UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

GENEVIEVE MAHONEY, a/k/a @genmahoney19, an individual, **Plaintiff,** **vs.** **FACEBOOK, INC.,** **Defendant.**	**Case No. 21-CV-00607** **Hon. William L. Campbell, Jr.**

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

In light of the events on January 6, 2021 in Washington, D.C. in and near the United States Capitol building, Defendant Facebook, Inc. ("Facebook") published an emergency news statement on its website addressing the steps that Facebook was taking to identify and remove content on the platform relating to those events that risked inciting or encouraging any further violence.

Plaintiff Genevieve Mahoney is a college student who was present in Washington near the Capitol but alleges that she did not enter the Capitol building or its grounds. She brings this action against Facebook for defamation and negligent infliction of emotional distress, alleging that Facebook's emergency news statement (which did not name her or anyone else) implicitly accused her of engaging in criminal activity at the Capitol and that a campus Instagram account called @fur.meme "recognized" that the statement applied to her. She demands compensatory damages of $56 million and punitive damages of $112 million.

For the reasons explained in Facebook's concurrently filed motion to transfer venue, plaintiff agreed to a forum-selection clause requiring her to resolve her disputes in the Northern District of California. This Court should grant that motion to transfer; if it does so, it need not address this motion to dismiss.

That said, plaintiff's claims for defamation and negligent infliction of emotional distress are meritless. First, plaintiff identifies a single statement from Facebook's emergency news statement that she alleges was defamatory: "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." Plaintiff alleges that because she posted an Instagram picture on January 6

at 2:00 PM showing a peaceful protest at the Capitol, Facebook's statement accused her of promoting criminal activity. This theory fails as a matter of law for multiple independent reasons:

- Facebook's emergency statement did not expressly refer to the plaintiff, and plaintiff has failed to plead facts showing that a reasonable person would have read the statement to refer to her specifically.

- Plaintiff has failed to satisfy the element of publication: she does not plead any facts showing that Facebook's statement was published to the @fur.meme account or that anyone at that account actually saw it; she has thus failed to plead that the statement was communicated to anyone who (1) understood the defamatory meaning of the statement and (2) applied it to her.

- Facebook's statement is not "susceptible of a defamatory meaning," because the broader context shows that Facebook's statement was directed at violence, not peaceful protestors.

- Plaintiff's claim is precluded by Section 230 of the Communications Decency Act, because she seeks to hold Facebook liable for allegedly defamatory information that was published by the @fur.meme account.

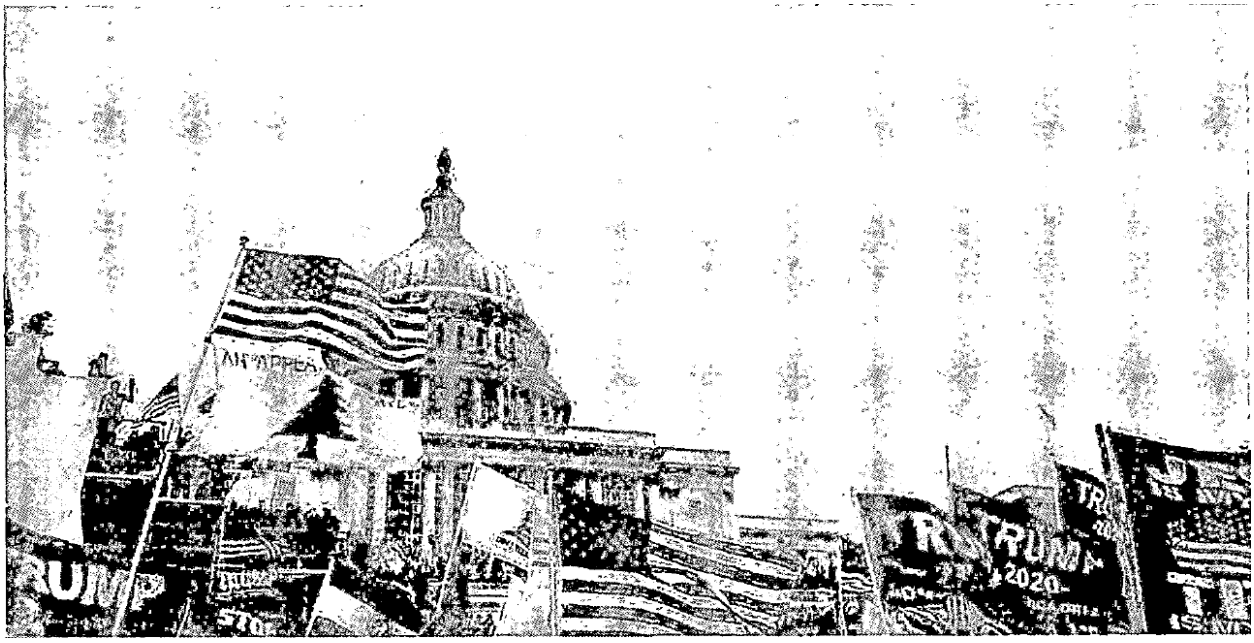
Plaintiff's claim for negligent infliction of emotional distress fares no better. First, it is well settled that a negligent infliction claim premised on the same facts as a failed defamation claim must be dismissed. But the claim also fails for independent reasons: the complaint's allegations, as pleaded, show at most that the @fur.meme account, not Facebook, proximately caused her alleged emotional distress; and plaintiff has failed to plead facts showing that her emotional distress was sufficiently severe to state a claim.

