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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

GENEVIEVE MAHONEY,
Plaintiff,
v.
FACEBOOK, INC.,
Defendant.

Case No. 3:22-cv-02873-AMO

**DEFENDANT’S REPLY IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF’S
AMENDED COMPLAINT; REPLY IN
SUPPORT OF ANTI-SLAPP MOTION TO
STRIKE**

Date: August 31, 2023
Time: 2:00 p.m.
Courtroom: 19
Judge: Hon. Araceli Martinez-Olguin

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1 **I. INTRODUCTION**

2 Plaintiff's Opposition to Meta's Motion to Dismiss ("Opposition" or "Opp.") does not
3 meaningfully address the numerous deficiencies in her Complaint that Meta identified in its
4 Motion. Nor does Plaintiff explain how she could overcome the fatal defects in her lone claim for
5 defamation. Instead, Plaintiff relies on the same flawed allegations and theories and attempts to
6 evade the clear application of both Section 230 of the Communications Decency Act and
7 California's anti-SLAPP statute. In so doing, Plaintiff only underscores why her Amended
8 Complaint ("Complaint" or "Compl.") fails to assert a viable claim for relief and why it should be
9 dismissed without leave to amend.

10 As explained in Meta's Motion, *first*, Plaintiff's lone defamation claim fails for three
11 independent reasons: (1) the Emergency News Statement did not refer to Plaintiff, and Plaintiff has
12 failed to plead any facts showing that a reasonable person would have read the Emergency News
13 Statement to refer to her; (2) Plaintiff has failed to satisfy the requisite element of publication; and
14 (3) the Emergency News Statement is not "susceptible to a defamatory meaning," because it was
15 expressly directed at violent, not peaceful protestors. Rather than contending with these
16 arguments, Plaintiff reiterates her flawed theory that the Emergency News Statement referred to all
17 individuals present at the Capitol on January 6 who posted photos. She also claims—without any
18 support—that the @fur.meme Instagram account saw the Emergency News Statement and
19 recognized its defamatory meaning towards Plaintiff. These arguments fail.

20 *Second*, Plaintiff's claim further fails because it is barred by Section 230 of the
21 Communications Decency Act ("Section 230"), which protects interactive service providers like
22 Meta from claims that treat the service provider as a publisher of third-party content. Despite
23 attempts to evade Section 230 in her Complaint and Opposition, Plaintiff's claim—at base—is
24 that she was harmed by information published by the third-party @fur.meme account, not by
25 Meta's Emergency News Statement. The Complaint satisfies all the requirements for Section
26 230(c)(1) protection.

27 *Third*, Plaintiff's claim should be struck under California's anti-SLAPP statute, which
28 permits early dismissal of lawsuits that seek to punish acts in furtherance of the right to speech.

1 Meta’s decision to post the Emergency News Statement was a quintessential act in furtherance of
 2 the right to speak. Plaintiff’s argument that the anti-SLAPP statute does not apply to federal
 3 courts sitting in diversity is simply incorrect.

4 **II. ARGUMENT**

5 **A. The Complaint Fails To State A Claim For Defamation *Per Se*.**

6 As explained in Meta’s Motion, Plaintiff’s defamation claim should be dismissed for three
 7 independent reasons: (1) the allegedly defamatory statement is not “of and concerning” her; (2)
 8 the statement was not published to anyone who understood it as defaming her; and (3) it cannot
 9 be reasonably understood as false or defamatory. Plaintiff’s Opposition—which does not address
 10 most of Meta’s arguments for dismissal—only underscores why her defamation claim must be
 11 dismissed with prejudice.

12 **1. The Emergency News Statement did not refer to Plaintiff and would
 13 not be read by a reasonable person to apply to her.**

