SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF KINGS

RICHARD LAKIN, *et al.*, Plaintiffs, - against - FACEBOOK, INC., Defendant.	Index No.: 12831/15 I.A.S. PART: JUSTICE Motion Seq. No.: 001 **ORAL ARGUMENT REQUESTED**

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Terrorist attacks are terrible events, and the October 2015 attacks in Israel were no exception. But this lawsuit is not the right way to address terrorism. Plaintiffs' wrongfully seek to hold Facebook liable for conduct that is protected from liability under settled federal law, and they have brought suit in the wrong forum, where neither the parties nor the evidence is based.

The gravamen of plaintiffs' complaint is that Facebook is responsible for deplorable terrorist activities because the terrorists used the Facebook platform to promote their views and activities. Plaintiffs allege that "[s]ome of the terrorists announced their intentions on Facebook just before going out to attack" and contend that "Facebook should be held accountable to remove these hateful messages immediately upon being posted . . . and shut down the Facebook accounts of recognized terrorist organizations and terrorists." Compl. ¶ 3.

Plaintiffs' claims are barred by § 230 of the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230. As state and federal courts across the country have repeatedly held, § 230 of the CDA insulates interactive-computer-service providers like Facebook from liability for speech by third-party users of the service. Indeed, lawsuits such as this—which seek to hold Facebook liable for failing to screen and remove content posted by its users—are precisely what the CDA was enacted to foreclose. For those reasons, the U.S. Court of Appeals for the District of Columbia recently considered and rejected a virtually indistinguishable case. *See Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014). In *Klayman*, a Facebook user sued Facebook for negligence and intentional assault based on Facebook's alleged delay in removing content "which called for Muslims to rise up and kill the Jewish people." *Id.* at 1355. The Court explained that, "even under a generous reading of the complaint, the Communications Decency Act forb[ade] th[e] suit." *Id.* at 1357. Likewise, other courts have dismissed similar lawsuits

against Facebook, reasoning that § 230 of the CDA barred the suit. *See Finkel v. Facebook, Inc.*, No. 102578/09, 2009 WL 3240365 (N.Y. Sup. Ct. Sept. 15, 2009); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, No. 15-cv-02442, 2015 WL 7075696, at * 4–*6 (N.D. Cal. Nov. 13, 2015); *Lathan v. Lathan*, No. 2013-07-3525 (Ohio Ct. Com. Pl. filed Sept. 30, 2015) (attached at Barday Aff., Ex. D); *Gaston v. Facebook, Inc.*, No. 3:12-cv-0063, 2012 WL 629868, at *6-7 (D. Or. Feb. 2, 2012); *Tetreau v. Facebook, Inc.*, No. 10-4558-CZ (Mich. Cir. Ct. filed Feb. 23, 2011) (attached at Barday Aff., Ex. C)).

The result here should be no different. Plaintiffs are seeking to treat Facebook, a provider of an interactive computer service, as the publisher or speaker of content posted by alleged terrorists and terrorist sympathizers. Whether phrased as a challenge to Facebook's alleged failure "to flag, review, and remove" content, or to the way Facebook's algorithms subsequently interact with that content, Compl. ¶¶ 48–52, 55, all of plaintiffs' claims "can be boiled down to deciding whether to exclude material that third parties seek to post online." *Klayman*, 753 F.3d at 1359. Because "the very essence of publishing is making the decision whether to print or retract a given piece of content," Facebook's conduct "is perforce immune under section 230." *Id.* (quotation omitted).

In addition to being entirely barred by § 230 of the CDA, plaintiffs' claims also are not properly brought in this Court. Facebook is not subject to personal jurisdiction in New York and, even if it were, New York would not be the appropriate forum in which to adjudicate these claims. Of the more than 20,000 parties to this suit, not a single one is a resident of New York. None of the events of which plaintiffs complain occurred in New York. Indeed, New York is mentioned only once in the complaint, when the plaintiffs assert that Facebook "maintains offices in both New York and Israel, and innumerable other places." Compl. ¶ 9. That is not a

sufficient basis upon which this Court should hear this suit. Dismissal for lack of personal jurisdiction over Facebook and on grounds of *forum non conveniens* is therefore both necessary and appropriate.

For these reasons, Facebook respectfully requests that the complaint be dismissed for failure to state a claim, for lack of personal jurisdiction, or for *forum non conveniens*.

BACKGROUND

Plaintiffs' suit arises out of certain third parties' use of online social-networking services provided by Facebook. Facebook allows users to share content with others, including articles, photographs, news about family members and friends, and opinions about world events. Users can also view content shared by other Facebook users on one or more of the hundreds of millions of Facebook pages. *See generally* Compl. ¶¶ 38, 39. To access Facebook, a user must open an account and agree to abide by the terms of service, including a Statement of Rights and Responsibilities. *See generally* Compl. ¶ 38. Facebook is, and always has been, a free service.

