small Claim Complaint" per District Court rules) means a Plaintiff must limit the amount of information explicated in the initial claim. Plaintiff never expected it needed to cite multiple clauses from the agreement set forth by Facebook Inc. to establish that such an agreement existed – and no reasonable person would come to that conclusion.

Had Counsel for the Defendant read the Terms of Use that their client executed in the first place, they would have understood that the very basis of this claim – the theft of intellectual property – extends from an agreement between both parties.

According to Defendant's reply: **"Plaintiff does not allege when it registered for Instagram or when it most recently used Instagram, all of which is important because prior versions of the Instagram Terms of Service, unlike the one relied on by Plaintiff, made no mention of Facebook."**

As any reasonable person would conclude, the basis of the claim implies this and has been accepted as an accurate categorization of our relationship. If a Plaintiff were to sue a car company for faulty airbags, the claim and court would assume Plaintiff actually owned a car from Defending company. The Defendant has not alleged that there is or was no account owned by the Plaintiff. If Counsel read the current agreement established by Defendant, they would understand that it produces a *de facto* agreement based on having an account in the first place. If Defendant wants to waste the courts' time arguing that Plaintiff never had an account in the first place, or didn't utilize the

service after April 19th 2018, we would gladly put that assertion to rest.

The **Defendant then goes from questioning the relevance, existence, and jurisdiction of the** agreement between both parties to pre-supposing its interpretation:
"In that contract, Plaintiff expressly waived the very claim that it now seeks to assert."

While it would be convenient for the Defendant for this to be the case, we fully expect to mount our case and argue the merits on the action. If Defendant feels strongly that the contract protects them from the alleged misconduct, then they should welcome a hearing on the merits. Quoting abridged snippets from the Terms of Use in a Motion to Dismiss is not germane to their argument of jurisdiction.

However, if it pleases the court, we will submit our preliminary response to this claim:

The Defendant quotes a piece of the Terms of Use to support its earlier claim: **"We can remove any content or information you share on the Service if we believe that it violates these Terms of Use [or] our policies . . . . We can refuse to provide or stop providing all or part of the Service to you (including terminating or disabling your account) immediately to protect our community or services, or if you create risk or legal exposure for us [or] violate these Terms of Use or our policies . . . . If you believe your account has been terminated in error, . . . consult our Help Center."**

Far from being "fatal" as their Counsel would argue, the claim against Facebook relating to a duty of care and negligence stems from their failure to act in accordance with this agreement in the treatment of an account and intellectual property owned.

Had the Defendant reproduced this quoted section from the Terms of Use in full, they would have included the sentence immediately preceding the above caption: **"Our responsibility for anything that happens on the Service (also called "liability") is limited as much as the law will allow."** This is a key element to the merits of the case. Plaintiff has already claimed, and intends to argue, that Facebook Inc. is liable for the claim as per state and federal law. To suggest that the Terms of Use bar anyone from claiming damages or liability against Facebook Inc. would again be a Catch-22 where Facebook Inc. faces no liability whatsoever for any actions or misconduct of its company, employees, or products.

In any event, none of this is germane to the Motion to Dismiss or questions of jurisdiction. Instead, by pre-emptively arguing the merits of the case and mounting a defense, the Defendant has already undermined a principle argument in its Motion to Dismiss – that it does not want to bear the 'substantial burden' of doing so.

The defendant argues: **"In short, Plaintiff cannot have it both ways: if Plaintiff seeks to invoke the 2018 Instagram Terms of Service to avoid Facebook's jurisdictional and pleading arguments, then Plaintiff must abide by the terms of that contact, and those terms explicitly**

bar its claim."

Here the Defendant is doing what they accuse Plaintiff of. We have invoked the Terms of Use to argue jurisdictional and pleading arguments **and** intend to invoke it to support our initial claim of intellectual property theft and criminal negligence. That we are alleging misconduct whereby Facebook Inc. violated its own stated policies in the Terms of Use does not then nullify that the jurisdictional policy still stands – this is the essence of 'severability' in contract law.

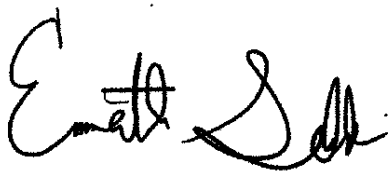
The Defendant goes on: **"Instead, Plaintiff's only argument in response is that the Court cannot consider CDA immunity on a motion to dismiss and must instead decide the issue at trial."**

This is not the case – Counsel must not have read our objection in full. We stated explicitly that when Defendant claims **"the CDA would similarly immunize Instagram from Plaintiff's claim,"** this was presented as fact without providing any evidence or analysis as to why that should be the case. The court should reject that assertion and allow Defendant to mount its case if they are so willing. We are confident that the Instagram Terms of Use provide clear responsibilities and liabilities for the Defendant that are not related to a Myspace case from 2011 or others referenced.

