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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GENEVIEVE MAHONEY,

Plaintiff,

v.

META PLATFORMS, INC., f/k/a Facebook, Inc.,

Defendant.

Case No. 22-cv-02873-AMO

Plaintiff's Response in Opposition to Defendant's Motion to Dismiss and Anti-SLAPP Motion to Strike

Judge: Hon. Araceli Martínez-Olguín

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION AND STATEMENT OF RELEVANT FACTS

On January 6, 2021, Plaintiff Genevieve Mahoney was a peaceful political protestor who lawfully took and posted on her Instagram account and the Internet a photograph of the U.S. Capitol, which she captioned "Our Capitol." Second Amended Complaint, ECF No. 132. ("SAC") ¶¶ 62-70. Her "Our Capitol" photograph was not representative of Mahoney engaging in criminal activity, nor did it represent or depict the promotion of criminal activity. *Id.* ¶ 68. Mahoney's lawful post on the Internet through her Instagram account of the photograph of the Capitol was protected speech under the First Amendment and not representative of her engaging in criminal activity. *Id.* ¶ 73. Nor did her "Our Capitol" photo "represent promotion of criminal activity" in violation of a criminal statute. *Id.* ¶ 74.

Nevertheless, shortly after Mahoney posted her photograph to her Instagram account, Defendant Meta Platforms, Inc., f/k/a Facebook, Inc. deleted Mahoney's "Our Capitol" photo by disabling and deleting her Instagram account from which she'd posted it, as part of its publicized effort to "search[] for and remov[e]" "photos from the protestors." *Id.* ¶¶ 81-90. Indeed, Meta's executive leadership team alerted the public — in the form of a published written Emergency News Statement ("ENS") — that it was searching in "real time" for photos and videos taken at the Capitol that day and posted on its platforms such as Instagram, which in Meta's view "represent promotion of criminal activity." *Id.* ¶¶ 81, 84-88.

Within hours after Meta's executive leadership team published its ENS to the public, @fur.meme, an Instagram account operated by an anonymous student at Furman University where Mahoney attended college, published a series of posts recognizing that the ENS targeting photos and videos at the Capitol actually referred to Mahoney by implication because of her "Our Capitol" photo that she had posted earlier that day. *Id.* ¶¶ 54, 100-107. And fellow students asked Mahoney to delete her "Our Capitol" photo, fearing for her safety and well-being. *Id.* ¶ 89.

LEGAL STANDARD

A. Rule 12(b)(6)

Pursuant to a motion to dismiss a plaintiff's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). When analyzing a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint — as well as any reasonable inferences to be drawn from them — as true and construe them in the light most favorable to the plaintiff. *Gaprindashvili v. Netflix, Inc.*, 2022 U.S. Dist. LEXIS 23304, at *8 (C.D. Ca., Jan. 27, 2022) (citing *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005); *ARC Ecology v. U.S. Dep't of Air Force*, 411 F.3d 1092, 1096 (9th Cir. 2005); *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994)).

A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

B. Defamation *Per Se*

"Defamation *per se* occurs when a statement, is defamatory on its face, that is untrue." *Yow v. National Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1183 (E.D. Cal. Mar. 9, 2008). "A [writing] which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face." Cal. Civ. Code § 45a; *see also Song Fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 888 (N.D. Cal. Jun. 10, 2015). "An allegation that a plaintiff is guilty of a crime is libelous on its face." *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles,* 117 Cal. App. 4th 1138, 1145 n.7 (Cal. Ct. App.

2004); *Barnes-Hind, Inc. v. Sup .Ct.,* 181 Cal. App. 3d 377, 385 (Cal. Ct. App. 1986) ("Perhaps the clearest example of libel per se is an accusation of crime."). Statements that falsely impute the commission of a crime are libelous on their face. *See Snider v. Nat'l Audubon Soc'y, Inc.,* 1992 U.S. Dist. LEXIS 10017, at *15 (E.D. Cal. Apr. 14, 1992) (denying motion to dismiss where "the clear implication from the article is that plaintiff is being investigated by the I.R.S."). Publishing false and untrue written material "which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation" is libelous *per se*. *See Washburn v. Wright,* 261 Cal. App. 2d 789, 797 (Cal. Ct. App. 1968).

