THE STATE OF NEW HAMPSHIRE
SUPREME COURT

SUPREME COURT CASE NO. 2019-0328

TEATOTALLER, LLC v. FACEBOOK, INC.

On Appeal From:
THE STATE OF NEW HAMPSHIRE
CIRCUIT COURT DISTRICT DIVISION

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

BRIEF OF APPELLEE FACEBOOK, INC.

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I. QUESTION PRESENTED

Did the trial court correctly dismiss Plaintiff Teatotaller, LLC's small claims complaint against Defendant Facebook, Inc. for alleged negligent deletion of Plaintiff's Instagram business page where:

(1) The Terms of Use that Plaintiff claims governs the contractual relationship between the parties explicitly bars any claims for lost profits or revenues if Facebook deletes a user's content; and

(2) Courts around the country have uniformly recognized that Section 230(c)(1) of the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c)(1), likewise bars any claims seeking to hold internet service providers like Facebook liable for removing a user's content.

II. STATEMENT OF THE CASE

This appeal arises from a negligence claim brought in small-claims court by Plaintiff Teatotaller, LLC against Facebook, Inc. for deleting Plaintiff's Instagram page. According to Plaintiff, Facebook's "negligence" in deleting the page caused it to lose "business and customers." SA at 3.[1]

The trial court held that Instagram's Terms of Use barred Plaintiff's claim because the Terms of Use prohibit lost profit claims that are based on Instagram's deletion of accounts. App. at 25. When Plaintiff sought reconsideration of the trial court's dismissal order, the trial court denied its motion, holding that Section 230(c)(1) of the CDA also barred Plaintiff's claim. *Id.* at 26.

[1] "SA" refers to the supplemental appendix appended to Facebook's brief.

III. STATEMENT OF THE FACTS

A. Plaintiff Alleges Facebook's Negligent Deletion of Its Instagram Account.

In June 2018, Plaintiff Teatotaller, LLC filed a small claims complaint against Facebook in trial court in the Circuit Court District Division for allegedly deleting its Instagram page.[2] SA at 2-3. Plaintiff claimed that Facebook and Instagram owed Plaintiff a "duty of care to protect [its] business from an algorithmic deletion as it hampers [its] business." *Id.* at 3. Because of Facebook and Instagram's alleged "negligen[t]" deletion, Plaintiff "request[ed] damages and the restoration of [its] account." *Id.*

B. The Trial Court Grants Facebook's Motion to Dismiss.

Facebook moved to dismiss, arguing that (1) the trial court could not exercise personal jurisdiction over Facebook, App. at 35-39; and (2) Section 230(c)(1) of the CDA barred Plaintiff's claim, *id.* at 44-45.

In order to avoid dismissal for lack of personal jurisdiction, Plaintiff asserted for the first time in its opposition to Facebook's motion that the relationship between the parties was governed by the Instagram Terms of Use from April 2018 (as opposed to other versions of the Instagram or Facebook terms). *Id.* at 44-45 (Objection to Motion to Dismiss); *id.* at 27-

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[2] Plaintiff sought $9,999.99 in damages, which was below the maximum amount of $10,000 permitted in a small claim action. SA 2.

33 (Terms of Use). Plaintiff argued that, because the Terms of Use permitted adjudication of claims in "local 'small claims' court," the trial court could exercise jurisdiction. *Id.* at 44. Plaintiff's Objection did not address Facebook's Section 230(c)(1) argument. *See id.* at 43-45.

On reply, Facebook argued that Plaintiff's claim was "explicitly barred" by the plain language of the Terms of Use that Plaintiff relied on to establish jurisdiction. *Id.* at 46. Indeed, the Terms of Use expressly prohibit the type of claim Plaintiff asserted:

> 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. *Id.* at 47.

Facebook added that the contract Plaintiff relied on also conferred upon Instagram the right to remove any content or stop providing its services 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. *Id.* at 47.

The trial court held a hearing on the motion to dismiss. *See* Mot. To Dismiss Hr'g Tr. at 2-3 (Feb. 5, 2019). Ultimately, the trial court granted Facebook's motion to dismiss, holding that the Terms of Use barred Plaintiff's claim. App. at 25 ("By subscribing to the service and using Instagram, the plaintiff agreed to the Terms of Service.").

C. The Trial Court Denies Plaintiff's Motion to Reconsider.

Plaintiff sought reconsideration of the trial court's dismissal order and contended that the trial court misread the Terms of Use. *Id.* at 54-56. The trial court denied Plaintiff's motion for reconsideration, reasoning that it did not "overlook[] or misconstrue[] any points of fact or law." *Id.* at 26. To the contrary, the trial court held that "[i]t [was] clear that the Communications Decency Act, 47 U.S.C. Section 230 protect[ed] [Facebook/Instagram] from the acts that are alleged by the plaintiff." *Id.* at 26. In so holding, the trial court noted that "[a]ny 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." *Id.* (quoting *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (en banc)).