14 Plaintiff concedes that to state a defamation claim, the statement on “which the claim is
 15 based must specifically refer to, or be ‘of and concerning,’ the plaintiff in some way.” *Blatty v.*
 16 *N.Y. Times Co.*, 42 Cal. 3d 1033, 1042 (1986); *see* Compl. ¶ 153 (“The First Amendment requires
 17 a plaintiff to establish that the statement on which the defamation claim is based is ‘of and
 18 concerning’ the plaintiff.” *D.A.R.E. America*, 101 F. Supp. 2d at 1289”). Plaintiff admits that she
 19 was not named in the Emergency News Statement but nevertheless claims it referred to her because
 20 it identified all “persons at the January 6 protest and events at the Capitol earlier that day who
 21 posted photos of Meta’s social media platforms.” Opp. at 14. Accordingly, Plaintiff claims—
 22 without citing a single case in support thereof—that the statement *must have* referred to her. But
 23 the challenged portion of the Emergency News Statement referred to “videos and photos from the
 24 protestors”—a group so large that the “of and concerning” requirement could not plausibly be met
 25 under California law. Indeed, where the allegedly defamatory statement concerns a group, “the
 26 plaintiff faces a difficult and sometimes insurmountable task.” *Blatty*, 42 Cal. 3d at 1046. And
 27 especially “where the group is large—in general, any group numbering over twenty-five members—
 28 the courts in California and other states have consistently held that plaintiffs cannot show that the

1 statements were of and concerning them.” *Id.* (collecting cases). This rule bars Plaintiff’s claim.
 2 *Bartholomew v. YouTube, LLC*, 17 Cal. App. 5th 1217 (2017) (dismissing defamation claims where
 3 plaintiff provided no theory as to how the generalized statements on YouTube’s Community
 4 Guidelines page were ascribed particularly to her). The Opposition ignores this glaring deficiency.

5 **2. The Emergency News Statement was not published to a third party**
 6 **who understood it as defaming Plaintiff.**

7 In her Opposition, Plaintiff again claims that the “@fur.meme Instagram group and
 8 community” reasonably understood the Emergency News Statement to “actually refer” to her.
 9 Opp. at 14-15. Plaintiff claims—without more—that she did identify a person who “actually saw
 10 the Emergency News Statement” and understood its “defamatory meaning towards Genevieve.”
 11 Opp. at 15. This is simply not the case. As explained in Meta’s Motion (Mot. at 7), none of the
 12 eleven screenshots acknowledging Plaintiff’s presence at the Capitol on January 6 says *a single*
 13 *word* about the Emergency News Statement—there is simply no plausible allegation that the
 14 Furman student who operates the @fur.meme Instagram account “recognized”—let alone even
 15 saw—the Emergency News Statement, which was published on *Facebook*, not Instagram.
 16 Compl. ¶¶ 15, 98; *see, e.g., Sieler v. Atieva Inc.*, 2022 WL 18402494, at *5 (N.D. Cal. Dec. 16,
 17 2022) (finding conclusory allegations that “[p]rofessionals in the automotive lighting community
 18 would and have interpreted” the defamatory statement as referring to Plaintiff insufficient); *Fitbit,*
 19 *Inc. v. Laguna 2, LLC*, 2018 WL 306724, at *8 (N.D. Cal. Jan. 5, 2018) (“It is hard to see how a
 20 party unidentified and unknown to the audience of the alleged defamation can claim it was
 21 defamed and injured.”).

22 What is more, as explained in Meta’s Motion (*see* Mot. at 8, fn. 4), the @fur.meme posts
 23 indicate that the user learned of Plaintiff’s activities from Plaintiff’s own posts, not from the
 24 Statement: “As of right now, it has been made clear that...@genmahoney19 [has] attended this
 25 violent, pro-Trump event. *This information is known by pictures [she has] shared on [her]*
 26
 27
 28

1 *public Instagram account.*” Compl. ¶ 15 (emphasis added).¹

2 **3. The Emergency News Statement is neither false nor susceptible to a**
 3 **defamatory meaning.**

4 In Opposition, Plaintiff reiterates her flawed argument that the Emergency News Statement
 5 is “false” because it “imputes that Genevieve committed a crime,” and she purportedly has never
 6 committed a crime. Opp. at 14, 16. Plaintiff does not contend with any of Meta’s arguments to the
 7 contrary. But as explained in Meta’s Motion (*see* Mot. at 8-10), Plaintiff has not plausibly alleged
 8 that the Emergency News Statement is defamatory.