"The First Amendment requires a plaintiff to establish that the statement on which the defamation claim is based is 'of and concerning' the plaintiff." *D.A.R.E. America v. Rolling Stone Magazine,* 101 F. Supp. 2d 1270, 1289 (C.D. Cal. Apr. 28, 2000); *Blatty v. New York Times Co.,* 42 Cal. 3d 1033, 1042 (Cal. 1986). "Under California law, there is no requirement that the person defamed be mentioned by name. It is sufficient if the jury can infer from the evidence that the defamatory statement applies to the plaintiff, or if the publication points to the plaintiff by description or circumstances tending to identify him." *Church of Scientology of California v. Flynn,* 744 F. 2d 694, 697 (9th Cir. 1984) (cleaned up).

When a plaintiff is not specifically named in the defamatory statement, but she is reasonably implicated by the circumstances surrounding the statement, she must also show that a third party understood the alleged statement to refer to her. *SDV/ACCI, Inc. v. AT&T Corp*., 522 F.3d 955, 960 (9th Cir. 2008) (applying *Flynn*'s two-step analysis, under which a statement that does not specifically name its target (1) must be capable of being understood to refer to the plaintiff and (2) must have been understood by a third party to actually refer to the plaintiff).

ARGUMENT

A. Meta's "three independent reasons" for dismissing Mahoney's defamation *per se* claim lack merit.

Meta argues that the SAC should be dismissed with prejudice because Mahoney "fails to establish" that the ENS "specifically referred to her;" "does not allege that a single person saw the [ENS], much less understood its allegedly defamatory meaning towards her, or who legitimately read that allegedly defamatory meaning as applying to her;" and "no reasonable reader could have reasonably understood the Emergency News Statement in the alleged defamatory sense because it was expressly directed at violent, not peaceful protestors." Motion at 2-3, quoting Dkt. 129 at 7-9 (quote marks omitted). But from the record before this Court construing the facts in the light most favorable to Mahoney, Meta's arguments must fail.

First, a plain reading of the ENS demonstrates that it *did* refer to Mahoney by implication. The ENS states – and Meta acknowledges that it states – that Meta was "searching for and removing" "[i]ncitement or encouragement of the events at the Capitol, including videos and photos from the protestors," which Meta claims "represent promotion of criminal activity." SAC ¶ 86. Meta then removed Mahoney's "Our Capitol" photo by "disabling and deleting her Instagram account." SAC ¶ 90. Photos, of course, are inanimate objects. They have no agency. In claiming in its ENS that protestors' photos "incite[d] or encourage[d] . . . the events at the Capitol," Meta necessarily claimed by implication that Genevive Mahoney committed that incitement because it is undisputed that she posted her "Our Capitol" photo on Meta's Instagram platform earlier that day. In other words, Mahoney was one of those protestors at the Capitol events that day who posted a photo on Meta's platform that Meta executives warned the public about in its ENS.

Second, Meta argues that "there is simply no plausible allegation that the Furman student who operates the @fur.meme Instagram account 'recognized' – let

alone even saw – the Emergency News Statement." Motion at 10. But this assertion is belied by the SAC. *See, e.g.* SAC ¶¶ 104 ("@fur.meme and others in this Instagram group seized upon Facebook's statement since it *linked* the posting of photos at the U.S. Capitol with the 'promotion of criminal activity'"); 105 ("Genevieve's @fur.meme Instagram group made this direct connection" "[b]ased on Bickert and Rosen's Emergency News Statement," "because Genevieve had been one of only two Furman student protestors"); 107 ("@fur.meme's language infers a collective responsibility to report and hold 'accountable' 'violent' individuals," as does Meta's ENS); 110 (Meta and @fur.meme both failed to differentiate between protestors who merely attended the rally and violent rioters).

Finally, Meta argues that the SAC never alleges that any person would reasonably understand the ENS in the defamatory sense. This is directly contradicted by the Ninth Circuit case that Plaintiff added to the SAC, *Miller v. Sawant,* 18 F.4th 328 (9th Cir. 2021) – a controlling case that Meta conspicuously does not even acknowledge in its Motion. And Meta's Emergency News Statement "can reasonably be understood as referring to" the January 6 protestors posting photos on Meta's platforms such as Instagram; "readers . . . knew that Plaintiff[] [was] . . . involved" in the protest, and "those readers . . . understood [the defendant]'s remarks refer to Plaintiff[]." *See Miller,* 18 F.4th at 340; SAC ¶ 167.