Plaintiff appealed.

IV. SUMMARY OF ARGUMENT

The trial court correctly dismissed Plaintiff's complaint for two independent reasons, and this Court can affirm the dismissal order on either ground.

First, the trial court correctly held that the Instagram Terms of Use barred Plaintiff's claim. Plaintiff agreed to a contract that expressly prohibits a claim for lost profits based on the deletion of an Instagram account. But Plaintiff's claim seeks to hold Facebook liable for just that.

Plaintiff's efforts to avoid the contractual bar of its claim are unpersuasive because

- The omission of the phrase "direct damages" from the Terms of Use does not save Plaintiff's claim because the recovery of lost profits that Plaintiff seeks here is explicitly prohibited under the Terms of Use;
- The availability of damages under certain circumstances not present here does not contradict or negate the contractual provision barring Plaintiff's damages claim in its entirety;
- Plaintiff waived any argument that the Terms of Use are void under RSA 338-A:1, and even if the argument were not waived, RSA 338-A:1 does not apply to Facebook;
- Plaintiff waived any argument that the Terms of Use violate New Hampshire's unfair competition law, and, in any case, that argument is baseless and contradicts its reliance on the contract to avoid dismissal for lack of jurisdiction;

- Neither discovery nor a hearing on the merits is warranted because the Terms of Use plainly bar Plaintiff's negligence claim, and resort to extrinsic evidence would therefore be improper.

Second and alternatively, even if the Terms of Use did not bar Plaintiff's claim, the trial court correctly held that Section 230(c)(1) of the CDA, 47 U.S.C. § 230, provides Facebook immunity from suit from this claim. Section 230(c)(1) confers broad immunity upon Facebook against claims like Plaintiff's that seek to hold Facebook liable for the exercise of a traditional editorial function, including the deletion of a user's content, as numerous courts around the country have uniformly held. Plaintiff's attempts to avoid application of the CDA all fail because:

- Whether a user paid for the use of Instagram's service is irrelevant to the application of Section 230(c)(1);
- Section 230(c)(1) immunity is not limited, as plaintiff incorrectly argues, to situations where a plaintiff sues an interactive computer service provider for the actions of a third party or to claims where the defendant removed one user's content but not another's; and
- Plaintiff waived any argument that Section 230(c)(1) does not apply to contract-based claims, and even if it did not waive such argument, Plaintiff asserted a negligence claim and has never asserted a contract-based claim and doing so would not have allowed it to avoid Section 230(c)(1) immunity.

In sum, the trial court correctly decided both that the Terms of Use bar Plaintiff's claim and that Section 230(c)(1) of the CDA immunizes

Facebook against Plaintiff's claim. This Court should thus affirm the trial court's dismissal of Plaintiff's claim on either ground.

V. STANDARD OF REVIEW

This Court exercises *de novo* review over the trial court's interpretation of the Terms of Use. *See Sherman v. Graciano*, 872 A.2d 1045, 1047 (N.H. 2005) ("[W]e review the trial court's interpretation of [a] contract de novo.").

As to the applicability of Section 230(c)(1) immunity under the CDA, this Court similarly exercises *de novo* review. *See Polonsky v. Town of Bedford*, 190 A.3d 400, 404 (N.H. 2018) ("the trial court's application of the law to the facts" and "the trial court's statutory interpretation" are reviewed *de novo*).

VI. ARGUMENT

A. The Trial Court Correctly Dismissed Plaintiff's Complaint Because the Instagram Terms of Use Bar Its Claim.

Plaintiff's claim is that Facebook is liable because it removed Plaintiff's Instagram account and that Plaintiff lost revenue as a result. *See* SA at 3. It alleges that Facebook wrongfully "deleted [its] Instagram business account," and that it has "and continue[s] to lose business and customers due to [Facebook's] negligence." *Id*.

But as explained below, Plaintiff explicitly agreed to waive the very claim it now asserts, and the trial court correctly concluded that the Instagram Terms of Use expressly bar the claim it seeks to bring.

1. Plaintiff contractually agreed that it could not hold Facebook liable for removing its content.

Under the plain language of the Terms of Use, Plaintiff cannot hold Facebook liable for allegedly deleting its content on Instagram, even if Plaintiff allegedly lost profits as a result. *See Foundation for Seacoast Health v. HCA Health Servs. of N.H., Inc.*, 953 A.2d 420, 425 (N.H. 2008) ("In the absence of ambiguity, the parties' intent will be determined from the plain meaning of the language used." (internal quotation marks omitted)).

The April 2018 Instagram Terms of Use specifically provide:

> 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***. App. at 47 (emphasis added).

