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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

JOHN DOE, an individual,

Plaintiff,

v.

SUBSTACK, INC., a Delaware corporation; AMAZON WEB SERVICES, INC., a Delaware corporation; JACK POULSON, an individual; TECH INQUIRY, INC., a Delaware corporation; DOES 1-25, inclusive,

Defendants.

CASE NO.: CGC-24-618681

DEFENDANT'S NOTICE OF SPECIAL MOTION TO STRIKE AND SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT AND REQUEST FOR ATTORNEYS' FEES

Date: January 6, 2025
Time: 9:30 AM
Dept.: 302
Before: Hon. Richard B. Ulmer, Jr.

Action Filed: October 3, 2024
Trial Date: None Set

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NOTICE OF SPECIAL MOTION TO STRIKE

PLEASE TAKE NOTICE that on January 6, 2025 at 9:30 a.m. or as soon thereafter as counsel may be heard in the Superior Court of San Francisco, the Hon. Richard B. Ulmer, Jr., presiding, Defendant SUBSTACK, INC. ("Substack") will and hereby does move this Court for an order, pursuant to California Code of Civil Procedure § 425.16 ("Section 425.16" or the "anti-SLAPP statute"), striking and dismissing each and every cause of action in the Complaint ("Compl.") filed by the Plaintiff identified as JOHN DOE with prejudice and without leave to amend.[1]

Every cause of action alleged in the Complaint falls within the scope of Section 425.16(e)(3). Accordingly, the burden shifts to Plaintiff to establish, with admissible evidence, a probability that he will prevail on his claims. (Code Civ. Proc., § 425.16(b)(1).) Plaintiff cannot satisfy this burden. Substack therefore requests that the Court strike and dismiss, with prejudice and without leave to amend, each of Plaintiff's causes of action, or, alternatively, portions thereof, for the following separate and independent reasons:

1. Plaintiffs' claims all arise from the publication of lawfully obtained information on a matter of public significance, and are accordingly barred by the First Amendment. (*Florida Star v. B.J.F.* (1989) 491 U.S. 524, 533; *Bartnicki v. Vopper* (2001) 532 U.S. 514, 535.)

2. Plaintiff's claims are completely barred by the federal Communications Decency Act, 47 U.S.C. § 230(c)(1) (the "CDA" or "Section 230"), which confers broad immunity from civil claims against internet service providers like Substack for enabling third parties to publish information on the internet. (E.g., *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39.)

[1] "A plaintiff cannot avoid a SLAPP motion by amending the complaint." (*Hansen v. Cal. Dep't of Corr. & Rehab.* (2008) 171 Cal.App.4th 1537, 1547; see also *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073.)

This Motion is based on this Notice, the attached Memorandum of Points and Authorities, the Declaration of Joshua A. Baskin, all pleadings and documents on file, and such further evidence or argument as may be presented at the hearing on this Motion.

Substack reserves the right to request that the Court enter an award of attorneys' fees and costs pursuant to Code of Civil Procedure § 425.16(c). (See, e.g., *Am. Humane Ass'n v. L.A. Times Commc'ns LLC* (2001) 92 Cal.App.4th 1095, 1103.)

Dated: December 6, 2024

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: */s/ Joshua A. Baskin*
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Substack, Inc.

SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT AND REQUEST FOR ATTORNEYS' FEES

I. INTRODUCTION

Plaintiff,[2] then the CEO of a technology company, was investigated and arrested on suspicion of felony domestic violence in 2021. He does not dispute that fact, nor can he. Though Plaintiff was not charged, and a judge sealed the report of that arrest in 2022 at Plaintiff's request, that does not change the authenticity of the report or the fact of the arrest. Defendant Jack Poulson, a journalist who publishes an online newsletter about the technology sector, published an accurate copy of the report on his online blog, which is operated by Defendant Substack, Inc. ("Substack"). Poulson had lawfully obtained the report from a confidential source, and deemed it newsworthy that Plaintiff had been arrested on suspicion of a violent crime against a woman apparently without suffering any consequences in his role as CEO. The First Amendment privileged the decision by Poulson and his organization Tech Inquiry, Inc. ("Tech Inquiry") to publish the report and stories based on it. The First Amendment equally protects the internet service providers, like Substack Inc. ("Substack"), who enabled Poulson to publish his newsletter.