Miller controls the outcome of this case. There, the plaintiffs, a pair of police officers, shot and killed a black man, Taylor, while attempting to make an arrest. 18 F4th at 333. The defendant, a City Council member, told a crowd that the killing was a "brutal murder . . . a blatant murder at the hands of the police." *Id.* "Although [the defendant] had not identified Plaintiffs by name in her remarks, the complaint alleges that Plaintiffs' families, friends, and colleagues, as well as members of the general public, all knew that they were the officers who shot Taylor." *Id.* at 334. The Ninth Circuit noted that "although [the defendant]'s remarks appear aimed, at least

in part, at the police generally, some of her language suggests that her words refer specifically to the officers who shot Taylor." *Id.* at 338. And although the defendant "did not identify Plaintiffs by name, . . . (1) her words can reasonably be understood as referring to the officers involved . . ., (2) readers and listeners knew that Plaintiffs were the officers involved in the shooting, and (3) those readers and listeners understood [defendant]'s remarks to refer to Plaintiffs." *Id.* at 340.

Here, Meta told its users and the general public in its ENS that the January 6 riot was an act of "violence," and that "protestors" had committed "[i]ncitement or encouragement of the events at the capitol" via "videos and photos." SAC ¶ 86. Although Meta did not identify Mahoney by name in the ENS, the SAC alleges that her friends and fellow members of the Furman community knew that she had attended the protest. *Compare Miller,* 18 F.4th at 334, above. The language in Meta's ENS refers specifically to protestors whose photographs Meta then removed. *Compare Miller* at 338. And although Meta did not use Mahoney's name in its ENS, (1) the ENS can reasonably be understood as referring to Capitol protestors posting photos on Meta's platforms, like Mahoney did with her "Our Capitol" photo that she posted on Instagram, (2) recipients of the ENS such as the @fur.meme Instagram group knew that Mahoney was one of the Furman students at the Capitol protest posting photos and pictures, and (3) the @fur.meme Instagram group understood Meta's ENS to refer to Mahoney. *Compare Miller* at 340. Here, as there in *Miller*, dismissal is inappropriate. *Id.* at 343.

Meta will no doubt try to make much of the distinction that its ENS referred to photos and the *Miller* defendant referred to people. But this Court should reject such an argument, as there is no "distinction" in such an argument. Photographs do not take and publish themselves. People take photographs like Mahoney took her "Our Capitol" photo and posted it on Instagram. Likewise, Meta's assertion that "the Statement was directed exclusively at *content* posted on Meta's services that could

have the effect of *promoting violence*" (Motion at 12) is just a shell game. Such content (e.g., the "Our Capitol" photo) was posted by people (e.g., Mahoney). And Meta's sarcastic phrasing of Plaintiff's argument "that one of these bullet points was somehow directed at posts by peaceful protestors is not a reasonable construction" (Motion at 13) is belied by the fact that Meta then *took action against a post by a peaceful protestor* when it removed Genevieve Mahoney's "Our Capitol" photograph. Meta's ENS was clearly about protestors posting photos at the Capitol on January 6, and the photos themselves — according to the views of Meta's executive leadership team — represent the promotion of criminal activity. Meta's flailing attempts in its Motion to dance around the plain meaning of the ENS are futile.

Furthermore, Meta's statement about protestors posting photos is defamation *per se*. Meta's statement in its ENS and subsequent action declares (falsely) that Mahoney's "Our Capitol" photo amounts to "incitement" of "violence" – which is a crime. Cal. Pen. Code § 404.6. In publishing the ENS and subsequently deleting Mahoney's "Our Capitol" photograph in accordance with statements made by Meta executives in the ENS, Meta "false[ly] . . . [c]harge[d]" Mahoney "with a crime." Cal. Civ. Code § 46(1); *Garcia v. City of Merced,* 637 F. Supp. 2d 731, 756 (E.D. Cal. 2008). "These allegations are neither conclusory nor implausible. Hence, they are entitled to a presumption of truth at this stage of the proceedings." *Miller,* 18 F.4th at 339, citing *Ashcroft v. Iqbal,* 556 U.S. 662, 678-79 (2009).

B. Section 230 is inapplicable because Meta is being sued for its own speech, not third-party speech, and Meta acted in bad faith.

Section 230 is inapplicable here because (1) Genevieve has sued Meta for its own speech, not the speech of third parties; and (2) Meta acted in bad faith.

1. Meta was an information content provider when it created and published its Emergency News Statement.

Meta was an information content provider when it created and published its Emergency News Statement that forms the basis for Genevieve's Defamation *Per Se* claim. *See* 47 U.S.C. § 230(f)(3). Meta is being sued for its own speech, not the speech of third parties, so Section 230 is inapplicable.