The plaintiffs in this case are two individuals with dual American/Israeli citizenship, along with 20,000 Israeli citizens residing in Israel. *Id.* ¶¶ 6, 7. They allege that "Israel has been plagued with a wave of Terror Attacks" since October 1, 2015. *Id.* ¶¶ 10-12. According to plaintiffs, "[t]hese Terror Attacks have been carried out by young Palestinians" using "knives," "axes, meat cleavers and screw drivers," *id.* ¶ 13, and "are part of a new terror campaign" that plaintiffs allege is "driven by social media in which terrorists incite, enlist, organize, and dispatch would-be killers to 'slaughter Jews,'" *id.* ¶ 16. They further allege that "designated terrorist organizations and their cohorts" "purposefully disseminate[] through Facebook" "motivation, advice and directions . . . about how to carry out attacks against Jews." *Id.* ¶ 21. Such "motivation, advice and directions" come "in the form of videos, photos, diagrams and

text." *Id.* ¶¶ 21-22. For example, plaintiffs allege that, "on October 1, 2015, a prominent member of the Fatah Central Committee, Mahmoud al-Aloul, posted to his Facebook page a video showing armed fighters from the Al-Aqsa Martyrs' Brigade set to music encouraging listeners to give their lives for the Al-Aqsa Mosque," and, a few days later, made a Facebook post containing "an explicit order to his followers and Facebook friends: '#let'scontinuetheattacks.'" *Id.* ¶ 19. They allege that posts like this one have "directly led [to] the specific terrorist attacks listed" in the complaint, *id.* ¶ 33, and that these terror attacks have "forced [the plaintiffs] to live in real fear of imminent Terror Attacks which could take place anywhere and at any time of day," *id.* ¶ 35.

The complaint seeks to hold Facebook liable in tort for these posts by terrorists and terrorist sympathizers. *Id.* ¶ 21. Significantly, plaintiffs ***do not*** allege that Facebook had any role in the creation of these posts. To the contrary, plaintiffs allege that these posts are created entirely by third parties—namely, "designated terrorist organizations and their cohorts." *Id.*; *see also id.* ¶¶ 24, 26, 53. Although the content at issue was created entirely by these third parties, plaintiffs nonetheless contend that Facebook should be held liable for failing to "flag, review, and remove content that calls for terrorism and offers training and instruction to terrorists." *Id.* ¶ 55. And they further contend that Facebook should be held liable for its use of "algorithms . . . to suggest friends, groups, products, services and local events, and target ads . . . to each individual user," *id.* ¶ 44, insofar as those algorithms interact with content provided by alleged terrorists and terrorist sympathizers, *id.* ¶¶ 44-52.

The complaint includes eight specific counts, three of which are pleaded under Israeli law. Plaintiffs allege that Facebook should be held liable for negligence, breach of statutory duty under Israel's Prevention of Terrorism Ordinance, and vicarious liability based on the use of

Facebook by alleged terrorists to "spread their murderous plans and incite and instruct others to carry out such plans." *Id.* ¶¶ 67, 79, 92, 94. Plaintiffs also allege that Facebook should be held liable for prima facie tort, intentional infliction of emotional distress, aiding and abetting terror networks, and civil conspiracy. *Id.* ¶¶ 100-101, 108, 115, 122.

Plaintiffs request an injunction requiring Facebook to "immediately remove all pages, groups and posts containing incitement to murder Jews;" "actively monitor its website for such incitement that all incitement is immediately removed prior to being disseminated to masses of terrorists and would-be terrorists;" and "cease serving as match-maker between terrorists, terrorist organizations, and those who incite others to commit terrorism." *Id.* ¶ 147.

LEGAL STANDARDS ON A MOTION TO DISMISS

Several legal standards govern this motion to dismiss. In evaluating Facebook's argument that the complaint should be dismissed under § 230 of the CDA, the Court must determine whether the complaint is "legally sufficient" under a "reasonable view of the facts stated." *Dee v. Rakower*, 976 N.Y.S.2d 470, 474 (2d Dep't 2013). The Court need not, however, presume "bare legal conclusions" to be true. *Barker v. Amorini*, 995 N.Y.S.2d 89, 91 (2d Dep't 2014). Where a claim is barred by the CDA, dismissal at the pleadings stage is appropriate because there would be no entitlement to relief as a matter of law. *See, e.g.*, *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 286 (2011); *Klayman*, 753 F.3d at 1357.

In evaluating the argument that the Court lacks personal jurisdiction over Facebook, plaintiffs bear the burden of proving that personal jurisdiction is appropriate. *Daniel B. Katz & Assocs. Corp. v. Midland Rushmore, LLC*, 937 N.Y.S.2d 236, 238 (2d Dep't 2011). Plaintiffs must "make a prima facie showing that ... [Facebook is] subject to the personal jurisdiction of the Supreme Court." *Id.* (quotation omitted). Facebook, however, "bears the burden on a motion

to dismiss on the ground of *forum non conveniens* to demonstrate relevant private or public interest factors which militate against accepting the litigation." *Boyle v. Starwood Hotels & Resorts Worldwide, Inc.*, 973 N.Y.S.2d 728, 729 (2d Dep't 2013) (quotation omitted).