Yet, in defiance of clear First Amendment precedent, Plaintiff now sues Poulson, his organization, and the internet service providers that enable him to publish online, in an effort to pressure them to remove information about his arrest report from the internet. This is a classic Strategic Lawsuit Against Public Participation ("SLAPP"), which has imposed costs on an independent journalist but has no chance of succeeding on the merits.

The internet service providers have a second dispositive defense under Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1) (the "CDA" or "Section 230"). Substack, which enables independent journalists and other creators to publish subscription newsletters online, and Amazon Web Services ("AWS"), which provides cloud computing services, are being sued only

[2] Plaintiff's identity has been widely disseminated on the internet and discussed in the *San Francisco Chronicle*, but he has improperly styled himself as a pseudonymous "John Doe" without leave of Court. (See Compl.)

for enabling Poulson to publish content online, and for not removing his content from the internet. Such claims are barred by Section 230.

The California Anti-SLAPP statute (Code Civ. Proc., § 425.16) was designed just for this purpose: to prevent defendants from incurring fees and costs to defend baseless lawsuits as a price for exercising their First Amendment rights. Poulson's newsletter, like many websites, is a vehicle for communicating about public matters to a large audience—clearly a "public forum." His writing about Plaintiff's arrest on suspicion of a violent crime against a woman—without apparent consequences for his career as a tech CEO at the time—concerned an "issue of public interest." Accordingly, the Anti-SLAPP statute applies. The burden then shifts to Plaintiff to show that he has viable claims, which is not possible in light of Substack's dispositive defenses under the First Amendment and the Communications Decency Act. The Court should accordingly strike Plaintiff's complaint and award Substack—and the other defendants—their fees and costs to defend this action.

II. BACKGROUND

Before the events giving rise to this case, Plaintiff was arrested by the San Francisco Police Department in December 2021. (Pl.'s Mot. to Proceed under a Fictitious Name at 3; Compl. ¶¶ 14-17, 24-25.) Plaintiff's arrest was detailed in a police incident report, which was a public record for nearly two months, from December 2021 until February 17, 2022, when a judge sealed the report at Plaintiff's request. (Pl.'s Mot. to Proceed under a Fictitious Name at 3; Compl. ¶ 17; see also Gov. Code, §§ 7923.610, 7923.615(a) [mandating that arrest reports and incident reports are public records].)

Defendant Jack Poulson, a journalist, published multiple articles on Substack about Plaintiff and the technology company for which he was the chief executive officer. (Compl. ¶¶ 30, 34, 140.) This was part of Plaintiff's reporting on the role of American companies in intelligence operations (Poulson Decl. ¶ 4), and in particular concerns about Plaintiff's former company and Plaintiff's integrity in light of his U.S. security clearance and the work he and his company were performing on behalf of the US Government. (See Baskin Decl. Exs. 3-6.) Some of Poulson's articles included

a link to the Incident Report.[3] (See Compl. ¶¶ 24, 29, 30, 34, 140; Baskin Decl. Ex. 1.) Poulson obtained the Incident Report from a source, and did not know at the time that it had been sealed. (Poulson Decl. ¶¶ 13-15.)

According to the December 21, 2021 police report (hereinafter, "Incident Report"), police arrested Plaintiff, who was then 53 years old, after he became involved in an alleged domestic-violence incident that injured his 25-year-old girlfriend and attracted the attention of a neighbor. (Baskin Decl. Ex. 1.) Plaintiff was evidently not criminally charged over this incident, and at his request, the San Francisco Superior Court sealed his Incident Report. (*Ibid.*; Mot. at 3.) Plaintiff does not allege that Poulson or any of the other Defendants obtained the Incident Report unlawfully.