In sum, plaintiff has failed to state a claim as a matter of law, and this case should be dismissed with prejudice.

BACKGROUND

The complaint alleges that plaintiff (Ms. Mahoney) is a college student at Furman University in South Carolina and a resident of Tennessee. Compl. ¶ 12. On January 6, 2021, the plaintiff attended what she describes as a "[r]ally" at the Capitol in Washington, D.C. in order to participate in a protest of the results of the 2020 United States presidential election. *Id.* ¶¶ 1, 26.

At approximately 2:00 pm Eastern, the plaintiff posted a picture to her personal Instagram account of the protest at the Capitol building. Her picture is depicted below:



Id. ¶ 29. The picture included the caption "Our Capitol." *Id.* The complaint alleges that plaintiff did not engage in any criminal activity that day. *See id.* ¶¶ 33, 50-51.

The complaint further alleges that, at about 7:00 pm Eastern, Facebook published an emergency news statement "to the public and groups and communities" on Facebook. *Id.* ¶ 59. The complaint excerpts the emergency news statement 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***:
>
> - Praise and support of the ***storming of the Capitol***.
> - ***Calls to bring weapons*** to locations across the US —not just in Washington but anywhere in the US—including protests.

- ***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.

- Calls for protests—even peaceful ones—if they ***violate the curfew*** in DC.

- Attempts to ***restage violence*** tomorrow or in the coming days.

Id. ¶ 61 (emphases added). The plaintiff alleges that the third bullet of Facebook's emergency news statement linked her to those who committed crimes at the Capitol on January 6, 2021 by implying that all protestors who attended, including the plaintiff, were engaging in criminal conduct. *Id.* ¶¶ 70, 77, 79. However, the introductory paragraphs of Facebook's statement expressly indicates that the "events" it is referring to are those surrounding the "violence at the Capitol today," and the context makes clear that Facebook is "searching for and removing" only those "videos and photos" that "[i]ncite[] or encourage[]" those events. *Id.* ¶ 61. The complaint does not allege that Facebook's statement explicitly referred to Ms. Mahoney or that Facebook or Instagram removed Ms. Mahoney's picture of the Capitol building. Rather, the complaint alleges that the plaintiff's Instagram account was "disabled and deleted" almost a full week after the January 6 insurrection, allegedly due to "people in groups and communities reporting Genevieve's account to Instagram and Facebook." *Id.* ¶ 62. The plaintiff does not allege that the disabling of her account is in any way connected to her posting the "Our Capitol" photograph.

One of the "groups" that allegedly received Facebook's emergency news statement was an Instagram account called @fur.meme in which the plaintiff was a "member." *Id.* ¶¶ 14, 60.[1] Plaintiff alleges that the @fur.meme account is operated by an anonymous current student at

[1] Unlike Facebook, Instagram does not have "groups" that users can join as members. Instead, Instagram users have accounts that are used to post photos and videos and that other users can follow.

