

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

GENEVIEVE MAHONEY,)	
a/k/a @genmahoney19,)	
an individual,)	
)	
Plaintiff,)	NO. 3:21-cv-00607
v.)	
)	Judge Campbell
)	Magistrate Judge Frensley
FACEBOOK, INC.,)	
a Delaware corporation,)	JURY DEMAND
)	
Defendant.)	ORAL ARGUMENT
)	REQUESTED
)	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION
TO REMAND TO STATE COURT PURSUANT TO FORUM-CLAUSE**

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STATEMENT OF THE CASE

I. Proceedings

A. Libel complaint filed against Facebook in Tennessee state court.

On July 1, 2021, plaintiff, Genevieve Mahoney, a Davidson County, Tennessee resident and Furman University student, known also by her Instagram handle and username, @genmahoney19, (“Genevieve”), filed a complaint against the defendant, Facebook, Inc. (“Facebook”), in the Davidson County, Tennessee Circuit Court, Twentieth Judicial District at Nashville, Case No. 21C1107. Complaint, Doc. 1-1, Page ID ## 7-45.

Facebook is a global social media platform incorporated in Delaware with its principal place of business located in California, and Facebook owns Instagram, a video and photo content-sharing platform. Complaint, Doc. 1-1, Page ID ## 7-45.

The case was assigned to the Honorable Joseph P. Binkley, Jr., the Presiding Judge of the eighteen trial court judges for the Twentieth Judicial District at Nashville. Ott Declaration, Exhibit 1.¹

The nature of the complaint is a libel and defamation claim concerning allegations of false and defamatory written statements published to the general public from Facebook’s Newsroom by its leadership team on January 6, 2021. Complaint, Doc. 1-1, Page ID ## 7-45. These statements were of and concerning video

¹ See 2021-2022 Tennessee Judicial Conference, presiding judges list. https://www.tncourts.gov/sites/default/files/docs/2021-2022_presiding_judges_2021sept2_0.pdf.

and photo content from the protestors at the Capitol events in Washington, D.C. on January 6, 2021, while Congress conducted the Certification Count of the 2020 Presidential Election that had just concluded. Complaint, Doc. 1-1, Page ID ## 7-45. Facebook's leadership publicly declared that photo content from the protestors at the Capitol events, were such content that represents incitement or encouragement of violence and promotion of criminal activity. Complaint, Doc. 1-1, Page ID ## 7-45.

Prior to the Certification Count at the Capitol, nearby at the Ellipse in President's Park a First Amendment Rally had commenced that morning, in which then-President Donald J. Trump delivered remarks. Complaint, Doc. 1-1, Page ID # 8. This First Amendment Rally was lawfully permitted and organized as a peaceful protest in response to alleged voting irregularities in the November 2020 Presidential Election. Complaint, Doc. 1-1, Page ID # 8.

Genevieve attended the First Amendment Rally that morning at the Ellipse, and she was one of the protestors posting photo content to Instagram that afternoon outside the Capitol. Complaint, Doc. 1-1, Page ID ## 7-45. Genevieve filed the lawsuit and libel claim in order to vindicate her rights, and the complaint itself is protected speech under the First Amendment. Complaint, Doc. 1-1, Page ID # 15.

Facebook is being sued for libel and other claims for its own defamatory speech, not the defamatory speech of third parties, published by its leadership team concerning photo content from the protestors at the Capitol events. Facebook is not immune from liability for its own speech. Complaint, Doc. 1-1, Page ID # 16.

B. Facebook’s removal to the Middle District of Tennessee.

On July 6, 2021, service of process was perfected upon Facebook’s Delaware registered agent. Affidavit of Service, Doc. 1-1, Page ID # 48. On August 4, 2021, Facebook filed a *Notice of Removal*, removing the case to the United States District Court for the Middle District of Tennessee, with the current case caption and Case No. 3:21-cv-00607. Notice of Removal, Doc. 1, Page ID ## 1-5.