For this reason alone, the trial court appropriately dismissed Plaintiff's complaint.

2. Plaintiff's attempts to avoid the contractual term it entered into are unpersuasive.

Plaintiff offers five arguments to try to avoid the plain meaning of its contractual agreement. Each of these arguments fails.

First, Plaintiff argues that its damages claim is outside the scope of the clause because the clause does not list the words "direct damages," in its list of impermissible recoveries. Appellant's Br. at 12. But Plaintiff ignores the fact that the list explicitly includes "any lost profit" or "revenue," App. at 32, which is precisely what Plaintiff seeks to recover here.

Plaintiff complains that it "ha[s] and continue[s] to lose business and customers due to [Facebook and Instagram's] negligence" in deleting its business account and "request[s] damages." SA at 3. Plaintiff offers no explanation for how "lost profits" or "revenue" differs from "direct damages," or how the damages it seeks to recover could somehow fall in the former category but not the latter—much less any legal authority to support such a distinction. Thus, regardless of how Plaintiff chooses to style its alleged losses, it ultimately seeks a form of recovery explicitly prohibited by the Terms of Use.

Second, Plaintiff argues that the trial court ignored the following additional language at the end of the clause: "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." Appellant's Br. at 13 (quoting App. at 32). Plaintiff's argument appears to be that this language contradicts and therefore negates the preceding language barring certain damages claims. This is a tortured reading of the contract that is contrary to New Hampshire law. *See Moore v. Grau*, 193 A.3d 272, 276 (N.H. 2018) ("In interpreting a contract, we consider the contract as a whole." (internal

quotation marks omitted)); *see also West v. Turchioe*, 761 A.2d 382, 387 (N.H. 1999) ("In interpreting a multiple document agreement, we seek to harmonize and give effect to the provisions of the various documents so that none will be rendered meaningless." (internal quotation marks omitted)).

The fact that the latter clause addresses some possible scenarios where damages may be permissible under the contract in no way contradicts or negates the preceding language that establishes that specific situations are barred—including precisely the one here, for claims for "lost profits" when Instagram deletes a user's account. App. at 32. Thus, the possibility of recovery for plaintiffs who sue Instagram for reasons unrelated to account deletion and not covered by the waiver clause does not help Plaintiff here.

Third, Plaintiff contends that the Terms of Use are void under public policy because they are prohibited under RSA 338-A:1. Appellant's Br. at 20. Plaintiff never argued that RSA 338-A:1 prohibits enforcement of the Terms of Use. *See* App. at 43-45 (Objection to Motion to Dismiss); App. at 50-53 (Sur-Reply); App. at 54-56 (Motion to Reconsider). Thus, Plaintiff has waived this argument on appeal. *See Quirk v. Town of New Boston*, 663 A.2d 1328, 1331 (N.H. 1995) ("[T]his court will not consider on appeal issues or arguments not raised below."); *Daboul v. Town of Hampton*, 471 A.2d 1148, 1149 (N.H. 1983).

Even if Plaintiff did not waive reliance on RSA 338-A:1 or could disregard provisions it does not like, its public policy argument is meritless.

RSA 338-A:1 prohibits liability releases by "architect[s], engineer[s], surveyor[s] or his agents or employees." *See Rankin v. S. Street Downtown Holdings, Inc.*, 215 A.3d 882, 892 (N.H. 2019) ("RSA 338-A:1 prohibits architects, among other professionals, from contractually absolving themselves completely from liability for professional negligence by contract."). Plaintiff does not allege that Facebook is an architect, engineer, or surveyor—nor, of course, could it.

Furthermore, Plaintiff's argument runs directly contrary to its arguments before the trial court, where it relied on the Terms of Use in order to avoid having the case dismissed for lack of personal jurisdiction. *See* App. at 44 (arguing that Terms of Use permitting adjudication in small claims court authorized trial court to exercise personal jurisdiction over Facebook).

Plaintiff cannot have it both ways, embracing the contract when it helps it avoid dismissal and then claiming the contract is void when a provision hurts its case, or cherry-picking provisions from the Terms of Use that inure to its benefit while disavowing those that disadvantage it. *See Tsiatsios v. Tsiatsios*, 744 A.2d 75, 79 (N.H. 1999) ("A contract which consists of several promises on either or both sides is indivisible if the parties expressed mutual assent to all the promises as a single unit."); *Lemire v. Haley*, 19 A.2d 436, 439 (N.H. 1941) ("If the parties gave a single assent to the whole transaction, the contract is indivisible, while it is divisible if they assented separately to several things. By great prevalence of authority an invalid or unenforceable part of an entire contract bars any

recovery on the other part of the contract." (internal citations omitted)); *see also Sybac Solar AG v. MSS-AEP 6th St. Solar Energy Park of Gainesville, LLC*, No. 12-CV-101, 2012 WL 12898881, at *1 (M.D. Fla. Oct. 2, 2012) (plaintiff suing for breach of contract could not avoid the contract's venue provision because "the law is quite clear that one suing on a contract cannot cherry pick the terms it wishes to enforce while ignoring those it finds do not further its interests").[3]

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[3] In any case, if the Terms of Use were void because of public policy, as Plaintiff now argues, then dismissal would be proper for an additional reason, which is lack of personal jurisdiction. Plaintiff relied on a provision from the Terms of Use authorizing suits in small claims court as the basis for jurisdiction in this case. App. at 44.