ARGUMENT

Three independent grounds require dismissal of plaintiffs' complaint. *First*, plaintiffs have failed to state a claim upon which relief could be granted because each of their claims is barred by § 230 of the CDA. *See* CPLR 3211(a)(7). *Second*, plaintiffs cannot establish personal jurisdiction over Facebook. *See* CPLR 3211(a)(8). *Third*, plaintiffs filed their suit in an inappropriate forum, and the doctrine of *forum non conveniens* necessitates its dismissal. *See* CPLR 327(a).

I. The Communications Decency Act Requires Dismissal Of Plaintiffs' Claims.

Plaintiffs' claims are barred as a matter of law by § 230 of the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230. As state and federal courts across the country have repeatedly held, the CDA bars any cause of action that seeks to hold an interactive-computer-service provider liable for content created by a third-party user of the service or for the service provider's decision to allow, edit, or remove that content. Because plaintiffs' claims seek to impose the exact type of liability the CDA forbids, this Court should dismiss the complaint in its entirety with prejudice.

A. Section 230 Of The CDA Immunizes Providers Of Interactive Computer Services From Civil Liability For Content Created By Third-Party Users

The broad immunity afforded by the CDA stems from the plain language of the statute. Section 230 of the CDA states that "[n]o 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." 47 U.S.C. § 230(c)(1). As the New York Court of Appeals has explained, the

effect of § 230 is to "immuniz[e] Internet service providers from liability for third-party content wherever such liability depends on characterizing the provider as a 'publisher or speaker' of objectionable material." *Shiamili*, 17 N.Y.3d at 289; *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("§ 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."). In particular, by mandating that providers of interactive computer services are not to be treated as "publishers," the statute "bar[s] lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Shiamili*, 17 N.Y.3d at 289 (quotations omitted).

New York courts have applied these rules to reject claims seeking to impose liability on service providers for third-party content, and the Court of Appeals has acknowledged a "national consensus" that such suits are barred. *Id.*; *see also id.* at 290-91 (§ 230 bars claims against the operator of a website relating to allegedly defamatory promotional statements posted by third parties); *Deer Consumer Products, Inc. v. Little*, No. 650823/2011, 2011 WL 4346674, at *6-7 (N.Y. Sup. Ct., Aug. 31, 2011) (table decision) (website operators entitled to CDA immunity for tort suit stemming from content posted by third-party user). Courts throughout the nation have similarly applied CDA immunity in cases pursuing such theories.[1]

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[1] *See, e.g.*, *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 680 (2014) (Facebook entitled to CDA immunity from negligence and assault claims for comments posted by third-party users); *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010) (internet service provider entitled to CDA immunity in defamation suit for comments posted to message board by third-party users); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (consumer-review website entitled to CDA immunity for tort claims relating to comments posted by third-party users); *Doe v. MySpace, Inc.*, 528 F.3d 413, 415 (5th Cir. 2008) (§ 230 barred negligence suit seeking to hold MySpace liable for failing to prevent 13-year-old from lying about her age to create profile and thus from being sexually assaulted); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-419 (1st Cir. 2007) (operator of internet message board entitled to CDA immunity for suit relating to defamatory postings made by third-party users); *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) (AOL entitled to § 230 immunity in suit alleging liability for messages transmitted through its internet service); *Levitt v. Yelp! Inc.*, No. 10-1321, 2011 WL 5079526, at *9 (N.D. Cal. Oct. 26, 2011) (Yelp! entitled to § 230 immunity in suit alleging that Yelp! unlawfully manipulated the content of its business review pages.); *Simmons v. Danhauer & Assocs., LLC*, No. 08-CV-03819, 2010 WL 4238856, at *5 (D.S.C. Oct. 21, 2010) (§ 230 bars claims against online auction site for

In fact, courts both in New York and other jurisdictions have held that Facebook specifically is entitled to CDA immunity in suits raising claims analogous to those here. *See Finkel v. Facebook, Inc.*, No. 102578/09, 2009 WL 3240365 (N.Y. Sup. Ct. Sept. 15, 2009) (Facebook entitled to CDA immunity from defamation claims arising out of third-party posts on its website); *see also Klayman*, 753 F.3d at 1357 (Facebook entitled to CDA immunity for tort claims arising out of Facebook page created by anonymous third parties calling for a Third Intifada); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, No. 15-cv-02442, 2015 WL 7075696, at * 6 (N.D. Cal. Nov. 13, 2015) (Facebook entitled to CDA immunity because "the CDA bars all claims that seek to hold an interactive computer service liable as a publisher of third-party content"); *Lathan v. Lathan*, No. 2013-07-3525, at 8 (Ohio Ct. Com. Pl. filed Sept. 30, 2015) (attached at Barday Aff., Ex. D) ("Facebook is immune under the CDA from Plaintiff's claims . . . ."); *Gaston v. Facebook, Inc.*, No. 3:12-cv-0063, 2012 WL 629868, at *6-7 (D. Or. Feb. 2, 2012) (Facebook entitled to § 230 immunity where plaintiff alleged that another Facebook user defamed him on her Facebook page); *Tetreau v. Facebook, Inc.*, No. 10-4558-CZ (Mich. Cir. Ct. Feb. 23, 2011) (dismissing defamation and tort claims because "Facebook is a provider of an interactive computer service and entitled to immunity under the [CDA]") (attached at Barday Aff., Ex. C).