II. Facts

A. Genevieve was a protestor at the Capitol events on January 6, 2021, and she posted her “Our Capitol” photo content to Instagram.

At approximately 2:00 pm Eastern while peacefully walking with family members from the First Amendment Rally at the Ellipse to the Certification Count at the Capitol as permitted, Genevieve posted to her Instagram account photo content of the Capitol in the distance, with the caption, “Our Capitol,” *see content below*:



“Our Capitol”

Complaint, Doc. 1-1, Page ID # 13.

B. Facebook’s leadership published an Emergency News Statement of and concerning photo content from the protestors at the Capitol events, declaring such content represents incitement or encouragement of violence and promotion of criminal activity.

A few hours following Genevieve’s post to Instagram of her “Our Capitol” photo content, Facebook’s leadership published an Emergency News Statement from its Newsroom to the public including members of various Instagram groups such as @fur.meme. Genevieve was an interactive member of @fur.meme, a popular Furman University Instagram group operated by an anonymous Furman student, comprised of students, faculty, school officials, and alumni. Complaint, Doc. 1-1, Page ID # 15.

This Emergency News Statement published to the public by Facebook’s leadership declared that photo content from the protestors at the Capitol events, were such content that represents: (1) “incitement of violence;” (2) “encouragement of violence;” and (3) “promotion of criminal activity.” Complaint, Doc. 1-1, Page ID # 16.

Facebook’s leadership further stated that photo content from the protestors were such content that violated its policies. Complaint, Doc. 1-1, Page ID # 21.

Facebook’s leadership team directed by Vice President of Global Policy Management, Monika Bickert (“Bickert”), and Vice President of Integrity, Guy Rosen (“Rosen”), declared in the Emergency News Statement in relevant part as follows:

Let us speak for the leadership team in saying what so many of us are feeling. We are appalled by the violence at the Capitol today. We are treating these events as an emergency. Our Elections Operations Center has already been active in anticipation of the Georgia elections and the vote by Congress to certify the election, and we are monitoring activity on our platform in real time. For those

of you who are wondering, here are the actions we're taking:

First, we have been searching for and removing the following content:

- Incitement or encouragement of the events at the Capitol, including videos and photos from the protestors. At this point they represent promotion of criminal activity which violates our policies.

Complaint, Doc. 1-1, Page ID # 21. Instagram disabled Genevieve's account and deleted her "Our Capitol" photo content on January 12. Complaint, Doc. 1-1, Page ID # 22.

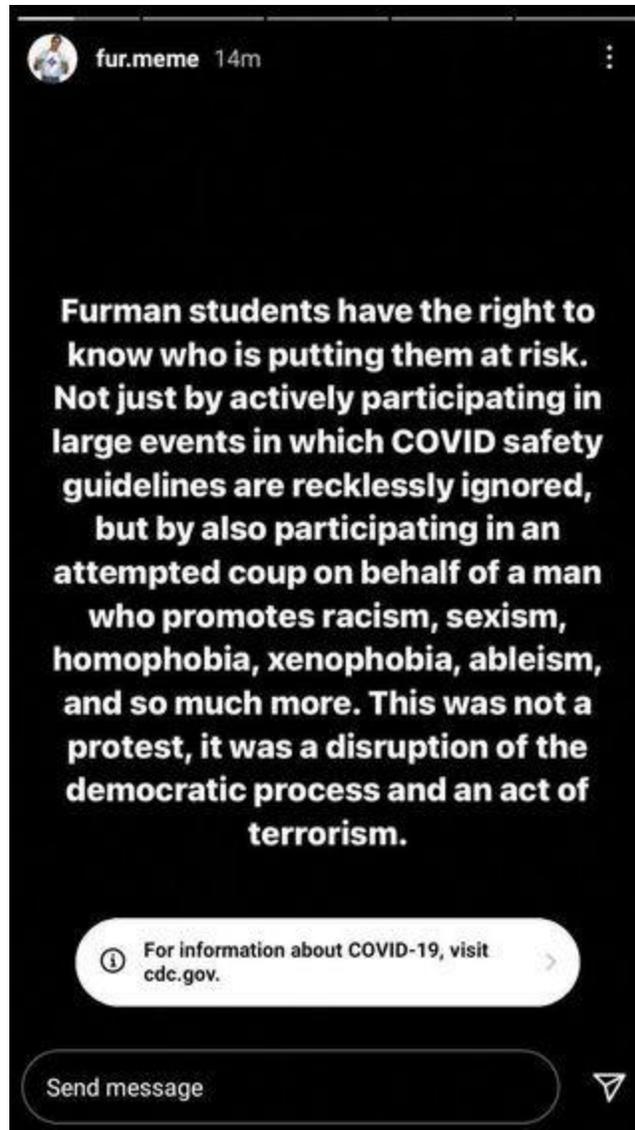
C. Genevieve was a member of a small class of two on Instagram's @fur.meme group, of protestors posting photo content at the Capitol events, such that injury to Genevieve's reputation from the Emergency News Statement is readily perceived.