It is Plaintiff's "burden [to] demonstrate[e] 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). Other than the Terms of Use, there is no such basis in the record. As to "general or all-purpose jurisdiction," Plaintiff did not show that Facebook's place of incorporation and principal place of business were in New Hampshire. *See Daimler AG v. Bauman*, 571 U.S. 117, 121, 137 (2014); *see* App. at 36. Nor did Plaintiff show that this was the "exceptional" case 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). Likewise, without the Terms of Use, Plaintiff would fail to show that specific jurisdiction should apply because (1) Plaintiff fails to allege any contacts between Facebook and New Hampshire, *see Vt. Wholesale*, 914 A.2d at 822; and (2) specific 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).

Fourth, Plaintiff suggests that the Terms of Use do not apply because it "was deceived into entering a bare promise" in violation of New Hampshire's unfair competition law. Appellant's Br. at 20-21 (citing RSA 358-A:2). Plaintiff has waived reliance on the unfair competition statute, never discussing it before the trial court. *See Quirk*, 663 A.2d at 1130; *Daboul*, 471 A.2d at 1149. In any case, Plaintiff has alleged nothing in its complaint to suggest that Facebook deceived it into entering a contract. *See* SA at 3. And this argument again flies in the face of Plaintiff's explicit reliance on the same contract in order to avoid dismissal for lack of personal jurisdiction. App. at 44-45; *id.* at 53. Thus, Plaintiff's threadbare assertion that Facebook violated New Hampshire's unfair competition law cannot be used to avoid the contractual bar of his claim.

Finally, Plaintiff argues that the trial court erred by granting the motion to dismiss without the benefit of discovery or a hearing on the merits. Appellant's Br. at 13-14. But discovery or a hearing would be fruitless because the Terms of Use unambiguously bar Plaintiff's claim to recover lost profits. App. at 32.

"The interpretation of a contract, including whether a contract term is ambiguous, is ultimately a question of law for this court to decide." *Sherman*, 872 A.2d at 1047. "A clause is ambiguous when the contracting parties reasonably differ as to its meaning." *Id.* Without ambiguity, this Court "must restrict [its] search for the parties' intent to the words of the contract." *Id.*

For the reasons detailed above, there is no ambiguity. *See* Section VI.A.1., *supra*. The Terms of Use are clear: Instagram is not "responsible . . . for any lost profits . . . includ[ing] when [it] delete[s] [a user's] content, information, or account." App. at 32.

Furthermore, if, as Plaintiff suggests, the trial court considered extrinsic evidence despite the clear language of the Terms of Use, it would have been error. *See Sherman*, 872 A.2d at 1047-48 ("[W]e will reverse the determination of the fact finder where, although the terms of the agreement are unambiguous, the fact finder has improperly relied upon extrinsic evidence in reaching a determination contrary to the unambiguous language of the agreement.").

In sum, the trial court correctly interpreted the Terms of Use to bar Plaintiff's negligence claim. This Court should therefore affirm the dismissal order.

B. The Trial Court Correctly Dismissed Plaintiff's Complaint Because Section 230(c)(1) of the Communications Decency Act Bars Plaintiffs' Claim.

Even if the trial court erred in ruling that the Terms of Use bar Plaintiff's claim (which it did not), this Court should affirm the trial court's dismissal order for a second, independent reason: as the trial court correctly held, Section 230(c)(1) of the CDA also bars Plaintiff's claim. *See* App. at 26.

1. Section 230(c)(1) broadly immunizes online service providers.

Congress enacted the CDA in 1996 to foster the development of the internet and to encourage free speech by shielding online service providers from lawsuits arising out of user-generated content. *See Zeran v. America Online, Inc*., 129 F.3d 327, 330-31 (4th Cir. 1997). To further this policy goal, the CDA confers "broad immunity" for interactive computer service providers against state-law claims. *Univ. Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007); *Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322 (1st Cir. 2017).

Under Section 230(c)(1) of the CDA, "[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." The CDA expressly preempts any cause of action that would hold an internet platform liable as a speaker or publisher of third-party speech: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with" the CDA. 47 U.S.C. § 230(e)(3); *Zeran*, 129 F.3d at 330 ("By its plain language, § 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.").