The New York Court of Appeals has recognized that the CDA's broad grant of immunity serves two important policy goals. *First*, because imposing tort liability on service providers for disseminating offensive material created by third parties would have an unacceptable chilling effect on freedom of speech on the Internet, § 230 helps "maintain the robust nature of Internet communication." *Shiamili*, 17 N.Y.3d at 287 (quotation omitted). The U.S. Court of Appeals

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information and actions of third-party user of the site); *Miles v. Raycom Media, Inc.*, No. 09CV713, 2010 WL 3419438, at *3 (S.D. Miss. Aug. 26, 2010) (television station immune from liability under CDA for failing to screen and remove allegedly defamatory comments posted on its website).

for the Fourth Circuit persuasively explained in *Zeran* the free-speech dangers that would result from allowing suits like this one to go forward:

> Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Zeran, 129 F.3d at 331 (citations and quotations omitted). *Second*, § 230 removes disincentives to self-regulation by assuring service providers that they can safely self-police the Internet for offensive material without fear that their editorial choices might subject them to liability. *See Shiamili*, 17 N.Y.3d at 287-88 (explaining that § 230(c)(1) "was meant to undo the perverse incentives created by" decisions subjecting them to liability for "defamatory statements posted by third parties because [they] had voluntarily screened and edited *some* offensive content") (emphasis added).

In light of the important interests at stake, "[b]oth state and federal courts around the country have generally interpreted Section 230 immunity broadly, so as to effectuate Congress's policy choice . . . not to deter harmful online speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Shiamili*, 17 N.Y.3d at 288 (quotation omitted); *see also Lycos*, 478 F.3d at 418 ("[C]ourts that have addressed these issues have generally interpreted Section 230 immunity broadly."); *Ramey v. Darkside Prods.*, No. 02-730, 2004 WL 5550485, at *7 (D.D.C. May 17, 2004) ("[C]ourts treat § 230(c) immunity as quite robust.").

B. Section 230 Of The CDA Requires Dismissal Of Plaintiffs' Claims

These well-established principles require dismissal of plaintiffs' complaint here. *See Shiamili*, 17 N.Y.3d at 293 (concluding that the lower court "properly dismissed" a complaint for failure to state a viable cause of action when the claims were all "barred by the CDA"); *Okeke v. Cars.com*, 966 N.Y.S.2d 843, 848 (Civ. Ct. 2013) (dismissing complaint under the CDA); *Finkel*, 2009 WL 3240365 (Facebook entitled to dismissal under CDA).

The statutory language and case law recognize that § 230 immunity applies when (1) the defendant is a "provider ... of an interactive computer service"; (2) the plaintiff is attempting to hold the defendant liable as a "publisher or speaker" of allegedly harmful content; and (3) the allegedly harmful content was "provided by another information content provider," and not by the defendant. 47 U.S.C. § 230(c)(1); *see also Shiamili*, 17 N.Y.3d at 286. Those elements are satisfied here.

1. Facebook Is A Provider Of An Interactive Computer Service

Facebook clearly qualifies as a "provider" of an "interactive computer service." 47 U.S.C. § 230(c)(1). The CDA broadly defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." *Id.* § 230(f)(2). The services provided by Facebook meet that description because Facebook, through its website and platform, allows users from around the world to access Facebook's servers for the purposes of posting information and sharing that information with others. *See, e.g.*, Compl. ¶ 38 ("Facebook is a social media platform.").

The D.C. Circuit, a New York state court, and at least three other courts have previously ruled that Facebook is a provider of an interactive computer service. *See Klayman*, 753 F.3d at 1357 ("Facebook qualifies as an interactive computer service"); *Sikhs for Justice*, 2015 WL

7075696, at * 4 ("The Court also agrees that [Facebook] 'provides or enables computer access by multiple users to a computer service' as required by § 230."); *Gaston*, 2012 WL 629868, at *7 (holding that Facebook "clearly" qualifies as an interactive-computer-service provider); *Tetreau*, No. 10-4558-CZ ("Facebook is a provider of an interactive computer service."); *Finkel*, 2009 WL 3240365 ("Facebook is immune from liability under the [CDA] as an interactive computer service."). There is no reason to reach a different conclusion here.

2. Plaintiffs Attempt To Hold Facebook Liable As The Publisher Or Speaker Of The Allegedly Harmful Content

Plaintiffs seek to hold Facebook liable as the "publisher or speaker" of the content created by the alleged terrorists and terrorist sympathizers. By the terms of their complaint, plaintiffs seek to hold Facebook liable for (1) failing to "flag, review, and remove content that calls for terrorism and offers training and instruction to terrorists," Compl. ¶¶ 55, 144; and (2) for using neutral algorithms to make suggestions to users about how to access other content in which they may be interested, which allegedly "broker[ed] the connections between and among . . . terrorist organizations," *id.* ¶ 44, 45, 48, 49, 52.