Following Facebook's publication of its Emergency News Statement, @fur.meme identified Genevieve as a member of a small class of two (2) on Instagram's @fur.meme group, of protestors posting photo content at the Capitol events, evidencing injury to Genevieve's reputation from the Emergency News Statement is readily perceived within the @fur.meme group and Furman community. Complaint, Doc. 1-1, Page ID # 15.

Because this class of two @fur.meme protestors posting photo content at the Capitol events is so small, Facebook's Emergency News Statement - that photo content from the protestors was content that represents "incitement or encouragement of violence" and "promotion of criminal activity" - is reasonably understood and readily perceived within the Instagram @fur.meme group, to refer to

Genevieve, @genmahoney19, and her “Our Capitol” Instagram photo content. Complaint, Doc. 1-1, Page ID # 15. Indeed, @fur.meme specifically identified Genevieve by her Instagram username as a member of this small class of two on Instagram’s @fur.meme group: (1) attending the “violent” event; (2) sharing “pictures” on “Instagram;” (3) putting “Furman students at risk.” (4) by “participating in an attempted coup” in “protest;” (5) disrupting the “democratic process;” and (6) committing “an act of terrorism.” These two posts by @fur.meme, are as follows:





Complaint, Doc. 1-1, Page ID ## 15-16, 23-34.

Likewise, the circumstances make it reasonable to conclude that within the Instagram @fur.meme group, Facebook’s Emergency News Statement is reasonably understood and readily perceived to refer to Genevieve, @genmahoney19, and her “Our Capitol” photo content, because other members of the @fur.meme group recognized that Genevieve posted photo content to Instagram while she attended the

events at the Capitol on January 6, 2021, as indicated by a series of posts from other members of @fur.meme. Complaint, Doc. 1-1, Page ID ## 16, 23-34.

At Furman, Genevieve serves as a Board Member for the Furman Conservative Society, a group that focuses on discussing and advancing conservative viewpoints and values. Complaint, Doc. 1-1, Page ID # 10. Following her “Our Capitol” photo content she shared on Instagram and Facebook’s subsequent Emergency News Statement, the Furman Conservative Society asked Genevieve to delete her “Our Capitol” photo content, because it feared for Genevieve’s safety and well-being, as well as the club’s image. Complaint, Doc. 1-1, Page ID # 22.

Upon Genevieve’s return to campus that month in January after attending the First Amendment Rally and Certification Count as a protestor and sharing photo content on Instagram, a Furman-sponsored school newspaper chronicled the intense political polarization on Furman’s campus based on various posts by members of the @fur.meme Instagram group. This article recognized that Genevieve and another Furman student on the @fur.meme group were protestors at the Capitol events on January 6, 2021. Complaint, Doc. 1-1, Page ID # 35.

D. The Emergency News Statement is provably false, because Genevieve has never been charged nor prosecuted with violating a state or federal criminal statute for her “Our Capitol” photo content.