3. CONCLUSION
   WHEREFORE, for the foregoing reasons, Teatotaller LLC respectfully requests the Court:

A: Deny the Request for a hearing on the Motion to Dismiss,
B: Deny the Motion to Dismiss on written pleadings,
C: Schedule mandatory mediation as required by NH RSA 503

DATED: November 29th, 2018



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THE STATE OF NEW HAMPSHIRE
CIRCUIT COURT

7th Circuit – District Division – Dover **Docket No. 432-2018-SC-00298**

TEATOTALLER LLC
V
FACEBOOK, INC.

MOTION TO RECONSIDER

NOW COMES Teatotaller LLC and motions the court to reconsider the motion to dismiss granted for the above-captioned civil action.

1. INTRODUCTION

Following NH District Court Rule 4.8, Plaintiff is filing a Motion for Reconsideration on the Order dated March 20th, 2019 with the written noticed filed by the court on April 1st, 2019. As per these rules, this motion will lay out which facts were were overlooked and misapprehended, as well as points of law that were overlooked in the court's determination on the motion to dismiss.

In the Order on the Motion to Dismiss, the Dover District Court accepted the Plaintiff's position that the court does have jurisdiction over Facebook LLC – which was the grounds on which the Defendant filed its Motion to Dismiss. The court further accepted that the 'Instagram Terms of Use' define a contract between the Plaintiff and Defendant. While recognizing this contract, and the court's jurisdiction to hear a case on the merits, the court asserted – without an opportunity for Plaintiff to present a case or the full facts of the alleged harm – "**the plaintiff cannot state a claim or demonstrate any breach of contract that gives rise to a cause of action**."

It is the Plaintiffs position that the court has overlooked and misapprehended points of law and the facts of the case when making this determination – the Plaintiff made a breach of contract claim in the initial filing, and in the subsequent briefs, but was barred from presenting discovery due to the nature of the small claims process. While the Defendant presented an abridged version of the Terms of Use that were construed to convey immunity from such a claim, a fuller excerpt from the contract, as was provided by the Plaintiff, nullifies this position and makes clear that the Defendant can assume liability for breach of contract. The Plaintiff contends that if the Court has determined it has jurisdiction over Facebook LLC in this matter, and that both parties are bound in a contract by the Terms of Use, then there are sufficient contractual and legal grounds to provide Plaintiff forum to argue the merits of its claim.

2. ARGUMENT

Given the Order, the Plaintiff acknowledges that the court accepts that:

a) the Terms of Use define a contract between both parties and,

b) the court does have jurisdiction to hear a case relating to a breach of this contract between the Plaintiff – a registered NH business – and Facebook LLC, an internet company that generates income from business and advertising accounts in New Hampshire, including Teatotaller.

To support this Motion to Reconsider, the Plaintiff will make two arguments: First, that – contrary to the ruling - the contract between parties does not limit the Defendant from the liability it claims, and Second, that the Plaintiff has sufficiently demonstrated, and will continue to explicate, the ways in which the Defendant breached its contract with a paying customer.

ON FACEBOOK'S LIABILITY

According to the court's Order, the singular basis for granting the motion to dismiss was based on a single paragraph, quoted in the Defendant's Reply In Support of the Motion to Dismiss from the Terms of Use, **"You agree we won't be responsible (liable) for any lost profits, revenues, information, or data, or consequential, special, indirect, exemplary, punitive, or incidental damages arising out of or related to these Terms, even if we know they are possible. This includes when we delete your content, information, or account."**

A fuller view of this section in the Terms of Use would include the preceding sentence, **"Our responsibility for anything that happens on the Service (also called "liability") is limited as much as the law will allow."**

The Plaintiff contends that the law supersedes the liability Facebook seeks to limit itself from in this matter. By way of example, if the Plaintiff alleged in a hearing that their account was deleted on discriminatory grounds (e.g. targeted for being an LGBT business), the law would not accept this limitation in liability. Furthermore, if the Plaintiff alleged that it paid for services (e.g. advertising) that were not fulfilled as a result of this deletion, the law would not accept this limitation in liability. These are just two of a myriad of ways the laws of the State of New Hampshire and the United State of America would challenge the kind of immunity the Defendant is attempting to claim. As per NH District Court Rule 4.8, the Plaintiff requests this reconsideration on the grounds that the court overlooked State law governing contracts and duty of care and based its order solely on the prima facie reading of one sentence in the Terms of Use.