"[L]ike other forms of immunity," Section 230(c)(1) 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). Accordingly, courts

regularly grant motions to dismiss based on Section 230(c)(1). *E.g., Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1272 (D.C. Cir. 2019) (affirming Rule 12(b)(6) dismissal under Section 230(c)(1)); *Univ. Commc'n Sys.*, 478 F.3d at 427 (same).

2. The trial court correctly concluded that Facebook is entitled to Section 230(c)(1) immunity.

Facebook is entitled to Section 230(c)(1) immunity if it satisfies three requirements: (1) it is a "provider . . . of an interactive computer service;" (2) the content at issue was "provided by another information content provider"; and (3) the claims treat Instagram as the "publisher" of that content. 47 U.S.C. § 230(c)(1); *Univ. Commc'n Sys.*, 478 F.3d at 418; Appellant's Br. at 16. Plaintiff concedes that the first requirement is met, and its arguments as to the second and third requirements fail.

a) Plaintiff concedes that the first requirement is satisfied because Facebook is an interactive computer service provider.

The first requirement for Section 230(c)(1) immunity is that the defendant be a "provider . . . of an interactive computer service." 47 U.S.C. § 230(c)(1). "Plaintiff does not dispute that [Facebook] is an 'interactive computer service provider.'" *See* Appellant's Br. at 16. Nor could it plausibly do so. An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). Courts have consistently held that social networking sites, including Facebook, meet this definition. *See, e.g., Franklin v. X Gear 101,*

LLC, Case No. 17 Civ. 6452 (GBD) (GWG), 2018 WL 3528731, at *19 (S.D.N.Y. July 23, 2018) (Instagram); *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 206-07 (2017) (Facebook). Thus, Facebook satisfies the first requirement for Section 230(c)(1) immunity.

b) Plaintiff's argument regarding the second requirement fails because it is undisputed that someone other than Facebook provided the content at issue.

The second requirement for Section 230(c)(1) immunity is that the content at issue was "provided by another information content provider." 47 U.S.C. § 230(c)(1). The CDA broadly defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development" of the content. *Id.* § 230(f)(3). This requirement is therefore satisfied whenever the content at issue is provided by someone other than the defendant—here, Facebook—including, specifically, when the material is from a user of a social media platform such as Facebook or Instagram. *See, e.g.*, *Franklin*, 2018 WL 3528731, at *19.

It is undisputed that someone other than Facebook created the only content at issue here. *See* SA 3 ("Facebook deleted our Instagram business account without notice"); Appellant's Br. at 9 ("Facebook terminated Teatotaller's Instagram account, including all the content, data, and followers that had been accumulated through paid and unpaid activity."). Plaintiff does not allege that Facebook or Instagram created any content. Thus, the content at issue is from "another information content provider,"

i.e., Plaintiff, and the second requirement for immunity is satisfied for this simple reason alone. 47 U.S.C. § 230(c)(1). *See Ebeid v. Facebook, Inc.*, Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *4 (N.D. Cal. May 9, 2019) (plaintiff qualified as "another" party under Section 230(c)(1)); *Lancaster v. Alphabet Inc.*, Case No. 15-cv-05299-HSG, 2016 WL 3648608, at *3 (N.D. Cal. July 8, 2016) (plaintiff's own video content satisfied second requirement for Section 230(c)(1) immunity).

Plaintiff's only argument as to the second requirement is that Section 230(c)(1) immunity requires "content that would otherwise be considered illegal or unlawful" and a claim that "stem[s] from an attribution of [such] content to the interactive computer service." Appellant's Br. at 17. Plaintiff cites no authority for this novel proposition, and none exists. Nothing in the text of Section 230(c)(1) speaks of illegality. To the contrary, Section 230(c)(1) immunizes service providers from "be[ing] treated as the publisher or speaker for ***any information*** provided by another information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). "[T]he actual statute has the word 'information,'" which does not limit itself to only illegal or unlawful content. *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008).

c) Plaintiff's arguments regarding the third requirement fail because its claim seeks to hold Facebook liable for removing its content.

The third requirement for Section 230(c)(1) immunity is satisfied if the claim "seek[s] 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." *Zeran*, 129 F.3d at 330.

In determining whether the third requirement is satisfied, "what matters is not the name of the cause of action." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009). Rather, "what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.*

Thus, as the trial court correctly noted, "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." App. at 26 (quoting *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (en banc)).