Furman University and is "well-followed" by students, faculty, school officials, and alumni of the university. *Id.* ¶¶ 14-15. The complaint does not identify any evidence showing that Facebook's emergency news statement was in fact "published" directly to the @fur.meme account. Instead, the complaint simply points to a hyperlink on Facebook's website available to the general public. It does not allege that the news statement was published in any form on the Instagram service, which is primarily accessed through apps on mobile devices. *See id.* (citing https://about.fb.com/news/2021/01/responding-to-the-violence-in-washington-dc/). *Id.* ¶ 60.

The complaint alleges that "@fur.meme posted a series of posts recognizing the Emergency News Statement was referring to Genevieve and her 'Our Capitol' photograph." *Id.* ¶ 67. But *none* of the 11 Instagram screenshots included in the complaint mentions Facebook's emergency news statement, *see id.* ¶ 68, and only the first five screenshots were actually posted by the @fur.meme account, *id.* pp. 18-22.[2] Further, the first @fur.meme post expressly states that the plaintiff's attendance at the January 6 protest was known not because of Facebook's emergency news statement but "by pictures [she has] shared on [her] public Instagram account[]." *Id.* p. 18. A screenshot of the first @fur.meme post taken from the complaint is depicted below:

[2] The last screenshot was posted by the similarly named yet distinct "@furm.meme" account. *See* Compl. ¶ 68 p. 28.

Id.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly,* 550 U.S. at 556). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly,* 550 U.S. at 557); *see also Parkell v. Markell*, 622 F. App'x 136, 141 (3d Cir. 2015) (allegations "equally consistent with lawful and [unlawful] behavior" are "insufficient to state a plausible claim"). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal,* 556 U.S. at 678

(quoting *Twombly,* 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of further factual enhancement.'" *Id.* (quoting *Twombly,* 550 U.S. at 557).[3]

ARGUMENT

I. The Complaint Fails To State A Claim For Defamation.

To state a defamation claim, the plaintiff must show "the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage." *Ringler Assocs. Inc. v. Md. Cas. Co.*, 80 Cal. App. 4th 1165, 1179 (2000). In addition, the First Amendment "requires that the statement on which the claim is based must specifically refer to, or be 'of and concerning,' the plaintiff in some way." *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042 (1986). Because plaintiff fails to allege all these elements, her defamation claims must be dismissed.[4]

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[3] As noted in Facebook's motion to transfer venue, the plaintiff agreed to Instagram's Terms of Service both in connection with the registration of her two Instagram accounts on January 6, 2014 and March 7, 2015 and the update to Instagram's Terms in December 2020. Dkt. No. 13 at 2-7. Instagram's Terms include a choice of law provision providing that "[t]he 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." Pricer Decl. Ex. 3 at 8. Facebook therefore evaluates the merits of plaintiff's claims under California law, which is generally consistent with Tennessee principles regarding defamation and negligent infliction of emotional distress. *See DeGroat v. Cooper*, 2014 WL 1922831, at *3 (D.N.J. May 14, 2014) (finding that Tennessee and California law (among others) regarding defamation, false light, and negligent infliction of emotional distress are either consistent or not in conflict).

[4] In addition to defamation claims, plaintiff brings a claim for false light invasion of privacy. Compl. ¶¶ 101-105. "[W]hen a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." *Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 1264 (2017) (quoting *Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1385 n.13 (1999)); *Sarver v. Hurt Locker LLC*, 2011 WL 11574477, at *10 (C.D. Cal. Oct. 13, 2011) (same).

A. Facebook's Emergency News Statement Did Not Refer To Plaintiff And Would Not Be Read By A Reasonable Person To Apply To Her.

"[F]or a claim based on an 'alleged injurious falsehood of a statement,' such as libel, 'the plaintiff must effectively plead that the statement at issue either expressly mentions him or refers to him by reasonable implication.'" *Eastman v. Apple, Inc.*, 2019 WL 3934805, at *7 (N.D. Cal. Aug. 20, 2019) (quoting *Blatty*, 42 Cal. 3d at 1045-46). The requirement that the defamatory statement be "of and concerning" the plaintiff "limits the right of action for injurious falsehood, granting it to those who are the *direct object of criticism* and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt." *Blatty*, 42 Cal. 3d at 1044 (emphasis added). The question "whether statements can be reasonably interpreted as referring to plaintiffs is a question of law for the court." *SDV/ACCI, Inc. v. AT & T Corp.*, 522 F.3d 955, 959 (9th Cir. 2008).