9 Indeed, the Emergency News Statement reflected that Meta was removing posts that incited
 10 violence. Specifically, those posts that “[p]raise and support the storming of the Capitol,” “[c]all[]
 11 to bring weapons,” “incit[e] or encourage ... the events at the Capitol, including videos and photos
 12 from the protestors,” because they “represent promotion of criminal activity which violates our
 13 policies,” and “[a]ttempt[] to restage violence tomorrow or in the coming days.” Compl. ¶ 86. As
 14 explained in Meta’s Motion (Mot. at 8-10), no person would have reasonably “understood the
 15 statement in the alleged defamatory sense”—i.e., that everybody who posted photos from the
 16 protest was a criminal, as Plaintiff contends. *Balzaga v. Fox News Network, LLC*, 173 Cal. App.
 17 4th 1325, 1337 (2009) (affirming ruling that no reasonable viewer of news program could have
 18 understood it to have defamatory meaning). Reading the Emergency News Statement as a whole
 19 makes clear that it was directed at content that could incite violence. *See Sidense Corp. v. Kilopass*
 20 *Tech Inc.*, 2012 WL 3545289, at *5 (N.D. Cal. Aug. 16, 2012) (finding statement not defamatory
 21 when read in context); *Balzaga*, 173 Cal. App. 4th at 1337 (applying totality of circumstances test
 22 to review allegedly defamatory language).

23 Accordingly, Plaintiff’s defamation claim should be dismissed with prejudice.

24
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 26 ¹ Plaintiff asserts that her claim should survive because she is entitled to “all reasonable inferences.” Opp.
 27 at 15. While this may be true, allegations do not “plausibly” state a claim if the alleged facts are not “only
 28 compatible with, but indeed [are] more likely explained by, lawful” conduct. *Ashcroft v. Iqbal*, 556 U.S.
 662, 680 (2009). Here—as evidenced by the @fur.meme posts themselves—Plaintiff’s Furman
 classmates likely came across her posts for reasons unrelated to the Emergency News Statement, which
 did not mention her at all.

1 **B. Section 230 Of The Communications Decency Act Bars Plaintiff’s Claims**

2 Plaintiff contends that Section 230 is inapplicable because she is purportedly suing Meta
3 over its own content. *See Opp.* at 16. Plaintiff is wrong. To be sure, Meta does not argue that
4 Section 230 frees it from liability for its own statements. Section 230 applies only to claims in
5 which the online provider is being treated “as publisher or speaker of any information provided
6 by another information content provider.” 47 U.S.C. § 230(c)(1). But that is what Ms.
7 Mahoney’s claim seeks to do here. Indeed, Plaintiff’s entire Complaint is a transparent attempt to
8 evade Section 230’s application. Although Plaintiff alleges that the Emergency News Statement
9 defamed her—and Section 230 would not bar claims based on Meta’s own content—she explains
10 that her claimed injuries resulted from posts by the Instagram user running the @fur.meme
11 account. *See Compl.* ¶¶ 104, 108 (“@fur.meme made the following series of posts on
12 Instagram...and it has severely damaged Genevieve’s reputation within the Furman community”).
13 None of those posts mentions the Emergency News Statement. And it was the @fur.meme
14 posts—not the Emergency News Statement—that named Ms. Mahoney as a participant in the
15 January 6, 2021 protests, which purportedly harmed her reputation at Furman. *Id.*; *Seaton v.*
16 *TripAdvisor LLC*, 728 F.3d 592, 600-01 (6th Cir. 2013) (finding plaintiff could not indirectly sue
17 defendant for allegedly defamatory user reviews by suing defendant for a list it authored based on
18 subjective user reviews).

19 Accordingly, as made clear in Meta’s Motion (Mot. at 11-13), each of the elements of
20 Section 230 is satisfied here. *See* 47 U.S.C. § 230(c)(1). **First**, California and federal courts have
21 uniformly held that Meta meets Section 230’s “interactive computer service provider” definition.
22 *See, e.g., Caraccioli v. Facebook, Inc.*, 700 F. App’x 588 (9th Cir. 2017) (affirming dismissal of
23 claims based on Section 230 and finding that Facebook is an interactive computer service
24 provider); *Lloyd v. Facebook, Inc.*, 2022 WL 4913347, at *8 (N.D. Cal. Oct. 3, 2022) (“Meta
25 and/or Facebook is an interactive computer service provider”). **Second**, Plaintiff seeks to hold
26 Meta liable for information published by @fur.meme. Despite her attempts at artful pleading, she
27 concedes that it was @fur.meme’s posts that “severely damaged” her reputation “within the
28 Furman community.” *Compl.* ¶ 108; *see, e.g., Lloyd*, 2022 WL 4913347, at *8. **Third**, Plaintiff’s