Courts across the country have consistently held that claims that seek to hold an interactive computer service provider like Facebook liable for deleting posts or accounts satisfy the third requirement and therefore must be dismissed under Section 230(c)(1). *See, e.g.*, *Riggs v. MySpace, Inc.*, 444 F. App'x 986, 987 (9th Cir. 2011) (affirming dismissal based on "MySpace's decisions to delete [plaintiff's] user profiles on its social networking website" under Section 230(c)(1) *Fed. Agency of News LLC v. Facebook, Inc.*, Case No. 18-CV-07041-LHK, 2020 WL 137154, at *8 (N.D. Cal. Jan. 13, 2020) (dismissing with prejudice plaintiffs' claims under Section 230(c)(1) because they were "based on Facebook's decision *not to publish* [plaintiffs'] content"); *Ebeid*, 2019 WL 2059662, at *5 (Facebook's "decision to remove plaintiff's posts undoubtedly falls under

'publisher' conduct" under Section 230(c)(1)); *Lancaster*, 2016 WL 3648608, at *2 (Section 230(c)(1) bars "any claim arising from Defendants' removal of Plaintiff's videos"); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094-96 (N.D. Cal. 2015) (Section 230(c)(1) barred plaintiff's claim based on Facebook's refusal to publish certain content); *Green v. YouTube, LLC*, Case No. 18-cv-203-PB, 2019 WL 1428890, at *3, *5-6 (D.N.H. Mar. 13, 2019) (recommending dismissal of plaintiff's claim based on alleged "shut down" of his YouTube account because of Section 230(c)(1) immunity), *adopted in Green v. YouTube, Inc.*, Case No. 18-cv-203-PB, 2019 WL 1428311, at *1 (D.N.H. Mar. 29, 2019).

Here, that is precisely what Plaintiff seeks to do. Plaintiff contends that Facebook is liable for allegedly removing its Instagram account. SA 3 (alleging that "Facebook deleted [Plaintiff's] Instagram business account without notice" and "request[ing] damages" as a result). The trial court thus correctly analyzed the caselaw and determined that Plaintiff's claim is barred by Section 230(c)(1). App. at 26.

Plaintiff's arguments for why the third requirement is not satisfied do not withstand scrutiny.

First, Plaintiff argues that all the cases cited by the trial court are entirely distinguishable because "none of the plaintiffs were engaged in a fee for service contract with defendants." Appellant's Br. at 18. But nothing in the text of the CDA provides an exception from Section 230(c)(1)

immunity when the plaintiff paid the interactive computer service provider. Indeed, payment is not mentioned in the statute.

Plaintiff cites no authority for the proposition that such an exception exists. *Id.* at 18. To the contrary, it is well-established that Section 230(c)(1) applies regardless of whether money is paid for the service. *See, e.g., Chicago Lawyers' Comm. for Civil Rights*, 519 F.3d at 668, 672 ("craigslist, which provides an electronic meeting place for those who want to buy, sell, or rent housing," was entitled to Section 230(c)(1) immunity); *Ebeid*, 2019 WL 2059662, at *1, 3-5 (Section 230(c)(1) barred plaintiff's claim against Facebook, even though he paid Facebook to "boost" his posts); *Levitt v. Yelp! Inc.*, Case Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *8 (N.D. Cal. 2011) ("traditional editorial functions often include subjective judgments informed by . . . financial considerations," thus barring plaintiffs' claim based on Yelp acting out of improper financial motives). Thus, Plaintiff's alleged payment to Facebook does not affect the applicability of Section 230(c)(1) immunity.

Second, Plaintiff argues that all the Section 230(c)(1) cases are distinguishable because "all of them include a plaintiff claiming damages against the interactive computer service companies for actions of a third party (e.g. someone posting offensive, slanderous, or discrimintary [sic] content)." Appellant's Br. at 18.

Not so. In both *Riggs* and *Sikhs for Justice*, cited by the trial court, the plaintiffs' claims were that material that they themselves posted was wrongfully removed. Neither case involved "offensive" material generated

by other users. *Riggs*, 444 F. App'x at 987; *Sikhs for Justice*, 144 F. Supp. 3d at 1094-96.

The same is true for numerous other cases applying Section 230(c)(1) immunity to claims regarding the deletion of Plaintiff's own content. *E.g., Ebeid*, 2019 WL 2059662, at *5 (holding that Section 230(c)(1) bars plaintiff's claim against Facebook for its deletion of plaintiff's own posts); *Lancaster*, 2016 WL 3648608, at *2 (same for plaintiff's claim against YouTube for its deletion of plaintiff's own videos); *Green*, 2019 WL 1428890, at *3, *6 (recommending dismissal under Section 230(c)(1) based on plaintiff's claim that YouTube "closed or shut down [his] accounts")

Third, Plaintiff argues that the third requirement for Section 230(c)(1) immunity is not satisfied because it is "not alleging that the harm stems from [Facebook] deleting the Plaintiff's account while not deleting others—the sort of actions the CDA is intended to protect." Appellant's Br. at 17. Plaintiff's argument has no basis in the text of the statute, and Plaintiff cites no authority holding that Section 230(c)(1) immunity applies only where the defendant allegedly deleted the plaintiff's material but not other material.[4]