When the allegedly defamatory statement concerns a group, "the plaintiff faces a difficult and sometimes insurmountable task. If the group is small and its members easily ascertainable, the plaintiff may succeed. But where the group is large—in general, any group numbering over twenty-five members—the courts in California and other states have consistently held that plaintiffs cannot show that the statements were of and concerning them." *Blatty*, 42 Cal. 3d at 1046 (internal quotation marks and brackets omitted) (collecting cases). In *Eastman*, the court applied this rule to dismiss claims by an individual claiming that he was defamed by having his name left off a patent; the court reasoned that the "group" in question includes "every other person" who was not named on the patent, and therefore was too large to support the plaintiff's claim. 2019 WL 3934805, at *7. Likewise, in *Bartholomew v. YouTube, LLC*, the court dismissed claims brought by an individual against YouTube for defamation based on YouTube's general "Community Guideline Tips" page, reasoning that the plaintiff "provided no theory as to how the

generalized statements on the Community Guideline Tips page were ever ascribed in any particular way to *her*." 17 Cal. App. 5th 1217, 1231 (2017) (emphasis in original).

The complaint has failed to adequately plead facts from which the Court can infer that Facebook's emergency news statement is "of and concerning" the plaintiff. Facebook's statement does not refer to her expressly, *see* Compl. ¶ 61, and the statement cannot be reasonably understood to refer to Ms. Mahoney by implication. Plaintiff's theory is that Facebook's statement defamed *every person* who attended the January 6 protest and did not engage in violence or other criminal behavior. But the complaint expressly alleges that "*thousands of people* across the country traveled to the Ellipse in D.C. on January 6, 2021, to have their voices heard and to peacefully and lawfully protest the Election and Certification Count." Compl. ¶ 7 (emphasis added). Accordingly, the group allegedly referred to by implication well exceeds the threshold of twenty-five members that California courts hold is too large to support a defamation claim. *See Eastman*, 2019 WL 3934805, at *7; *Bartholomew*, 17 Cal. App. 5th at 1231. Plaintiff's failure to adequately allege that Facebook's emergency news statement identifies or concerns her is fatal to her defamation claims.

B. Facebook's Emergency News Statement Was Not Published To A Third Party Who Understood Its Alleged Defamatory Meaning Or Applicability To The Plaintiff.

One of the elements of libel is "publication," which California courts define as a "communication to some third person who understands both the defamatory meaning of the statement and its application to the person to whom reference is made." *Ringler Assocs. Inc.*, 80 Cal. App. 4th at 1179 (2000); *Neary v. Regents of Univ. of Cal.*, 185 Cal. App. 3d 1136, 1147 (1986).

The *only* allegation in the complaint even relevant to the publication element is plaintiff's conclusory assertion that Facebook's emergency news statement "was published by Facebook's Newsroom to the public and groups and communities *including the @fur.meme Instagram group*." Compl. ¶ 60 (emphasis added). But plaintiff does not allege that Facebook's statement was published directly to the @fur.meme Instagram account. Instead, she cites a hyperlink to the statement on a Facebook website (not the Instagram service) that was published on January 6, 2021 at 7:00 PM EST and made available to the general public. Compl. ¶¶ 59-60. Plaintiff does not identify a single person or organization who (1) saw the Facebook statement, much less understood its allegedly defamatory meaning and (2) read that allegedly defamatory meaning as applying to Ms. Mahoney.