The CDA bars both theories of liability. *First*, Facebook cannot be held liable in tort for failing to "flag, review, and remove" offensive content. "[T]he very essence of publishing is making the decision whether to print or retract a given piece of content." *Klayman*, 753 F.3d at 1359; *see also Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) (listing "decisions relating to the monitoring, screening, and deletion of content" as "actions quintessentially related to a publisher's role"); *Zeran*, 129 F.3d at 330 (listing the decision to "withdraw" content as one of "a publisher's traditional editorial functions"). The cases are therefore unanimous that the CDA bars claims that would seek to hold a service provider liable for failing to adequately review and remove offensive content. *See, e.g.*, *Klayman*, 753 F.3d, at 1359; *Jones v. Dirty World Entm't*

Recordings LLC, 755 F.3d 398, 416 (6th Cir. 2014); *Barnes v. Yahoo, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 761 (Tex. Ct. App. 2014).

Second, Facebook cannot be held liable for use of neutral algorithms that suggest content to users—a content-management function that plaintiffs allege "brokered" connections among terrorists. As the Court of Appeals has recognized, "[r]eposting content created and initially posted by a third party" is a classic publisher function that falls within the scope of the CDA. *Shiamili*, 17 N.Y.3d at 291. Thus, in *Shiamili*, when the administrators of a blog moved content that was initially posted as a comment to a "stand-alone post, prefacing it with the statement that 'the following story came to us as a comment, and we promoted it to a post'" with a new heading and subheading, that conduct fell within the scope of CDA immunity. *Id.* at 285. Similarly, other courts have recognized that plaintiffs cannot avoid § 230 by recasting their claims to focus on the manner in which interactive-computer-service providers use neutral tools to organize or suggest content. *See, e.g.*, *Roca Labs, Inc. v. Consumer Opinion Corp.*, No. 14-cv-2096, 2015 WL 6437786, at *8 (M.D. Fla. Oct. 21, 2015) (explaining that "manipulation of the data" provided by "third parties" did "not preclude Section 230 immunity"); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1198 (N.D. Cal. 2009) ("[T]he provision of neutral tools generally will not affect the availability of CDA immunity even if a service provider *knows* that third parties are using such tools to create illegal content.") (quotations omitted); *Dowbenko v. Google, Inc.*, 582 F. App'x 801, 805 (11th Cir. 2014) ("allegation that Google manipulated its search results to prominently feature the article at issue" could not overcome CDA immunity).

The district court in *Klayman* addressed and rejected this very same argument. There, the plaintiff argued that Facebook was not entitled to immunity under § 230 because Facebook "collect[ed] data from Facebook users and then us[ed] that data 'to make suggestions' to users

about content in which the users might be interested." *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 321 & n.3 (D.D.C. 2012), *aff'd*, 753 F.3d 1354 (D.C. Cir. 2014). The court rejected that theory, explaining that the plaintiffs' claims were based "on the role that the defendants played in *publishing* the Facebook page" and that collecting data and making suggestions "do not constitute the creation or development of information." *Id.* (collecting cases). As the court recognized, "courts have held in other cases that [even] the manipulation of information provided by third parties" does not impose liability. *Id.* "If the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider's decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally." *Lycos*, 478 F.3d at 422. Thus, an interactive-computer-service provider like Facebook does not forfeit immunity under § 230 of the CDA by using neutral algorithms to recommend or suggest content to other users.

3. The Allegedly Harmful Content Was Provided By A Third-Party Facebook User, And Not By Facebook Itself

Finally, the offensive statements forming the basis of plaintiff's claims were all "provided by ***another*** information content provider," and not by Facebook itself. 47 U.S.C. § 230(c)(1) (emphasis added). The CDA defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development" of the statements at issue, *id.* § 230(f)(3), and courts give that definition a narrow construction, *see Ramey*, 2004 WL 5550485, at *7 (courts adopt a "relatively restrictive definition of 'information content provider'"). Here, the complaint is entirely devoid of any allegation that Facebook was somehow "responsible," even "in part," for the "creation or development" of the alleged incitement. *Id.* at *5. To the contrary, plaintiffs' allegations are grounded in Facebook's alleged handling of statements posted by ***others***. *See, e.g.*, Compl. ¶¶ 44–50, 55.

In the end, plaintiffs cannot escape the command of Section 230(c)(1) of the CDA: "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." That command affords Facebook immunity from all of plaintiffs' claims, regardless of what state or country's law the plaintiffs seek to invoke. The breadth of CDA immunity is clear from the statutory text and encourages the "free exchange of information and ideas over the Internet" that the statute was designed to protect. *Shiamli*, 17 N.Y.3d at 288 (quotation omitted). As the New York Court of Appeals explained, "Creating an open forum for third parties to post content—including negative commentary—is at the core of what section 230 protects." *Shiamili*, 17 N.Y.3d at 290–91. The complaint should be dismissed.

II. This Court Cannot Exercise Personal Jurisdiction Over Facebook.

For the reasons explained above, plaintiffs' claims are barred by § 230 of the CDA. But plaintiffs' claims should also be dismissed for a second reason: This Court lacks personal jurisdiction over Facebook.