"Meta does not contend that Section 230 immunizes it from liability for its own statements." ECF No. 134, p. 13. In other words, Meta concedes that the Emergency News Statement — which forms the basis for Genevieve's claim — forecloses any reliance upon Section 230 as a defense. That is correct and should end any argument and debate on Section 230's applicability to this case.

But remarkably, Meta then incorrectly asserts that "Plaintiff's claim is that she was harmed by information published by the @fur.meme account, not directly by the Emergency News Statement." ECF No. 134, p. 13. Nothing could be further from the truth regarding the facts alleged. Mahoney does not allege that the @fur.meme statements were themselves defamatory; she alleges that *Meta's* Emergency News Statement was defamatory, and that the @fur.meme statements show that Meta's statement was reasonably understood by others to refer to her. Meta fails to engage with the actual factual allegations Mahoney alleged in her SAC, which are considered true at this stage of the litigation and must be construed in the light most favorable to her. *See Gaprindashvili*, 2022 U.S. Dist. LEXIS at *8.

2. Meta published its Emergency News Statement in bad faith.

To the extent Meta relies upon 47 U.S.C. § 230(c)(2) as a defense, it may not do so because that provision of Section 230 requires voluntary action to be taken in "good faith." And Meta did not act in good faith when it published the ENS.

Instead, Bickert and Rosen acted with actual malice because (1) they knew the ENS stating that all protestors' photos "represent promotion of criminal activity"

was false when they published it; and (2) they harbored serious doubts as to its truth. They knew it was false or harbored serious doubts it was true because they and Meta employees had not even reviewed and evaluated *all* the photos to determine whether they "represent promotion of criminal activity" at the time they published the ENS since they acknowledged they were still searching their platforms "in real time" — which includes Instagram where Mahoney posted her "Our Capitol" photo.

C. California's Anti-SLAPP statute is inapplicable because, pursuant to the Rules Enabling Act, Congress did not authorize States to prescribe rules of practice and procedure in diversity actions in federal courts.

California's Anti-SLAPP statute — a state rule of practice and procedure — is inapplicable here because Congress did not authorize California's legislature — or any other state legislatures — to implement such rules in diversity actions in federal courts.

First, the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, authorizes *only* the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Not a state such as California. The Act has been described as a treaty between Congress and the judiciary and represents a manifestation of the traditional doctrine of separation of powers. Congress, through the Act, delegated the essential rulemaking function to a co-equal branch of government while retaining the ability to review and reject any rule adopted by the Supreme Court. Pursuant to Section 2073 of the Rules Enabling Act, the Judicial Conference has established procedures to govern the work of the Standing Committee and its advisory rules committees.[1]

[1] *See* https://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees#:~:text=The%20Rules%20Enabling%20Act%2C%2028,evidence%20for%20the%20federal%20courts.

The United States Supreme Court analyzed the Rules Enabling Act and the federal rulemaking process in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995). In that case, the Court was faced with a rule issue implicating its "power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals." *Id.* at 48. (citing 28 U.S.C. § 2072(a)). The Court noted, however, that the procedure Congress ordered for such rule changes is not expansion by court decision, but by rulemaking under § 2072. *Id.* The Supreme Court explained its "rulemaking authority is constrained by §§ 2073 and 2074, which require, among other things, that meetings of bench-bar committees established to recommend rules ordinarily be open to the public, § 2073(c)(1), *and that any proposed rule be submitted to Congress before the rule takes effect, § 2074(a)." Id.* (emphasis added). In other words, only the Supreme Court and Congress can implement rules of practice and procedure in federal courts, not a state legislature like the California legislature here with its anti-SLAPP statute.

Second, California's anti-SLAPP statute is inapplicable in federal court under the Supreme Court's test in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (reaffirming *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) ("When a situation is covered by one of the Federal Rules," a federal court must apply the Federal Rule, notwithstanding the existence of a conflicting state statute)). Under *Shady Grove*, if a federal rule of civil procedure "answers the question in dispute," then it governs—notwithstanding a state-law procedure to the contrary. *Id.* In this instance, the question in dispute is whether Meta may dismiss or strike Mahoney's defamation *per se* claim by motion. Because Federal Rule of Civil Procedure 12 provides the conditions and grounds under which Meta may do so and it has not challenged the applicability or validity of Rule 12, the Federal Rule trumps California's anti-SLAPP statute.