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[4] Plaintiff's reliance on *Fair Housing Council* is misguided. That case does not involve the deletion of content. *See* Appellant's Br. at 17. Indeed, "Roommate [was] not being sued for removing some harmful messages while failing to remove others; instead, it [was] being sued for the predictable consequences of creating a website designed to solicit and

In fact, contrary to Plaintiff's assertion, courts have consistently applied Section 230(c)(1) to bar claims where there is no allegation that the defendant deleted some material but not other material. *E.g., Ebeid*, 2019 WL 2059662, at *1-2, 5 (Section 230(c)(1) barred plaintiff's claim based on Facebook's removal of his online posts, even though plaintiff never alleged that Facebook declined to remove other user's online posts); *Lancaster*, 2016 WL 3648608, at *2 (same for claims based on YouTube's removal of plaintiff's videos).

Finally, Plaintiff argues that the third requirement is not satisfied because it is asserting a claim for breach of contract or breach of the implied covenant of good faith and fair dealing. Appellant's Br. at 17. As before, Plaintiff never raised this argument—that the CDA does not apply because it has some contract-based claim—before the trial court, and the argument is therefore waived. *See Quirk*, 663 A.2d at 1330; *Daboul*, 471 A.2d at 1149.

Even if this argument weren't waived, it fails because, as a matter of fact, Plaintiff never asserted any contract-based claim. Rather, Plaintiff's complaint made clear that it only sought to assert a tort claim, based in

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enforce housing preferences that are alleged to be illegal." *Fair Housing Council*, 521 F.3d at 1170. Thus, contrary to Plaintiff's claim, *Fair Housing Council* does not hold that the selective deletion of content precludes Section 230(c)(1) immunity.

negligence. Plaintiff alleged that Instagram owed it "a duty of care" and that Instagram's "negligence" caused it "to lose business and customers." SA at 3; *see also Christen v. Fiesta Shows, Inc.*, 173 A.3d 162, 164 (N.H. 2017) ("To recover for negligence, a plaintiff must show that the defendant owes a duty to the plaintiff and that the defendant's breach of that duty caused the plaintiff's injuries.").[5]

In any event, Plaintiff cannot avoid Section 230(c)(1) of the CDA by repackaging its claim as one arising under contract rather than tort. Section 230(c)(1) immunity does not depend on "the name of the cause of action." *Barnes*, 570 F.3d at 1101. Instead, "what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher

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[5] If Plaintiff had asserted a contract-based claim, then Facebook would have moved to dismiss on the additional ground that this sort of contract claim fails as a matter of law. "[C]ourt[s] ha[ve] correctly recognized [that] while Facebook's Terms of Service place restrictions on users' behavior, they do not create affirmative obligations." *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1064 (N.D. Cal. 2016) (internal quotation marks omitted); *see also Young v. Facebook, Inc.*, Case No. 5:10-cv-03579-JF/PVT, 2010 WL 4269304, at *3 n.6 (N.D. Cal. Oct. 26, 2010) ("While the Statement of Rights and Responsibilities indicates that it 'derives from the Facebook Principles,' the Facebook Principles do not create legal obligations or grant a user the right to enforce those principles in court."). Such a claim would also be barred by the same contractual provision that bars Plaintiff's tort claim. *See* Section I, *supra*. Moreover, any attempt by Plaintiff to assert a contract-based claim would be flatly inconsistent with its arguments here that this very contract is unenforceable for public policy reasons and because Plaintiff did not understand the contract. *See* Appellant's Br. at 20-21.

or speaker' of content provided by another." *Id.* at 1101-02. Courts have thus dismissed claims based on removal of content even when styled as contract claims. *See Fed. Agency of News*, 2020 WL 137154, at *8 (holding that Section 230(c)(1) barred plaintiff's breach of contract claim based on Facebook removing plaintiff's Facebook account); *Lancaster*, 2016 WL 3648608, at *2-3, 5 (dismissing breach of covenant of good faith and fair dealing claim based on removal of plaintiff's video).

The only authority that Plaintiff cites is *Young v. Facebook*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011), but that case is inapposite because it never addressed the applicability of Section 230(c)(1). Instead, the *Young* court held that the plaintiff failed to plead enough facts to support a claim for breach of the implied covenant. *Id.* at 1118.[6]

In sum, all three requirements for Section 230(c)(1) immunity are satisfied, and so the trial court correctly held that Plaintiff's claim was barred as a matter of law.

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[6] Plaintiff's final argument is that Section 230(c)(1) in its entirety is voided by New Hampshire public policy. Appellant's Br. at 21. This baseless argument turns federalism on its head. The CDA is federal law that explicitly preempts state law. 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 828 (2002) (holding the CDA preempted plaintiff's state-law claim).