Genevieve’s “Our Capitol” photo content she posted to Instagram while she was outside the Capitol on January 6, 2021, was not such content that represents incitement or encouragement of violence, nor was it content that promotes criminal

activity, and it was lawful content and protected speech under the First Amendment. Complaint, Doc. 1-1, Page ID # 13.

Genevieve lawfully attended the Capitol events as a protestor, and she did not go onto the premises of the Capitol, nor did she enter the Capitol building itself, and she remained positioned well behind the temporary spectator scaffolding as depicted by her vantage point in her “Our Capitol” photo content she shared on Instagram. Complaint, Doc. 1-1, Page ID ## 13, 14.

Facebook’s Emergency News Statement is provably false, because Genevieve has never been charged nor prosecuted with violating a state or federal criminal statute for inciting or encouraging violence and promoting criminal activity arising out of her “Our Capitol” photo content she shared on Instagram on January 6, 2021.

First, the U.S. Attorney’s Office in D.C. is prosecuting cases of all protestors involved in criminal activity at the Capitol events on January 6, 2021, and Genevieve is not charged with a crime. Nor is she being prosecuted for the incitement or encouragement of violence and promotion of criminal activity from sharing illegal photo content. These cases are matters of public record, and Genevieve’s name is not listed as a protestor inciting or encouraging violence and promoting criminal activity, arising from her “Our Capitol” photo content she shared on Instagram while she was outside the Capitol on January 6, 2021. See <https://www.justice.gov/usao-dc/capitol-breach-cases>. Complaint, Doc. 1-1, Page ID # 18.

Second, a few days prior to the January 6, 2021, Capitol events, Instagram updated its terms of use (“Terms”) regarding its video and photo content-sharing

service (“Service”) it provides to those individuals with Instagram accounts, as discussed more fully below in Section III. The Terms constitute an agreement between Genevieve and Facebook, Inc. and were in effect on January 6, 2021, when Genevieve shared her “Our Capitol” photo content on Instagram. Ott Declaration, Exhibit 2.

In a section of the Terms titled, “Fostering a positive, inclusive, and safe environment,” it states as follows:

We also have teams and systems that work to combat abuse and violations of our Terms and policies, as well as harmful and deceptive behavior. We use all the information we have- including your information- to try to keep our platform secure. We also may share information about misuse or harmful content with other Facebook Companies or law enforcement.

Ott Declaration, Exhibit 2.

The plain language of this section of the Terms authorizes Facebook’s leadership team to share information of “harmful content” with law enforcement. This “harmful content” clause provides Facebook the legal authority to share with law enforcement video and photo content from the protestors at the Capitol events, claimed by leadership in the Emergency News Statement to represent the incitement or encouragement of violence and promotion of criminal activity.

Thus, the only verifiable fact that may be proven from law enforcement not charging and prosecuting Genevieve with inciting or encouraging violence and promoting criminal activity from sharing her “Our Capitol” photo content on

Instagram on January 6, 2021, is that her “Our Capitol” photo was not illegal content, and it was lawful content and protected speech under the First Amendment.

Accordingly, Facebook’s Emergency News Statement is provably false.

As a result of Facebook’s false and defamatory Emergency News Statement, Genevieve’s reputation has been damaged within the @fur.meme Instagram community, including her reputation with fellow Furman students, faculty members, school officials, and alumni. Complaint, Doc. 1-1, Page ID # 35.

Facebook’s false and defamatory Emergency News Statement has severely damaged Genevieve’s future professional and economic status once she completes her college career, by falsely linking her to those protestors who incited or encouraged violence and promoted criminal activity by sharing illegal photo content at the Capitol events on January 6, 2021, a date that President Joseph Biden in his address to Congress called, “the worst attack on our democracy since the Civil War.” Complaint, Doc. 1-1, Page ID # 35.

E. Facebook knew its Emergency News Statement was false, and its leadership purposely published it to deflect away criminal liability since some of the protestors at the Capitol events used Facebook’s platform to engage in criminal activity.