A New York court may assert personal jurisdiction only if doing so comports with the Due Process Clause of the U.S. Constitution. *Penguin Grp. (USA) Inc. v. American Buddha*, 16 N.Y.3d 295, 302 (2011). The Supreme Court has recognized that there are two types of personal jurisdiction—"general or all-purpose jurisdiction, and specific or case-linked jurisdiction"—each with different Due Process requirements. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). A court may assert general jurisdiction over a corporation from another state only when that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Id.* A court may assert specific jurisdiction to adjudicate "issues deriving from, or connected with" a particular activity or occurrence that "takes place in the forum State and is therefore subject to the State's

regulation." *Id.* "New York does not confer jurisdiction over every case in which it would be allowed to exercise [specific] jurisdiction pursuant to the due process clause of the United States Constitution." *Paterno v. Laser Spine Institute*, 973 N.Y.S.2d 681, 690 (2d Dep't 2013).

Plaintiffs have failed to make a prima facie showing that Facebook is subject to either general or specific jurisdiction in New York. *See Daniel B. Katz & Assocs.*, 937 N.Y.S.2d at 240. Accordingly, this Court should dismiss the action pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction.

A. Subjecting Facebook To General Jurisdiction In New York Would Violate Due Process Because Facebook Is Not "At Home" In New York.

A court may only exercise general jurisdiction consistent with Due Process when the corporation'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*, 131 S. Ct. at 2851 (emphasis added); *see also Zucker v. Waldmann*, No. 503467/13, 2015 WL 390192 (N.Y. Sup. Ct. Kings County. Jan. 23, 2015) (table decision). The Supreme Court made clear in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), that a corporation is "at home" in its "place of incorporation and principal place of business," *id.* at 760. Only in an "exceptional case" can a corporation be found "at home" in another state. *Id.* at 761 n.19; *see also Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 225 (2d Cir. 2014) ("The natural result of general jurisdiction's 'at home' requirement is that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there.") (internal citations omitted).

Plaintiffs do not assert, and have failed to make any showing, that Facebook is "at home" in New York. They assert that Facebook "is a corporation organized and existing pursuant to the laws of the State of Delaware, which conducts business throughout the United States and the world, including Israel, and maintains offices in both New York and Israel, and innumerable

other places." Compl. ¶ 9. That falls far short of an allegation that Facebook is incorporated in New York or has its principal place of business in New York.

Nor could plaintiffs make out the requisite allegations. Facebook is a global company incorporated in Delaware with its principal place of business located in California. *See* Compl. ¶ 9; So Aff. ¶ 3; Farren Aff. ¶ 5. Accordingly, California and Delaware are Facebook's paradigm forums for general jurisdiction under *Daimler*. 134 S. Ct. at 760. Although Facebook has offices worldwide, the Supreme Court made clear in *Daimler* that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." 134 S. Ct. at 762 n.20; *accord id.* (clarifying that "[g]eneral jurisdiction . . . calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide").

Facebook's relatively minor contacts with New York do not make this an "exceptional case" in which it can be found "at home" in a place other than its principal place of business or place of incorporation. *Daimler*, 134 S. Ct. at 761 n.19; *see also Cont'l Indus. Grp., Inc. v. Equate Petrochemical Co.*, 586 F. App'x 768, 769-70 (2d Cir. 2014) (holding plaintiff failed to make prima facie showing of general jurisdiction where plaintiff did not allege corporation "is headquartered or incorporated in New York, nor has it alleged facts sufficient to show that it is otherwise 'at home' in New York"). Facebook does not own real property in the state; it leases space for its offices in New York. So Aff. at ¶¶ 4-5. None of Facebook's data centers is located in New York. *Id.* at ¶ 7. And Facebook's California headquarters is more than ten times larger than its office in New York. Farren Aff. at ¶¶ 5-6.

Facebook's contacts with New York thus "fall short of those required to render it at home in New York," and subjecting Facebook to "all-purpose general jurisdiction in that state would deny it due process." *Sonera*, 750 F.3d at 226 (holding foreign corporation's contacts in New

York insufficient to find it at home in New York). Indeed, state and federal courts in New York have consistently concluded since *Daimler* that there is "no basis for general jurisdiction" when the defendant "is not incorporated in New York and does not have its principal place of business in New York." *Magdalena v. Lins*, 999 N.Y.S.2d 44, 45 (1st Dep't 2014); *see also D & R Glob. Selections, S.L. v. Pineiro*, 9 N.Y.S.3d 234, 235 (1st Dep't 2015) (same); *Norex Petroleum Ltd. v. Blavatnik*, No. 650591/11, 2015 WL 5057693, at *20 (N.Y. Sup. Ct. Aug. 25, 2015) ("The only kind of corporate activity that ordinarily will satisfy the general jurisdiction test is incorporation in the state or maintenance of a corporation's principal place of business in the state."); *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014) (subjecting nonparty foreign bank to general jurisdiction in New York would be inconsistent with due process where bank's contacts in New York "plainly do not approach the required level of contact").