1 claim for defamation necessarily treats Meta as the publisher or speaker of @fur.meme’s content
 2 on Instagram. Again, despite Plaintiff’s attempts to avoid Section 230, at its core, Plaintiff’s
 3 Complaint seeks to hold Meta liable for allowing allegedly defamatory content—created and
 4 posted by @fur.meme—on Instagram. *Calise v. Meta Platforms, Inc.*, 2022 WL 1240860, at *4
 5 (N.D. Cal. 2022) (dismissing breach of contract claim for allowing purportedly fraudulent ads on
 6 Facebook).²

7 **C. Plaintiff’s Complaint Should Be Struck Under The Anti-SLAPP Statute.**

8 Meta also moved to strike Plaintiff’s claims under California’s anti-SLAPP statute, Cal.
 9 Civ. Proc. Code § 425.16(b). As explained in Meta’s Motion (Mot. at 13-15), a plaintiff’s state
 10 law claims are struck if (1) the defendant makes a *prima facie* showing that the claims arise from
 11 “protected activity” and (2) the plaintiff fails to demonstrate that her claims are legally sufficient.
 12 *See, e.g., Sarver v. Chartier*, 813 F.3d 891, 901 (9th Cir. 2016). Both conditions are present here.

13 **1. This Court can consider Meta’s anti-SLAPP Motion.**

14 Rather than addressing Meta’s arguments to strike Plaintiff’s claim, Plaintiff spends much
 15 of her Opposition on the erroneous argument that California’s anti-SLAPP statute is
 16 “inapplicable” because Congress did not “authorize States to prescribe rules of practice and
 17 procedure in diversity actions in federal courts.” Opp. at 18. Plaintiff is wrong.

18 In fact, Plaintiff ignores settled Ninth Circuit precedent on this issue—instead resorting to
 19 out-of-circuit cases holding that California’s anti-SLAPP statute is “inapplicable in federal court.”
 20 Opp. at 19. But the Ninth Circuit “has long held that [C]alifornia’s anti-SLAPP law, Cal. Civ.
 21 Proc. Code § 425.16, appl[ies] to diversity jurisdiction proceedings in federal court, and that
 22 district courts may consider and grant special motions to strike brought under that law in such
 23 cases.” *Fennell v. Becerra*, 2020 WL 9422373, at *4 (N.D. Cal. June 3, 2022). Indeed, the Ninth
 24 Circuit has held that “California’s anti-SLAPP statute ... supplements rather than conflicts with
 25 the Federal Rules.” *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1182 (9th Cir. 2013); *Simoni v.*

26 _____
 27 ² Plaintiff asserts that to the extent Meta relies upon 47 U.S.C. § 230(c)(2) as a defense, “it may not do so
 28 because that provision of Section 230 requires voluntary action to be taken in ‘good faith.’” Opp. at 17.
 Meta solely relies upon 47 U.S.C. § 230(c)(1), which does not have any “good faith” requirement. *Al-
 Ahmed v. Twitter, Inc.*, 603 F.Supp.3d 857 (N.D. Cal. 2022).

1 *Am. Media, Inc.*, 673 Fed. Appx. 782 (9th Cir. 2017) (affirming dismissal of diversity action
 2 under anti-SLAPP). As such, district courts sitting in diversity *frequently* apply California’s anti-
 3 SLAPP statute to strike claims. *See, e.g., Stossel v. Meta Platforms, Inc.*, 2022 WL 6791430, at
 4 *11 (N.D. Cal. Oct. 11, 2022) (granting defendants’ motions to strike plaintiff’s defamation
 5 claims against Meta in diversity action); *Hu and Assocs., LLC v. New Life Senior Wellness*
 6 *Center, LLC*, 2018 WL 8755870, at *8 (C.D. Cal. Dec. 10, 2018) (applying anti-SLAPP to
 7 diversity action and striking plaintiff’s defamation claim); *Todd v. Lovecruft*, 2020 WL 60199
 8 (N.D. Cal. Jan. 6, 2020) (granting defendant’s motion to strike claims in action sitting in
 9 diversity). The Court may consider Meta’s anti-SLAPP motion to strike Plaintiff’s defamation
 10 claim.

11 **2. Meta’s conduct is protected activity.**

12 As explained further in Meta’s Motion (*see* Mot. at 13-14), Plaintiff’s Complaint in part
 13 targets Meta’s decision to deliver the Emergency News Statement regarding the January 6 events.
 14 The anti-SLAPP statute protects Meta’s alleged conduct because (1) Meta’s decision to post a
 15 timely statement on Facebook, a place open to the public, is an act that furthers the right to speak
 16 and (2) Meta’s decisions relate to the events of January 6, 2021, at the U.S. Capitol, which is
 17 manifestly an issue of public interest. Plaintiff does not dispute either of these points.