Facebook’s leadership team knew its Emergency News Statement was false and purposely published it to deflect criminal liability and suspicion away from Facebook and onto protestors at the Capitol events, even those protestors posting lawful photo content, such as Genevieve and her “Our Capitol” Instagram photo content. Complaint, Doc. 1-1, Page ID # 39.

First, as one of the authors of the Emergency News Statement, Bickert is a Harvard-trained lawyer and former federal prosecutor, and she is well versed in the artful legal language that is required and used in federal criminal statutes when referring to illegal photo content that represents “incitement or encouragement of violence and promotion of criminal activity.” Complaint, Doc. 1-1, Page ID # 37.

Because of her legal acumen, Bickert knew that some photo content from the protestors at the Capitol events, such as Genevieve’s “Our Capitol” Instagram photo content, were not such content that represents incitement or encouragement of violence and promotion of criminal activity. Complaint, Doc. 1-1, Page ID # 37-38.

Bickert further knew by using the precise words, “incitement or encouragement of violence and promotion of criminal activity,” that she used in the Emergency News Statement, all of the protestors posting photo content at the Capitol events would be labeled and viewed as criminals involved in sharing illegal photo content, even those protestors sharing lawful photo content, such as Genevieve and her “Our Capitol” photo content. Complaint, Doc. 1-1, Page ID # 37.

Second, a few days after January 6, 2021, Facebook’s leadership led by chief operating officer, Sheryl Sandberg (“Sandberg”), attempted to downplay Facebook’s role in the events at the Capitol. Complaint, Doc. 1-1, Page ID # 36. Sandberg deflected away any criticism that Facebook’s platform may have been used by some protestors to organize criminal activity in the days leading up to the Capitol events, and she stated:

I think these events were largely organized on platforms that don't have our [Facebook] abilities to stop hate and

don't have our [Facebook] standards and don't have our [Facebook] transparency.

Complaint, Doc. 1-1, Page ID # 36.

However, contrary to Sandberg's attempt to guide Facebook's desired public narrative downplaying its role in the events at the Capitol, several reports indicated that criminal activities at the Capitol events were openly pre-planned on various social media platforms including Facebook, in the days leading up to January 6, 2021. For example, *Forbes* reviewed data from the "Program on Extremism at the George Washington University," which as of February 7, 2021, had collated a list of more than 200 charging documents filed by prosecutors against protestors involved in criminal activity at the Capitol events. Complaint, Doc. 1-1, Page ID ## 35-36.

According to this report in *Forbes*, the charging documents in total at that time referred to 223 individuals involved in criminal activity at the Capitol events. Of those charging documents, 73 reference Facebook and indicate its platform was used in some way to facilitate criminal activity of those charged in the events at the Capitol. Complaint, Doc. 1-1, Page ID ## 35-36. That's far more references in the charging documents than other platforms and social media sites. YouTube was the second most-referenced platform with 24. Instagram, a Facebook-owned company and platform as indicated herein, was next with 20 references. Parler, another social media platform, was referenced eight times. Complaint, Doc. 1-1, Page ID ## 35-36.

These reports further indicated that new Facebook "groups" and "communities" had surfaced just before the events at the Capitol, and some of these groups and communities were organized for the very purpose of carrying out criminal

activity at the Capitol. It is clear from these reports that some protestors used Facebook's social media platform to coordinate and plan criminal activity at the Capitol events on January 6, 2021. Complaint, Doc. 1-1, Page ID # 36.

Third, several corporations and platforms including Facebook, contributed financially to an organization that promoted and staged the First Amendment Rally, and these financial contributions are commonly referred to as "dark money." Complaint, Doc. 1-1, Page ID ## 9-10.