Furthermore, the same liability clause referenced in the Terms of Use continues after the section provided by Defendant, **"Our aggregate liability arising out of or relating to these Terms will not exceed the greater of $100 or the amount you have paid us in the past twelve months."** This paragraph alone nullifies the claim that the Plaintiff "cannot" statutorily or by this very contract bring a breach of contract claim. This fact – that the contract between parties sets forth its non-zero liability – was overlooked by the court in granting the motion to dismiss.

Finally, the plaintiff requests the court reconsider its order on the motion to dismiss recognizing that the opportunity to present evidence pertaining to the breach of contract has not been provided. A hearing on the motion to dismiss has been the only venue for the Plaintiff to

present its case – and the merits of the case were not germane to the motion to dismiss filed by the Defendant. As the court and Defendant know, and has been explained in a previous brief, the Small Claims process limits the amount of explication of a claim and prohibits discovery from being submitted prior to a hearing. Such Discovery might include receipts for payments made to the Defendant and communications from the Defendant regarding wrongful account deletion. While this limitation is intended to streamline the claims process, the Defendant has used it to obfuscate the Plaintiff's case and draw out this process – by presenting abridged sections of the Terms of Use to challenge the merits of the case under the banner of a jurisdictional challenge – in a forum in which the merits were not being addressed.

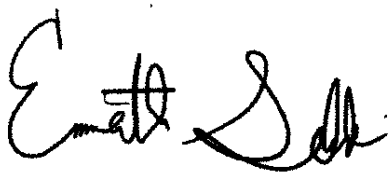
ON BREACH OF CONTRACT

The contract between both parties expressly states the grounds for account termination: "**We can remove any content or information you share on the Service if we believe that it violates these Terms of Use [or] our policies.**" As part of the claim, the Plaintiff alleges – and intends to present discovery in support of – that the account was *not* terminated for reasons based on the Terms of Use or Facebook policies, and thus the Defendant violated the contract held between both parties, all while collecting fees for service from the business account. The deletion, and subsequent negligence to respond to the wrongful termination, forms the basis for the breach of contract. The Plaintiff looks forward to a hearing to explain the damages that the Defendant is liable for under New Hampshire law.

3. CONCLUSION
   WHEREFORE, for the foregoing reasons, Teatotaller LLC respectfully requests the Court:

A: Reconsider the ruling on the Motion to Dismiss
B: Schedule mandatory mediation as required by NH RSA 503

DATED: April 9th, 2019



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THE STATE OF NEW HAMPSHIRE
CIRCUIT COURT

7th Circuit – District Division – Dover Docket No. 432-2018-SC-00298

TEATOTALLER LLC

v.

FACEBOOK, INC.

DEFENDANT FACEBOOK, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER

The Court should reject Plaintiff Teatotaller LLC's motion for reconsideration of its order dismissing the Complaint.

A motion for reconsideration must be based on "particular points of law or fact that the court has overlooked or misapprehended." N.H. Cir. Ct. R. 4.8(a); *see also Smith v. Shepard*, 144 N.H. 262, 264, 740 A.2d 1039, 1042 (1999) ("A motion for reconsideration allows a party to present points of law or fact that the Court has overlooked or misapprehended. We will uphold a trial court's decision on a motion for reconsideration absent an abuse of discretion.").

Here, Plaintiff does not identify any particular points of law or fact that the Court overlooked or misapprehended. Instead, Plaintiff's motion for reconsideration merely repeats arguments that Plaintiff previously made at length to the Court—including in Plaintiff's opposition brief, Plaintiff's (unauthorized) sur-reply brief, and in the hour-long oral argument held before the Court.

For example, Plaintiff's primary argument is that the limitation-of-liability term in the Terms of Service should not be read to bar his claim because it contains a clause stating that liability "is limited as much as the law will allow." Mot. for Reconsideration at 2 ("A fuller view of this section in the Terms of Use would include the preceding sentence, 'Our responsibility for

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anything that happens on the Service (also called 'liability') is limited as much as the law will allow.' The Plaintiff contends that the law supersedes the liability Facebook seeks to limit itself from in this matter."). Plaintiff presented precisely the same argument in its sur-reply in opposition to the motion to dismiss. Sur-Reply at 3 ("Had the Defendant reproduced this quoted section from the Terms of Use in full, they would have included the sentence immediately preceding the above caption: 'Our responsibility for anything that happens on the Service (also called 'liability') is limited as much as the law will allow.' This is a key element to the merits of the case. Plaintiff has already claimed, and intends to argue, that Facebook Inc. is liable for the claim as per state and federal law.").

Thus, the Court already had Plaintiff's argument—and the plain language of the contract—before it when it made its decision. Plaintiff offers no basis to reopen the Court's well-reasoned order.

For these reasons, Facebook respectfully requests that the Court deny Plaintiff's motion for reconsideration.

Dated: April 18, 2019

BY: Stephen Soule

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