Plaintiff alleges that the @fur.meme account "posted a series of posts recognizing the Emergency News Statement was referring" to the plaintiff. Compl. ¶ 67. But the actual Instagram posts in the complaint show nothing of the sort. Most importantly, *none* of the 11 Instagram screenshots says a word about Facebook's emergency news statement, so there is no plausible allegation that the anonymous Furman University student who operates the @fur.meme account "recognized"—let alone even *saw*—Facebook's statement. Compl. ¶¶ 15, 68. Indeed, plaintiff's allegation that @fur.meme recognized Facebook's statement is contradicted by the first @fur.meme post, which indicates that the anonymous student learned of Ms. Mahoney's attendance at the January 6 protest directly from Ms. Mahoney's *own activity on Instagram*: "As of right now, it has been made clear that . . . @genmahoney19 [has] attended this violent, pro-Trump event. *This information is known by pictures [she has] shared on [her] public Instagram account[]*." Compl. ¶ 68 p. 18 (emphasis added).

In sum, plaintiff's allegations that a third party understood the alleged defamatory meaning of Facebook's statement or its applicability to Ms. Mahoney are entirely conclusory. Plaintiff has therefore failed to plausibly allege the publication element.

C. Facebook's Emergency News Statement Was Not Susceptible Of A Defamatory Meaning.

In determining whether a statement has defamatory meaning, "courts apply a totality of the circumstances test to review the meaning of the language in context and whether it is susceptible of a meaning alleged by the plaintiff." *Balzaga v. Fox News Network, LLC*, 173 Cal. App. 4th 1325, 1337 (2009). "[D]efamatory meaning must be found, if at all, in a reading of the publication as a whole. This is a rule of reason. Defamation actions cannot be based on snippets taken out of context." *Kaelin v. Globe Comms. Corp.*, 162 F.3d 1036, 1040 (9th Cir. 1998) (citations omitted). "The defamatory character of language is measured 'according to the sense and meaning . . . which such language may fairly be presumed to have conveyed to those to whom it was published.'" *Balzaga*, 173 Cal. App. 4th at 1338 (quoting *Savage v. Pac. Gas & Elec. Co.*, 21 Cal. App. 4th 434, 447 (1993)).

In addition to the language of the alleged defamatory statement, "the context in which the statement was made must be considered. This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed." *Id.* (quoting *Monterey Plaza Hotel v. Hotel Emps. & Rest. Emps. Local 483*, 69 Cal. App. 4th 1057, 1064 (1999) (alterations incorporated)). Accordingly, a standalone statement that "could be construed as false" is insufficient to state a defamation claim. *Id.* at 1339. "If no reasonable viewer could have reasonably understood the statement in the alleged defamatory sense, the matter may be decided as a question of law." *Id.*

Here, the complaint identifies only a single bullet point in Facebook's news statement—published on Facebook's web site—as defamatory: "Incitement or encouragement of the events at the Capitol, including videos and photos from the protesters. At this point they represent promotion of criminal activity which violates our policies." Compl. ¶ 61. Plaintiff alleges that this statement is defamatory because, in her view, it sweeps in not only criminal conduct at the Capitol but also peaceful protestors like herself. Compl. ¶ 93. In the totality of the circumstances, no reasonable person would construe Facebook's statement to have a defamatory meaning.

The language of Facebook's emergency news statement, read as a whole, conclusively shows that the statement was directed exclusively at *content* posted on Facebook's platforms that could have the effect of *promoting violence*.

First, the introductory paragraph states that "[w]e are appalled by the *violence in the Capitol* today. We are treating *these events* as an emergency." *Id.* ¶ 61 (emphases added). Facebook's statement thereby defined "events" in terms of "violence at the Capitol." The clear implication is that the phrase "events at the Capitol" in the allegedly defamatory statement referred *only* to violence, and the "videos and photos from the protestors" that were the focus of the statement were those that could "incite or encourage" violence at the Capitol. *See id.*

Second, that conclusion is reinforced by the phrase "*including* videos and photos from the protestors," whereby Facebook identified videos and photos from the protestors as one category of content that *could* violate Facebook's policies against inciting violence. *See id.* (emphasis added). Facebook's statement was directed not at "all of the protestors posting photographs," *id.* ¶ 80, but rather only at the content that risked inciting or encouraging violence.