According to reports, Facebook contributed \$50,000 in so called "dark money" to this organization that upon information and belief financed the staging and presentation of the First Amendment Rally on January 6, 2021. Complaint, Doc. 1-1, Page ID ## 9-10. Consequently, Facebook had a further incentive to dissociate itself from the criminal activity of protestors at the Capitol events, based on dark money contributions it made toward the staging of the First Amendment Rally.

Fourth, an internal report from Facebook later surfaced, indicating it knew its global social media platform contributed to and facilitated criminal activity by some of the protestors at the Capitol events on January 6, 2021. Complaint, Doc. 1-1, Page ID # 36. The leadership team further knew that Facebook's platform was used by some protestors to specifically coordinate, organize, and plan criminal activity that was eventually committed during the Capitol events on January 6, 2021.

III. Forum-clause and photo licensing agreement

Forum-Clause

The first page of the Terms contains an arbitration provision stating as follows:

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

Ott Declaration, Exhibit 2.

Following the arbitration notice, the Terms contain a forum-clause with several designated bullet-point clauses, as follows:

How We Will Handle Disputes.

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

The following claims don't have to be arbitrated and may be brought in court: disputes related to intellectual

property (like copyrights and trademarks), violations of our Platform Policy, or efforts to interfere with the Service or engage with the Service in unauthorized ways (for example, automated ways). In addition, issues relating to the scope and enforceability of the arbitration provision are for a court to decide.

This arbitration provision is governed by the Federal Arbitration Act.

You can opt out of this provision within 30 days of the date that you agreed to these Terms. To opt out, you must send your name, residence address, username, email address or phone number you use for your Instagram account, and a clear statement that you want to opt out of this arbitration agreement, and you must send them here: Facebook, Inc. ATTN: Instagram Arbitration Opt-out, 1601 Willow Rd., Menlo Park, CA 94025.

- Before you commence arbitration of a claim, you must provide us with a written Notice of Dispute that includes your name, residence address, username, email address or phone number you use for your Instagram account, a detailed description of the dispute, and the relief you seek. Any Notice of Dispute you send to us should be mailed to Facebook, Inc., ATTN: Instagram Arbitration Filing, 1601 Willow Rd. Menlo Park, CA 94025. Before we commence arbitration, we will send you a Notice of Dispute to the email address you use with your Instagram account, or other appropriate means. If we are unable to resolve a dispute within thirty (30) days after the Notice of Dispute is received, you or we may commence arbitration.

- We will pay all arbitration filing fees, administration and hearing costs, and arbitrator fees for any arbitration we bring or if your claims seek less than \$75,000 and you timely provided us with a Notice of Dispute. For all other claims, the costs and fees of arbitration shall be allocated in accordance with the arbitration provider's rules, including rules regarding frivolous or improper claims.

- For any claim that is not arbitrated or resolved in small claims court, you agree that it will be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo

County. You also agree to submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim.

- The laws of the State of California, to the extent not preempted by or inconsistent with federal law, will govern these Terms and any claim, without regard to conflict of law provisions.

Ott Declaration, Exhibit 2.

Photo Licensing Agreement

In accordance with the Terms, Genevieve granted Facebook a license of her intellectual property rights, like photo and video content, such as her “Our Capitol” photo content that forms the basis for the libel lawsuit, more particularly described as follows: **Permissions You Give to Us**. As part of our agreement, you also give us permissions that we need to provide the Service.

- **We do not claim ownership of your content, but you grant us a license to use it.**

Nothing is changing about your rights in your content. We do not claim ownership of your content that you post on or through the Service and you are free to share your content with anyone else, wherever you want. However, we need certain legal permissions from you (known as a “license”) to provide the Service. When you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings). This license will end when your content is deleted from our systems. You can delete content individually or all at once by deleting your account. To learn more about how we use information, and how to control or delete your content,

review the [Data Policy](#) and visit the [Instagram Help Center](#).