18 Indeed, Meta’s post on its own service occurred in a “place open to the public” because
 19 “websites [that] are accessible to the public,” including Facebook, are considered “open to the
 20 public” for the purposes of the anti-SLAPP statute. *Jackson v. Mayweather*, 10 Cal. App. 5th
 21 1240, 1252 (2017) (finding statements made on Facebook meet the definition of “public forum”
 22 for purposes of anti-SLAPP statute). Moreover, there is simply no question that the events of
 23 January 6 are a matter of public interest. *Albert v. Seal*, 2018 WL 1163852, at *4 (Cal. Ct. App.
 24 March 6, 2018) (“there is, of course, no question that political rallies and proposed legislation are
 25 matters of public interest under the anti-SLAPP statute”). Plaintiff concedes as much in her
 26 Complaint—she acknowledges that she “never in her wildest dreams imagined how something so
 27 uniquely American as free speech and the right to peacefully and lawfully assemble in accordance
 28 with the First Amendment would turn into an event marred by violence and unlawful behavior by

1 some protestors in breaching the Capitol.” Compl. ¶ 75.³; *see, e.g., Royal Holdings Techs. Corp.*
 2 *v. IP Video Market Info Inc.*, 2020 WL 8225666, at *4 (C.D. Cal. Dec. 18, 2020) (finding efficacy
 3 of vaccine during pandemic of public interest). Accordingly, as explained in Meta’s Motion,
 4 Meta’s conduct in posting the Emergency News Statement is protected activity.

5 **3. Plaintiff fails to state a claim.**

6 In her attempt to evade the application of the anti-SLAPP statute, Plaintiff argues that the
 7 statute does not apply because Meta’s motion is based on the deficiencies in Plaintiff’s
 8 Complaint. *See* Opp. at 21. To the contrary, as explained in Meta’s Motion (*see* Mot. at 14),
 9 where an anti-SLAPP motion is “based on alleged deficiencies in the plaintiff’s complaint”—like
 10 this one is—it simply means the motion “must be treated in the same manner as a motion under
 11 Rule 12(b)(6) except that the attorney’s fee provision of § 425.16(c) applies.” *Planned*
 12 *Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018).

13 Accordingly, as explained in Meta’s Motion and reiterated above, Plaintiff’s defamation
 14 claim fails as a matter of law because: (1) Plaintiff has failed to plead sufficient facts showing that
 15 a reasonable person would have read the Emergency News Statement to refer to her; (2) Plaintiff
 16 has failed to satisfy the requisite element of publication; (3) Meta’s Emergency News Statement is
 17 not “susceptible to a defamatory meaning,” because it was expressly directed at violent, not
 18 peaceful protestors. *See* Section II.A *supra*. Moreover, Plaintiff’s claim fails for the additional
 19 reason that it is barred by Section 230. *See* Section II.B, *supra*. Plaintiff simply cannot
 20 demonstrate that her claims are legally sufficient.

21 Accordingly, because Meta’s conduct constitutes “protected activity,” and Plaintiff has
 22

23 ³ Plaintiff claims that Meta is precluded from prevailing on its anti-SLAPP Motion because it fails to
 24 address Plaintiff’s allegations that “Bickert and Rosen acted with actual malice” when Meta published the
 25 Emergency News Statement. Opp. at 21. Plaintiff’s argument misunderstands defamation law—the
 26 actual malice requirement only applies where Plaintiff is a “public figure.” *Makaeff v. Trump Univ., LLC*,
 27 715 F.3d 254, 265 (9th Cir. 2013). Plaintiff does not allege—nor could she—that she is a public figure.
 28 As such, Meta’s purported failure to address whether the Meta representatives acted with actual malice is
 irrelevant to the analysis. In fact, if Plaintiff *had* needed to demonstrate actual malice, her claim would
 fail for the additional reason that she has failed to do so. *See, e.g., Tull v. Higgins*, 2021 WL 6116971, at
 *9 (N.D. Cal. Dec. 27, 2021) (dismissing defamation claim as a matter of law for failure to adequately
 plead actual malice, noting that where “allegation lacks supporting details and is entirely conclusory, it
 fails to satisfy the demanding burden of pleading actual malice.”).