B. New York's Long-Arm Statute Does Not Permit The Exercise Of Specific Jurisdiction Over Facebook In This Case.

Plaintiffs also do not allege any facts that would support a finding of specific jurisdiction under CPLR 302. *See Int'l Diamond Importers, Inc. v. Oriental Gemco (N.Y.), Inc.*, No. 14-cv-3506, 2014 WL 6682622, at *6 (S.D.N.Y. Nov. 24, 2014) (discussing CPLR 302(a)). Specific jurisdiction is appropriate under CPLR 302(a) only if the cause of action arises out of a defendant's "transact[ion of] any business within the state"; "tortious act within the state"; or, in certain circumstances, "tortious act without the state causing injury to person or property within the state." CPLR 302(a). None of those facts is present here.

First, plaintiffs do not allege that their claims arise from any of Facebook's alleged transacting of business in New York. *See* CPLR 302(a)(1) (providing for specific jurisdiction over a non-domiciliary that transacts any business within the state, or contracts anywhere to supply goods or services in the state). Instead, they only generally allege that Facebook does

business around the world including in New York, without any effort to connect Facebook's content-regulating activities to New York. That is not a sufficient basis upon which this Court could conclude that the causes of action alleged here arise out of Facebook's transaction of business in New York. *Arroyo v. Mountain Sch.*, 892 N.Y.S.2d 74, 76 (1st Dep't 2009).

Second, plaintiffs have not alleged that any of the purported tortious activities occurred in New York. *See* CPLR 302(a)(2) (providing for specific jurisdiction over a non-domiciliary that commits a tortious act within the state). To the contrary, plaintiffs allege only that terrorist and terrorist sympathizers ***abroad*** have engaged in tortious activity ***in Israel.*** *See* Compl. ¶ 11 ("Israel has been plagued with a wave of Terror Attacks."); ¶ 15 (describing terror attacks in Israel); ¶ 16 ("These attacks and numerous others are part of a new terror campaign . . . directed by terrorist organizations and the Palestinian leadership."). The complaint identifies no such activities that occurred in New York.

Third, plaintiffs do not allege that any purported injury occurred in New York. *See* CPLR 302(a)(3) (providing for specific jurisdiction over a non-domiciliary that commits a tortious act outside the state that causes injury within the state). Instead, plaintiffs allege injury only ***in Israel.*** *See, e.g.*, Compl. ¶ 8. ("The threat of being killed or seriously injured in the random terrorist attacks has spread to every sector of ***Israeli*** society. Barely an hour goes by ***in Israel*** without the report of another attack or attempted attack against civilians.") (emphases added). Injuries that occur outside of state cannot provide a basis for the exercise of specific jurisdiction. *See, e.g.*, *Stern v. Four Points*, 19 N.Y.S.3d 289, 290 (1st Dep't 2015).

In sum, plaintiffs offer no facts to suggest that Facebook's alleged tortious conduct took place or caused injury in New York. Accordingly, New York law does not authorize specific jurisdiction over Facebook in this matter. *See Stern*, 19 N.Y.S.3d at 290 (concluding that the

booking of an out-of-state hotel room in NY was too remote a contact to justify the exercise of long-arm jurisdiction for a suit based on defective premises); *Mejia-Haffner v. Killington, Ltd.*, 990 N.Y.S.2d 561, 564 (2d Dep't 2014) (concluding that plaintiffs' allegations about a website through which a person in New York could purchase services was too remote to support long-arm jurisdiction for negligence associated with ski instructors out of state); *Waggaman v. Arauzo*, 985 N.Y.S.2d 281, 283–284 (2d Dep't 2014) (holding that plaintiff failed to establish a sufficient connection between a defendant's alleged acts and the forum to establish specific jurisdiction under CPLR 302(a)(3) or due process). The Court should therefore dismiss the action for lack of personal jurisdiction.

III. This Suit Should Also Be Dismissed For *Forum Non Conveniens.*

Even if this Court could exercise personal jurisdiction over Facebook (and it cannot), the suit would still warrant dismissal under the doctrine of *forum non conveniens*. See CPLR 327. That doctrine permits a court to dismiss an action that, "although jurisdictionally sound, would be better adjudicated elsewhere." *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478–79 (1984). In applying this doctrine, a court should consider whether the parties are residents of New York; whether the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction; whether adjudication of the action will burden New York courts or create a hardship for the defendant or nonparty witnesses; whether the evidence is located in New York; and whether there is an alternative forum in which the plaintiffs may bring suit. *Id.*; *see also Jackam v. Nature's Bounty, Inc.*, 895 N.Y.S.2d 508, 510 (2d Dep't. 2010). "No one factor is controlling," but "a plaintiff must be able to show more than its own convenience for selecting the forum when the choice imposes a heavy burden on the court and the defendant." *Pahlavi*, 62 N.Y.2d at 479, 482.

Here, the relevant factors all militate in favor of dismissal. Not a single one of the more than 20,000 parties to this action is a resident of New York. Plaintiffs are more than 20,000 residents of Israel and, as discussed above, Facebook is a resident of California and Delaware. The transactions out of which the cause of action arose took place outside of New York—the Facebook posts described in the complaint allegedly were made by individuals outside of the United States and the terror attacks/fear of terror attacks described in the complaint occurred in Israel. Compl. ¶¶ 10–18, 35. Plaintiffs identify no specific connection between their allegations and the Facebook office or employees in New York. In fact, the only connection between this State and the litigation appears to be that plaintiffs' lawyers maintain an office in New York. But the location of counsel plays no factor in the *forum non conveniens* analysis. *See, e.g.*, *Huani v. Donziger*, 11 N.Y.S.3d 153, 154 (1st Dep't 2015); *Tooth v. Georgiou*, 895 N.Y.S.2d 33, 34 (1st Dep't 2010).