Third, *all* of the other bullet points in Facebook's statement made clear that it was concerned about posts encouraging violent or criminal conduct: "[p]raise and support of the

storming of the Capitol"; "[c]alls to bring weapons to locations across the US . . . including protests"; [c]alls for protests . . . if they violate curfew in DC"; and "[a]ttempts to restage violence tomorrow or in the coming days." Compl. ¶ 61. Reading Facebook's emergency news statement "as a whole" makes clear that it was directed at content that could incite and encourage violence. *Kaelin*, 162 F.3d at 1040. As a matter of law, plaintiff's allegation that just one of these bullets was in fact directed at content posted by peaceful protestors is not a reasonable construction.

Considering the context in which Facebook published the emergency news statement leads to the same conclusion. *See Balzaga*, 173 Cal. App. 4th at 1339. The Court need look no further than the allegations in the complaint to understand the full import of the events of January 6, 2021 at the U.S. Capitol and the meaning Facebook intended to convey in its statement. "President Biden in his address to Congress called [them] 'the worst ***attack on our democracy*** since the Civil War.'" Compl. ¶ 70 (emphasis added). "Some protestors other than [the plaintiff] did allegedly ***commit crimes by breaching the Capitol and engaging in criminal activity*** on January 6, 2021. ***The U.S. Attorney's Office for the District of Columbia is prosecuting those cases*** of protestors charged with engaging in criminal activity including inciting, encouraging, or promoting criminal activity arising out of the Capitol Breach." *Id.* ¶ 50 (emphases added). The plaintiff "never in her wildest dreams imagined how something so uniquely American as free speech and the right to peacefully and lawfully assemble in accordance with the First Amendment would turn into ***an event marred by violence and unlawful behavior*** by some protestors in breaching the Capitol." *Id.* ¶ 53 (emphasis added). The Court should not divorce Facebook's emergency news statement from this context, which informed the "sense and meaning" that Facebook intended to convey in its emergency news statement. *See Balzaga*, 173 Cal. App. 4th at 1338.

No reasonable factfinder could conclude that Facebook's statement could be interpreted in the way plaintiff suggests. Plaintiff's defamation claims must be dismissed for this reason as well.

D. Under Section 230 of the Communications Decency Act, Facebook Cannot Be Held Liable For The Statements Published By The Instagram User Responsible For The @fur.meme Account.

Section 230 of the Communications Decency Act immunizes providers of an interactive computer service, like Facebook, from liability for statements made by third parties on those platforms. Facebook does not contend that Section 230 immunizes it from liability for its *own* statements (such as the emergency news statement). At bottom, however, plaintiff's claim is that she was harmed by information published by the @fur.meme account, not directly by Facebook's emergency statement (which plainly cannot be read to apply to her, for the reasons discussed above). Accordingly, the elements of Section 230(c) are satisfied and the claims must be dismissed.

Section 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). This provision immunizes providers of "interactive computer service[s]" from liability arising from content posted by third parties on those platforms. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (even "close cases . . . must be resolved in favor of immunity," *id.* at 1174); *Sikhs for Justice, Inc. v. Facebook, Inc.* 697 F. App'x 526, 526 (9th Cir. 2017) (same); *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 406-08 (6th Cir. 2014) (same); *see also* 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."). This immunity applies so long as "the interactive computer service provider is not also an 'information content provider,' which is defined as someone who

is 'responsible, in whole or in part, for the creation or development of' the offending content." *Fair Hous. Council*, 521 F.3d at 1162 (quoting 47 U.S.C. § 230(f)(3)).

Section 230(c)(1) requires dismissal of plaintiff's state law claims if "(1) Facebook is a provider or user of an interactive computer service, (2) the information for which Plaintiff seeks to hold Facebook liable was information provided by another information content provider, and (3) the complaint seeks to hold Facebook as the publisher or speaker of that information." *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1065 (N.D. Cal. 2016) (internal quotation marks omitted). Each of these elements is satisfied here.

First, Facebook is plainly an "interactive computer service" provider, as multiple cases have found. *Id.* at 1065 (collecting cases).

Second, it is clear that plaintiff seeks to hold Facebook liable for information published by @fur.meme. Despite her artful pleading, she concedes that it was *@fur.meme's posts* that "severely damaged [her] reputation within the Furman community." Compl. ¶ 68. And as discussed above, plaintiff fails to make any plausible factual allegations that Facebook contributed "in whole or in part" to the creation or development of @fur.meme's posts. *Fair Hous. Council*, 521 F.3d at 1162.