VII. CONCLUSION

Facebook respectfully requests that the Court affirm the trial court's well-reasoned dismissal orders. As it correctly held, the Terms of Use bar Plaintiff's negligence claim or, alternatively, Facebook is entitled to Section 230(c)(1) immunity from Plaintiff's claim.

Facebook furthermore respectfully requests oral argument of fifteen minutes.

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January 17, 2020

Appellee's Supplemental Appendix

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For e-Filing only

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: 7th Circuit - District Division - Dover

Case Name: Teatotaller LLC v. Facebook, Inc.

Case Number: 432-2018-SC-00298
(if known)

SMALL CLAIM COMPLAINT

Plaintiff name: Teatotaller LLC

Residence address:
Street: 69 High St
City: Somersworth
State: NH Zip code: 03878
Telephone: (cell) (603) 978-9225
(home)

Mailing address: (if different):
Street:
City:
State: Zip code:
E-mail: emmett@teatotallerteahouse.com

Date of birth: *Provide on Confidential Information Sheet* ☐ Check here if there are multiple Plaintiffs

If filing on behalf of another individual or a business please see below, otherwise continue to Defendant Information.

☒ **District Division Rule 1.3D Statement Attached** (This is required when filing on behalf of an individual or business in addition to the applicable authorization below.)

Type of Business/ 3rd Party: (If applicable)

☐ Corporation	☐ Trust
☐ Limited Liability Company	☐ Partnership
☐ Sole Proprietorship	☐ Other

Type of Authorization if filing on behalf of individual or business:

☐ Power of Attorney	☐ Authorization signed by General Partner
☐ Corporate Resolution (corporation)	☐ Authorization signed by Trustee
☒ Authorization signed by Member with Management Authority	☐ Other

Defendant name Facebook, Inc.

Residence address:
Street: 1601 Willow Rd
City: Menlo Park
State: CA Zip code: 94025
Telephone: (650) 618-7714

Mailing address: (if different):
Street:
City:
State: Zip code:
☐ Check here if there are multiple Defendants

☐ **Military Statement Attached** (The court cannot issue a default judgment in the event of a default on the part of an individual defendant until the Military Statement has been filed.)

Case Name: Teatdaller LLC v. Facebook, Inc.
Case Number: 432-2018-SC-00298

SMALL CLAIM COMPLAINT

Type of Business: (If applicable)

☒ Agent for Service: David Kling
Name of agent
1601 Willow Rd
Address
Menlo Park, CA 94025
City State Zip code

Type of Business/ 3rd Party: (If applicable)

☒ Corporation	☐ Trust
☐ Limited Liability Company	☐ Partnership
☐ Sole Proprietorship	☐ Other

The Plaintiff claims that the Defendant owes the Plaintiff $ 9,999.99
Use this space to clearly state the business or other relationship between the plaintiff and defendant and how, when and where the claim arose:
[See Attachment 'Claim Description']

Amount of Claim $ 9,999.99 *
Filing Fee $ 145.00
Total $ 10,144.99

☐ Check here if this debt is from the extension of consumer credit and attach a Statement of Consumer Debt.

☐ Check here if this is a debt that was purchased from or assigned by a third party.

Name of third party

***The maximum amount of a Small Claim action is $10,000.00**
***Claims in excess of $5,000.00 are subject to mandatory mediation**
***Claims over $1,500 entitle the defendant to request a jury trial**

Emmett Soldati
Name of Filer

/s/ /s/ Emmett Soldati 6/28/18
Signature of Filer [See Attachment(s), item 'Sig'] Date

Law Firm, if applicable Bar ID # of attorney

(603) 978-9225
Telephone

69 High St
Address

emmett@teatdallertearhouse.com
E-mail

Somersworth, NH 03878
City State Zip code

Court Use Only:

Return Date: July 30, 2018
This is the date by which the Defendant must file a response with the court or be defaulted. See separate Instructions to the Defendant.

Clerk's Notice
Document sent to parties
on 06/28/2018

432-2018-SC-00298

Attachment Page 1 (of 1)

To Small Claims Complaint

Claim Description

On June 8th Facebook deleted our Instagram business account without notice. They sent two contradicting statements as to the reason for deletion and provided no appeal or contact to get more information.

Instagram had a duty of care to protect our business from an algorithmic deletion as it hampers our business. We have and continue to lose business and customers due to their negligence. We request damages and the restoration of our account.

Signature

Signed by Emmett Soldati on behalf of Teatotaller LLC

FileCourt.com Form Set #2650773

If the item that this Attachment concerns is made under penalty of perjury, all statements in this Attachment are made under penalty of perjury.