Third, the Second Circuit applied the *Shady Grove* test in a case of first impression and held that "California's anti-SLAPP statute is inapplicable in federal court because it increases a plaintiff's burden to overcome pretrial dismissal, and thus conflicts with Federal Rules of Civil Procedure 12 and 56." *La Liberte v. Reid*, 966 F. 3d 79, 83 (2d Cir. 2020).[2] The Second Circuit acknowledged a circuit split as to whether anti-SLAPP statutes apply in federal courts, with the Fifth, Eleventh, and D.C. Circuits holding them inapplicable, *id*. at 86 (citing *Klocke v. Watson*, 936 F. 3d 240, 242 (5th Cir. 2019) (Texas statute); *Carbone v. Cable News Network, Inc*., 910 F. 3d 1345, 1350 (11th Cir. 2018) (Georgia statute); *Abbas v. Foreign Policy Grp*., *LLC*, 783 F. 3d 1328, 1335 (D.C. Cir. 2015) (D.C. statute); and the First Circuit applying them. *Id*. (citing *Godin v. Schencks,* 629 F.3d 79, 86-7 (1st Cir. 2010) (Maine statute)).

The Second Circuit noted that the Ninth Circuit decision *United States ex rel. Newsham v. Lockheed Missiles & Space Co*., 190 F.3d 963, 972 (9th Cir. 1999) (California statute), which had applied the California anti-SLAPP law, predated *Shady Grove* and was no longer controlling law. *Id*. at 87 (citing *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., joined by Kozinski Ch. J., Paez J., and Bea, J., dissenting from denial of rehearing en banc) ("Just as the New York statute in *Shady Grove* impermissibly barred class actions when Rule 23 would permit them, so too California's anti-SLAPP statute bars claims at the pleading stage when Rule 12 would allow them to proceed.").[3]

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[2] Additionally, the court rejected defendant's argument that she enjoyed Section 230 immunity, a defense Meta has also asserted in this case. *See La Liberte*, 966 F. 3d at 89.

[3] In the underlying opinion, the Ninth Circuit panel reversed the denial of the anti-SLAPP motion and held the nonmoving party was a limited public figure. The panel remanded to the district court for a determination of whether the nonmoving party could prevail on the merits of its defamation claim when it was a limited public figure. *Makaeff v. Trump Univ*., LLC, 715 F. 3d 254, 271-72 (9th Cir. 2013).

The Second Circuit explained that under Rule 12, "'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). In contrast, the California anti-SLAPP statute "require[es] the plaintiff to establish that success is not merely plausible but probable." *Id.* (cleaned up). The court found that the California anti-SLAPP statute "establishes the circumstances under which a court must dismiss a plaintiff's claim before trial, a question that is already answered (differently) by Federal Rules 12 and 56." *Id.* Thus, it concluded "federal courts must apply Rule 12 and 56 instead of California's special motion to strike." *Id.* at 88. The court further denied attorneys' fees because California's anti-SLAPP statute "does not purport to make attorney's fees available to parties who obtain dismissal by other means, such as under Federal Rule 12(b)(6)." *La Liberte*, 966 F.3d at 88; *Abbas*, 783 F.3d at 1337 n.5; *see also Klocke*, 936 F.3d at 247 n.6.

Finally, to the extent this Court allows California's Anti-SLAPP statute to be applied on the merits, Meta has failed to show its ENS was protected speech, particularly in light of the substantial and compelling facts Mahoney alleged involving Bickert and Rosen's actual malice when they published the ENS on January 6, 2021. *See generally New York Times v. Sullivan*, 376 U.S. 254 (1964).

D. If necessary, Plaintiff should be given leave to amend.

Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). This policy is "to be applied with extreme liberality." *Owens v. Kaiser Foundation Health Plan, Inc.,* 244 F.3d 708, 712 (9th Cir. 2001) (cleaned up). Thus, leave to amend is freely given to a party unless the opposing party can establish "bad faith, undue delay, prejudice to the opposing party, and/or futility." *Id.*

Here, as set forth herein, Mahoney has plausibly pled a defamation *per se* claim, and Meta's Motion should be denied. However, if it is necessary for Mahoney to

amend her SAC, Meta is unable to establish that Mahoney has acted in bad faith, with undue delay, that it is prejudiced in any way, or it is futile to allow her to amend her SAC if that becomes an issue before the Court.

CONCLUSION

For these reasons, Mahoney has plausibly pled her Defamation *Per Se* claim against Meta. Thus, the Court should deny in their entirety Meta's (1) Rule 12 motion to dismiss; and (2) Anti-SLAPP motion to strike.

Dated: April 11, 2024

Respectfully submitted,

/s/ James McQuaid

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served on all counsel of record via the Court's ECF system.

/s/ James McQuaid