COMMONWEALTH OF VIRGINIA
FOURTEENTH JUDICIAL CIRCUIT

L.A. HARRIS, JR., JUDGE
JAMES S. YOFFY, JUDGE
RICHARD S. WALLERSTEIN, JR., JUDGE
JOHN MARSHALL, JUDGE
RANDALL G. JOHNSON, JR., JUDGE

CIRCUIT COURT OF HENRICO COUNTY

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June 24, 2020

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Re: Devin Nunes v. Twitter, Inc., Elizabeth L. "Liz" Mair, Mair Strategies, LLC, et al.,
Case No.: CL19-1715-00

Dear Mr. Biss, Mr. Carome and Mr. Seyfarth,

This matter came before the court on the motion to dismiss defendant Twitter, Inc. on June 12, 2020. The court makes the following ruling based on the filings by the parties and the arguments presented at the hearing.

The motion to dismiss by Twitter argues that Section 230 of Title 47 of the U.S. Code grants Twitter immunity from suit for the claims filed by the plaintiff in this case. Twitter relies specifically on subsection (c) of Section 230 as the basis for the immunity. The court will address the plaintiff's claims and arguments that the motion to dismiss should not be granted.

Plaintiff contends that the motion to dismiss is a second motion to dismiss and should not be allowed. The court finds this argument without merit as the first motion to dismiss concerned venue and jurisdiction to hear the case and this motion to dismiss concerns immunity. Plaintiff further argues that the immunity Twitter claims pursuant to 47 USC Section 230 is an

affirmative defense and must be asserted as an affirmative defense in the answer to the lawsuit. The court finds no authority that states defendant is barred from filing a motion to dismiss claiming immunity from suit before filing an answer. The Supreme Court of Virginia ruled in Clark v. Va. Dept. of State Police, 291 VA 725 (2016) that immunity from suit under federal or state law are an appropriate basis for a Virginia Court to dismiss a suit at this stage of this case. The court finds the motion to dismiss based on immunity to be properly before the court.

The plaintiff alleges that Twitter is an information content provider and therefore immunity under 47 USC Section 230 does not apply. The plaintiff alleges that Twitter's decisions regarding content that is allowed or not allowed to be posted on its internet platform makes Twitter an information content provider or somehow the creator of content. Plaintiff further alleges that the content allowed by Twitter to be on the platform is defamatory and that Twitter is liable for the defamatory content and negligent for allowing the defamatory content to remain on the internet platform.

Twitter rightfully agrees that the court must accept all these facts as true. However, the court is "not bound to accept conclusory allegations made without any factual support". Squire v. Va. Hous. Dev. Auth. 287 VA 507, 527 (2014). The plaintiff concedes that there is no evidence that Twitter or anyone associated with Twitter was present with the author of the content that is the subject of this lawsuit when it was placed on the Twitter internet platform and that there is no evidence that Twitter or anyone associated with Twitter helped draft the content that is the subject of this lawsuit. Twitter argues that solely by alleging that Twitter is an internet content provider is a conclusion without facts and the court agrees.

The court must look to 47 USC Section 230 and the caselaw interpreting the act and analyze plaintiff's allegations to determine if Twitter has immunity under the act. Plaintiff would have Twitter be held liable for defamation for the content placed on its internet platform by others and would have Twitter found to be negligent for not removing the content placed on its internet platform by others. Section 230 reads in subsection (c)(1) "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". Plaintiff seeks to have the court treat Twitter as the publisher or speaker of the content provided by others based on its allowing or not allowing certain content to be on its internet platform. The court refuses to do so and relies on the rulings in Zeran v. Am. Online, Inc., 129 F.3d 327, (1997) The court in Zeran stated "Section 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. Specifically, section 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, 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 – are barred". Zeran 129 F.3d at 329.

The plaintiff also alleges that Twitter has a bias towards a point of view and that bias is so extreme that it governs its decisions regarding content that is allowed on its internet platform and that course of conduct makes it a content provider. The allegations in the Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc. 591 F.3d 250 were similar to those by the plaintiff in this case concerning content decisions being one sided and the court in the Nemet case ruled that the service provider was immune from suit pursuant to 47 USC Section 230.

The court finds the issues in this case substantially similar to the issues presented in the Zeran and Nemet cases and applying the rulings in the Zeran and Nemet cases the court finds that Twitter is not a content provider based on the allegations by Plaintiff in this lawsuit. The court finds that Twitter is immune from the defamation claims of plaintiff based on 47 USC Section 230.

The court further finds that 47 USC Section 230 (c)(2) provides immunity for all civil liability and therefore Twitter is immune from Plaintiff's negligence claim based on the allegations in the complaint and the courts application of the rulings in the Zeran and Nemet cases to the allegations in this case.

I thank you for the presentation of the issues and for all the information that was provided to me. Mr. Carome please prepare the order.

Sincerely,

John Marshall, Judge