Nor does Plaintiff dispute that the copy of the Incident Report posted online was a true and accurate representation of the original, or claim that Poulson's stories contain any false statements. Indeed, he does not even allege that the police description of events was false in the report itself. Instead, without disputing that all relevant statements in Poulson's articles are true, Plaintiff alleges two theories of falsity that defy common sense.

First, Plaintiff alleges that unspecified "[s]tatements" by Poulson "create the false and intentionally misleading understanding that PLAINTIFF was found guilty" of felony domestic violence. (Compl. ¶ 29.) The only reason suggested for this is that Poulson's articles did not initially say expressly that Poulson was *not* found guilty. (*Ibid.*) But Plaintiff does not (and cannot) allege that Poulson's stories ever said that he was charged and brought to trial, much less found guilty. Again, Plaintiff does not allege that Poulson made *any* false statement of fact.

Second, Plaintiff asserts that "any statement that the arrest did occur is, ***by operation of law, not truthful***" because a judge sealed the report in an order that stated in part that "the arrest [was] ***deemed not to have occurred***." (Compl. ¶ 20 [emphasis added].) But the sealing order does not purport to have the Kafkaesque effect that Plaintiff suggests. (Baskin Decl. Ex. 2.) It is true that

[3] Plaintiff alternatively refers to the police report as an "arrest report" and an "incident report," both of which are presumptively public records under different sections of the Public Records Act. (See Gov. Code, §§ 7923.610, 7923.615(a).) The report itself appears to be titled "Incident Report."

Plaintiff was arrested on suspicion of felony domestic violence in 2022, and the sealing order does not render it false. (*Ibid.*; cf. *G.D. v. Kenny* (N.J. 2011) 15 A.3d 300, 315-16.)[4] This is clear from the order itself, which is incorporated by reference in the Complaint. (Baskin Decl. Ex. 2.)[5]

III. PROCEDURAL BACKGROUND

On October 3, 2024, Plaintiff sued Poulson, Tech Inquiry, Substack, and AWS (collectively, "Defendants"). (Compl. ¶ 1.) Every one of Plaintiff's claims against Defendants arises from the publication of the Incident Report that was a public record from December 2021 to February 2022—with Poulson's corresponding news articles—and Defendants' purported failure to remove these documents from Poulson's online newsletter. (Compl. ¶¶ 50-176.) Yet the Complaint omits the details of the Incident Report, and the order that sealed it in February 2022.

Throughout, Plaintiff has taken steps that have increased litigation costs on Defendants. At the outset, he ignored the requirement that he seek leave of Court before filing under a fictitious name (*Dep't of Fair Emp. & Hous. v. Superior Court* (2022) 82 Cal.App.5th 105, 111, fn. 1), and sued as a "John Doe" despite his name being publicized in the *San Francisco Chronicle* and elsewhere on the internet (Compl. ¶ 1; Baskin Decl. Exs. 3-7). Defendants have accordingly had to undertake expensive additional steps to oppose Plaintiff's motion to proceed anonymously and

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[4] In a case involving an analogous statute, the New Jersey Supreme Court explained: "It is true that under the expungement statute, as a matter of law, an expunged conviction is 'deemed not to have occurred,' N.J.S.A. 2C:52–27. But the expungement statute does not transmute a once-true fact into a falsehood…. It is not intended to create an Orwellian scheme whereby previously public information—long maintained in official records—now becomes beyond the reach of public discourse on penalty of a defamation action. Although our expungement statute generally permits a person whose record has been expunged to misrepresent his past, it does not alter the metaphysical truth of his past, nor does it impose a regime of silence on those who know the truth." (*G.D.*, 15 A.3d at 315-16.)