- **Permission to use your username, profile picture, and information about your relationships and actions with accounts, ads, and sponsored content.**

You give us permission to show your username, profile picture, and information about your actions (such as likes) or relationships (such as follows) next to or in connection with accounts, ads, offers, and other sponsored content that you follow or engage with that are displayed on Facebook Products, without any compensation to you. For example, we may show that you liked a sponsored post created by a brand that has paid us to display its ads on Instagram. As with actions on other content and follows of other accounts, actions on sponsored content and follows of sponsored accounts can be seen only by people who have permission to see that content or follow. We will also respect your ad settings. You can learn more [here](#) about your ad settings.

- **You agree that we can download and install updates to the Service on your device.**

Ott Declaration, [Exhibit 2](#).

LEGAL STANDARD

The removing party of a case from state court carries the burden of showing that removal is proper, and that the federal court has original jurisdiction to hear the case. *See Pullman Co. v. Jenkins*, 305 U.S. 534, 540 (1939); *Her Majesty the Queen v. City of Detroit*, 874 F. 2d 332, 339 (6th Cir. 1989). Any doubt as to whether the removal is proper should be resolved in favor of remand to state court. *See* 28 U.S.C. § 1447(c); *see also Union Planters Nat'l Bank v. CBS. Inc.*, 557 F. 2d 84, 89 (6th Cir. 1977).

The United States Supreme Court has held that it is well-settled law that federal courts are courts of limited jurisdiction. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019). Within this constitutional framework of limited federal court jurisdiction, lower district courts may not exercise jurisdiction absent a statutory basis. *Id.*

The Sixth Circuit has made it clear that while the right of removal to federal court is a statutory right, this right to remove a case to federal court may be waived when such waiver is clear and unequivocal. *Regis Assocs. v. Rank Hotels (Mgmt.) Ltd.*, 894 F. 2d 193, 195 (6th Cir. 1990).

This clear and unequivocal standard first articulated in *Regis* does not require literal waiver removal language in a forum-clause when the forum-clause by its plain meaning prohibits removal. *APAC Atlantic Inc., d/b/a Harrison Const. Co., formerly APAC-Tenn., Inc. v. Lake Developers, II, LLC*, 2009 WL 10709911, at *2 (E.D. Tenn. Jan. 7, 2009) (Jordan, J.) (granting motion to remand to state court pursuant to clear and unequivocal waiver based on the plain meaning of a forum-clause).

Additionally, a motion to remand must first be resolved before a motion to dismiss. *Greenbaum v. Clarksville Health System, G.P., Prof. Acc. Svcs., Inc.*, 2021 WL 1816901, n. *3 (M.D. Tenn. May 6, 2021) (Crenshaw, C.J.) (cleaned up).²

² Facebook has filed motions to dismiss [Doc. 19] and to transfer venue [Doc. 13]. Plaintiff submits this Court must first resolve her motion to remand to state court in accordance with the *Greenbaum* decision, prior to reviewing Facebook's motions.

ARGUMENT

I. Facebook's forum-clause prohibits removal to the Middle District of Tennessee and provides for resolution of claims in only two forums: (1) an arbitral forum; or (2) a local small claims court in Davidson County.

Facebook's forum-clause states that instead of using arbitration, you [Genevieve] or we [Facebook], can bring claims in your local "small claims" court, if the rules of that court will allow it. If you don't bring your claims in small claims court (or if you or we appeal a small claims court judgment to a court of general jurisdiction), then the claims must be resolved by binding, individual arbitration.

From the plain meaning of the forum-clause based on Genevieve's libel claim as pled, Facebook clearly and unequivocally waived its right to resolve any disputes with Genevieve in the United States District Court for the Middle District of Tennessee, Nashville Division. *See APAC*, 2009 WL 10709911, at *2; *see also Regis*, 894 F. 2d at 195. Consequently, remand to the Circuit Court of Davidson County, Tennessee is mandatory.

A. Genevieve timely opted out of arbitration.

It is undisputed that Genevieve timely opted-out of arbitration regarding the December 20, 2020, revised and updated Terms, by delivering written notice to Facebook on January 15, 2021, in accordance with the Terms. Pricer Declaration, Doc. 15, Page ID # 162; Doc. 15-6, Page ID ## 193-203; Ott Declaration, Exhibit 2.