Finally, plaintiff's claims fall squarely within the third Section 230(c) element because they seek to hold Facebook liable as the publisher or speaker of @fur.meme's posts. For this element, "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. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009) (emphasis added). Here, plaintiff's claims necessarily treat Facebook as the publisher or

speaker of @fur.meme's content by asserting that it was @fur.meme's posts *on Instagram* that caused the asserted harm to plaintiff. Compl. ¶ 67.

In short, Section 230 precludes plaintiff from bringing a claim against Facebook for content published by the @fur.meme account. Because the only information the complaint identifies as giving rise to liability was posted by @fur.meme, plaintiff's defamation claims must be dismissed.

II. Plaintiff Fails To State A Claim For Negligent Infliction Of Emotional Distress.

If the Court holds that plaintiff has failed to state a defamation claim, it must dismiss the claim for negligent infliction of emotional distress as well: A negligent infliction of emotional distress claim based on the same facts as a failed defamation claim cannot survive.

> Emotional distress caused by defamation is a compensable component of damages recoverable in a defamation action, but does not give rise to a separate cause of action on a separate tort theory. To allow another tort cause of action for emotional distress 'based on the same acts which would not support a defamation action, would allow plaintiffs to do indirectly what they could not do directly and render meaningless any defense of truth or privilege.'

Ratcliff v. Redfern, 2010 WL 5385336, at *9 (Cal. Ct. App. Dec. 29, 2010) (quoting *Fellows v. Nat'l Enquirer, Inc.*, 42 Cal. 3d 234, 245 (1986)) (citation and brackets omitted). Plaintiff cannot seriously contend that her negligent infliction claim is based on a different set of facts as the defamation claim. Indeed, the negligent infliction count in the complaint merely incorporates the preceding paragraphs and formulaically recites the elements of the tort. *See* Compl. ¶¶ 106-09. Accordingly, plaintiff's failure to state a defamation claim requires dismissal of her negligent infliction of emotional distress claim.

Even on its own terms, Plaintiff's negligent infliction claim would fail. California law does not recognize an independent tort of negligent infliction of emotional distress. *Jackson*, 10 Cal. App. 5th at n.11. Rather, "[t]he tort is negligence, a cause of action in which a duty to the plaintiff is an essential element." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 984-85 (1993)

(collecting cases). "[R]ecovery is available only if . . . the emotional distress is proximately caused by that breach of duty." *Id.* at 985. In addition, "where there is no accompanying personal, physical injury, the plaintiff must show that the emotional distress was serious." *Wong v. Jing*, 189 Cal. App. 4th 1354, 1377 (2010) (internal quotation marks omitted).

Plaintiff has failed to allege that Facebook's emergency news statement proximately caused her emotional distress. There are two aspects to proximate causation: the first is "cause in fact," in which an act is a "necessary antecedent of an event"; the second is concerned "with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct," including whether it would be "unjust to hold him or her legally responsible." *State Dep't of State Hosps. v. Super. Ct.*, 61 Cal. 4th 339, 352-53 (2015). An "intervening cause" that is not reasonably foreseeable breaks the chain of causation and relieves the original actor of liability. *Schrimscher v. Bryson*, 58 Cal. App. 3d 660, 664 (1976). "[W]here the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." *State Dep't of State Hosps.*, 61 Cal. 4th at 353.

Here, the complaint alleges no facts that would allow the court to conclude that Facebook's emergency news statement was the cause in fact of plaintiff's emotional distress. The plaintiff does not allege that she personally saw Facebook's statement; rather, her alleged harms were derived entirely from @fur.meme's Instagram posts. *See* Compl. ¶ 67. But there is no plausible allegation that the anonymous @fur.meme account user even *saw* Facebook's statement; to the contrary, the first @fur.meme screenshot states that the anonymous user learned of Ms. Mahoney's presence near the U.S. Capitol on January 6 directly from the picture that the *plaintiff herself* shared on Instagram. *See* Compl. ¶ 68 p. 18.