Adjudication of these tort claims would also impose significant hardships on the parties and the Court. To be sure, Facebook believes that this suit is entirely barred by § 230 of the CDA and this Court should dismiss on that ground alone, as numerous other courts have done when presented with similar claims. *See supra* at 10-14. But if this Court were to disagree with that position and instead proceed to the merits, resolving plaintiffs' claims would be substantially burdensome. None of the relevant evidence is located in New York, and the witnesses—including the 20,000 Israeli plaintiffs and Facebook's California-based employees—would need to travel long distances to appear in this Court. Additionally, the complaint includes claims under Israeli law, the resolution of which would likely require expert testimony.[2] Although no

[2] The complaint does not specify whether plaintiffs are Facebook users. If they are, then their claims are governed by California law. As plaintiffs acknowledge in their complaint, all Facebook users sign a Statement of Rights and Responsibilities. Compl. ¶ 38 ("Facebook is a social media platform that provides 'Services' to its users, all of whom must consent to Facebook's terms and conditions."). That Statement includes a choice-of-law provision

forum will perfectly balance the hardships in a suit between more than 20,000 Israeli plaintiffs and a California defendant, a New York forum with no connection to the subject matter of the claim is not an appropriate choice.[3]

This suit is thus similar to others that New York courts have dismissed on the ground of *forum non conveniens*. The New York Court of Appeals in *Pahlavi*, for example, affirmed a dismissal for *forum non conveniens* of a suit filed by the Islamic Republic of Iran against its former ruler for bribery and misappropriation of funds. 62 N.Y.2d at 477-78. The Court explained that the suit would pose a "substantial financial and administrative burden on the New York courts," the claims had their "genesis" in Iran and were likely subject to Iranian law, and none of the parties or witnesses were residents in New York, so the suit would likely require "extended trial and pretrial proceedings" necessitating the "appearance of many foreign witnesses." *Id.* at 480. Similarly, the Appellate Division in *Wild v. University of Pennsylvania*, 983 N.Y.S.2d 58 (2d Dep't 2014), affirmed the dismissal of a veterinary malpractice suit where the witnesses and evidence were located in Pennsylvania and "Pennsylvania [wa]s the situs of the underlying events," *id.* at 61. The same factors require dismissal here.

Indeed, under similar circumstances, New York courts have even found a refusal to dismiss on the ground of *forum non conveniens* to be an abuse of discretion. In *Mashreqbank PSC* v. *Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129 (2014), for example, the Court of

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under which all Facebook users agree that "[t]he laws of the State of California will govern . . . any claim that might arise between [the user] and [Facebook], without regard to conflict of law provisions." Statement of Rights and Responsibilities §15(1) (attached at Ex. 1, Barday Aff., Ex. B). Such choice-of-law provisions are enforceable. *See, e.g.*, *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 7 N.Y.3d 624, 629 (2006) ("Generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction.").

[3] Indeed, that choice is particularly inappropriate here, where at least some of the plaintiffs may have agreed to pursue any claims against Facebook in California. Facebook users agree to "resolve any claim, cause of action or dispute (claim) [they] have with [Facebook] arising out of or relating to [the Statement of Rights and Responsiblities] or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County." Statement of Rights and Responsibilities §15.1 (attached at Ex. 1, Barday Aff., Ex. B). Such forum-selection clauses are enforceable in New York. *Brooke Group Ltd. v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996). If, as seems likely, some of the plaintiffs are Facebook users, the forum-selection clause will provide yet another reason for this Court to dismiss the action.

Appeals concluded that dismissal on *forum non conveniens* grounds was "required as a matter of law" in a case involving a foreign exchange swap transaction between a bank located in the United Arab Emirates and a Saudi Arabian company, *id.* at 130. The Court explained that "[a]part from the use of New York banks to facilitate dollar transfers, . . . [it saw] nothing in th[e] case to justify resort to a New York forum." *Id.* at 138. "No party [wa]s a New York resident; no relevant conduct apart from the execution of fund transfers occurred in New York; . . . New York law does not apply; no property related to the dispute is located in New York; no related litigation is pending in New York; and no other circumstance supports an argument that New York is an appropriate forum." *Id.* at 138–39. In that "classic case for the application of the *forum non conveniens* doctrine," dismissal was required. 23 N.Y.3d at 139; *see also In re Oxycontin II*, 908 N.Y.S.2d 239, 242-43 (2d Dep't 2010); *Jackam*, 895 N.Y.S.2d at 1002; *Cheggour v. R'Kiki*, 740 N.Y.S.2d 391, 392 (2d Dep't 2002).

This Court should exercise its discretion under the common law and CPLR 327 to dismiss the case.

CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court dismiss plaintiffs' complaint under CPLR 327 or 3211.

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Respectfully submitted,

By: _____

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