Accordingly, arbitration is not an available forum in which to resolve Genevieve's claims against Facebook, because she opted-out of arbitration as Facebook's forum-clause allowed.

B. The local small claims court in Davidson County is a court of limited jurisdiction that prohibits resolution of claims in excess of \$25,000.00.

Turning to the next available forum in accordance with the Terms of the forum-clause, a local “small claims” court in Tennessee is referred to as General Sessions court, and the jurisdiction of these courts extends to the sum of twenty-five thousand dollars (\$25,000) in all civil cases. Tenn. Code Ann. § 16-15-501 (d)(1). Because Genevieve’s claims as pled in her complaint exceed the jurisdictional cap, the local Davidson County General Sessions court is not a viable forum in which to resolve Genevieve’s claims against Facebook since the rules disallow it. Complaint, Doc. 1-1, Page ID ## 7-45.

Had Genevieve filed her claims in General Sessions court, assuming her claims did not exceed the jurisdictional monetary cap, the forum-clause contemplates an appeal by either Facebook or Genevieve, from a judgment in General Sessions court to the Davidson County Circuit Court, pursuant to Tenn. Code Ann. § 27-5-101. The Davidson County Circuit Court is a court of general jurisdiction and is the applicable court that hears appeals from judgments in General Sessions court. *Id.* And of course, Davidson County Circuit Court is the original court in which Genevieve filed her libel claim, that Facebook has removed to this Court.

Nonetheless, the Davidson County General Sessions court is not an available forum or local “small claims” court in which to resolve Genevieve’s claims against Facebook, because her libel claim exceeds the jurisdictional cap, and the rules disallow her claims to be resolved in General Sessions court.

C. Facebook clearly and unequivocally waived its right in its forum-clause to remove the case to the Middle District of Tennessee and remand to Circuit Court is mandatory.

The only other court(s) or forum(s) expressly mentioned in the forum-clause, is the U.S. District Court for the Northern District of California, or a state court located in San Mateo County. These California forums are triggered by claims “not arbitrated” or “resolved in small claims court.” Both of these scenarios exist since Genevieve: (1) did “not arbitrate” because she chose to opt-out as the forum-clause allowed; and (2) her claims were “not resolved in small claims court” because the monetary cap rules in Tennessee disallow it.

However, Facebook chose to remove the case from a Tennessee state court to the U.S. District Court for the Middle District of Tennessee, instead of the U.S. District Court for the Northern District of California, which maintained exclusive federal court jurisdiction under the forum-clause.³ From the plain meaning of its own forum-clause which designated the Northern District of California as having exclusive federal court jurisdiction, Facebook clearly and unequivocally waived its right to remove this case to the Middle District of Tennessee.

CONCLUSION

Genevieve prays this Court grants her motion to remand to state court.

³ 28 U.S.C. § 1441 (a) required Facebook to remove the case to this district court since it was the “district and division embracing the place where such action is pending.” Facebook’s forum-clause has a “missing link” in that it does not provide for removal to the district court where the action is pending pursuant to § 1441 (a). Assuming the Northern District of California is its desired federal court forum, Facebook could have simply inserted removal language in its forum-clause to align with § 1441 (a).

Respectfully submitted this 20th day of September 2021.

**DUNCAN, HATCHER,
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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to LR 5.01, I hereby certify that on September 20, 2021, a copy of the foregoing *Memorandum of Law in Support of Plaintiff's Motion to Remand To State Court Pursuant to Forum-Clause* was filed electronically via the court's CM/ECF filing system. Notice of this filing will be sent by operation of the court to all parties indicated on the electronic filing receipt, including counsel below. Pursuant to LR 7.01 (a)(2) and LR 7.03 (a), I further certify that this *Memorandum* complies with the twenty-five-page limitation, exclusive of case caption, signature line, and this certificate of service.

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