In addition, plaintiff's negligent infliction claim fails for the independent reason that @fur.meme's posts were an intervening cause of plaintiff's alleged harm: Facebook could not have reasonably foreseen that publishing a statement about the various steps it was taking to respond to content on its platform that risked encouraging or inciting violence would cause the @fur.meme account to post allegedly defamatory information about Ms. Mahoney. Plaintiff's allegations make clear that she has sued the wrong entity: If anyone bears legal responsibility for her claimed harms, it is @fur.meme, not Facebook.

Finally, plaintiff fails to allege sufficient emotional distress to state a claim for negligent infliction of emotional distress. "[S]erious mental distress may be found where a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 928 (1980). Plaintiff alleges that Facebook's emergency news statement caused her to sustain "serious emotional stress, melancholy, and fatigue, for which she has received treatment." Compl. ¶ 109. But such a "formulaic recitation of the elements of a cause of action" is insufficient to state a plausible claim. *Twombly,* 550 U.S. at 555. Nor does her allegation of emotional distress rise to the level of seriousness that courts have found necessary to support a claim: in *Wong v. Jing*, the court held that the plaintiff's similar allegation that the defendant's alleged defamatory conduct "was very emotionally upsetting to [her], and has caused [her] to lose sleep, have stomach upset and generalized anxiety" was not "the sort of serious emotional distress with which a reasonable, normally constituted person would be unable to cope." 189 Cal. App. 4th at 1377-78; *see also Hughes v. Pair*, 46 Cal. 4th 1035, 1051 (2009) (statement by plaintiff "that she has suffered discomfort, worry, anxiety, upset stomach, concern, and agitation as the result of" the defendant's vulgar and offensive comments was insufficiently severe emotional distress to state a claim);

Lawler v. Montblanc N. Am., LLC, 704 F.3d 1235, 1246 (9th Cir. 2013) (allegation of "[a]nxiety, sleeplessness, upset stomach, [and] sometimes muscle twitches" insufficiently severe to state a claim); *Lufti v. Spears*, 2015 WL 1088127, at *22 (Cal. Ct. App. Mar. 11, 2015) (allegation of "insomnia, anxiety, [and] fear of going out in public" insufficiently severe to state a claim). Accordingly, the complaint fails as a matter of law to plead sufficient facts showing the seriousness of her emotional distress to sustain a claim.

Plaintiff has failed to state a claim for negligent infliction of emotional distress.

III. The Complaint Should Be Dismissed With Prejudice.

A court may dismiss a complaint without leave to amend "if it determines that allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (internal quotation marks omitted); *see also Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) (holding that pleadings may be dismissed without leave to amend if amendment "would be an exercise in futility"). Plaintiff has failed to plead cognizable legal theories that would entitle her to recovery as a matter of law. Because these deficiencies cannot be cured, the Court should dismiss the complaint with prejudice.

CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court dismiss plaintiff's claims for failure to state a claim under Rule 12(b)(6).

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Respectfully submitted,

/s/ Overton Thompson III

Overton Thompson III (BPR 011163)
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
Telephone : (615)-742-7730
Facsimile : (615) 742-2804
othompson@bassberry.com

Archis A. Parasharami
(*aparasharami@mayerbrown.com*)
Kevin Ranlett (*pro hac vice* to be filed)
(*kranlett@mayerbrown.com*)
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

Lauren R. Goldman (*pro hac vice* to be filed)
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10016
Telephone: (212) 506-2500
Facsimile: (212) 849-5589
lrgoldman@mayerbrown.com

Matthew D. Provance (*pro hac vice* to be filed)
MAYER BROWN LLP
71 Wacker Drive
Chicago, IL 60606
Telephone: (312) 701-8598
mprovance@mayerbrown.com

Counsel for Defendant Facebook, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed and served upon the following via the Court's ECF system on this the 30th day of August, 2021:

M. E. Buck Dougherty III
Phillip E. Fleenor
Duncan, Hatcher, Holland & Fleenor, P.C.
1418 McCallie Avenue
Chattanooga, TN 37404
(423) 266-2207
bdougherty@duncanhatcher.com
pfleenor@duncanhatcher.com

/s/ Overton Thompson III
Overton Thompson III (BPR 011163)
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
Telephone : (615)-742-7730
Facsimile : (615) 742-2804
othompson@bassberry.com