[5] The order makes clear that the *Court* deems the arrest not to have occurred, and restores to Plaintiff certain privileges as a result, but it does not require parties not before the Court to pretend that the arrest did not actually happen. (*Ibid.* ["The court GRANTS the petition. The record of arrest in the following matter shall be sealed under the provisions of section 851.91, and the arrest deemed not to have occurred[.]"]) The order goes on to explain what this means: while Plaintiff "may answer any question relating to the sealed arrest as though it did not happen, and petitioner is released from all penalties and disabilities resulting from the arrest," there are exceptions. (*Ibid.*) For example, "[t]he sealed arrest may be pleaded and proved in any later prosecution of the petitioner for any other offense." (*Ibid.*) The order, by its terms, did not command any non-party to do anything at all—and certainly did not purport to command journalists to censor themselves.

lodge documents tentatively under seal merely because they reflect Plaintiff's (widely known) identity. (Baskin Decl. ISO Mot. to Seal.)

Later, on November 12, 2024—over a year after Poulson's first published the arrest report and over a month after filing suit—Plaintiff sandbagged Defendants by filing an *ex parte* application for a temporary restraining order ("TRO"). (Pl.'s App. for TRO.) The TRO sought to compel Defendants to remove information about his arrest report from the internet. (*Ibid*.) This forced Defendants to undertake an expensive round of overnight briefing and to prepare for argument the next day. (See Def's Opp'n to Pl.'s App. for TRO.) The TRO motion was futile: at the hearing, the Court declined to reach the merits, instead ordering Plaintiff to do what he had been required to do from the beginning: "Plaintiff should first file a regularly-noticed motion for Court authorization to proceed in this action as a Doe plaintiff." (Defs.' Opp. to Pl.'s Mot. to Proceed under a Fictitious Name at 8.) Plaintiff thereafter filed a belated motion to proceed under a pseudonym (Pl.'s Mot. to Proceed Under a Fictitious Name), which Defendants opposed (Defs.' Opp. to Pl.'s Mot. to Proceed under a Fictitious Name), and which remains pending.

Defendants, including Substack, now bring Anti-SLAPP motions to specially strike Plaintiff's complaint in its entirety. (See Code Civ. Proc., § 425.16.) Substack also demurs to the Complaint in a motion filed herewith, but the law requires that the Court decide this motion first. (See *Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 864-65 ["Trial courts should either grant or deny [anti-SLAPP] motions in toto, i.e., without leave to amend, prior to ruling on any pending demurrers."].)

IV. ARGUMENT

A. CALIFORNIA'S ANTI-SLAPP STATUTE PROTECTS JOURNALISTS FROM FEAR OF CRUSHING LITIGATION.

The term "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) SLAPP suits are "aimed at preventing citizens from exercising their political rights or punishing those who have done so." (*Simpson Strong-Tie Co. v. Gore* (2010) 49 Cal.4th 12, 21; *Equilon Enters., LLC v. Consumer*

Cause, Inc. (2002) 29 Cal.4th 53, 59-60.) To prevent such lawsuits from "masquerad[ing] as ordinary lawsuits such as defamation" (*Simpson Strong-Tie*, 49 Cal.4th at 21), the California legislature enacted the anti-SLAPP statute "to nip SLAPP litigation in the bud by striking offending causes of actions which 'chill the valid exercise of the constitutional rights of freedom of speech and petition.'" (*Braun v. Chronicle Publ'g Co.* (1997) 52 Cal.App.4th 1036, 1042 [quoting § 425.16(a)].)

The purpose of the law is "to prevent SLAPPs by ending them early and without great cost to the SLAPP target." (*Varian Med. Sys., Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) The legislature further directed that the anti-SLAPP statute "be construed broadly." (§ 425.16(a).)

Resolution of an anti-SLAPP motion involves a two-step analysis. "***First***, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity" as defined in Code Civ. Proc., § 425.16(e). (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1035; *Taus v. Loftus* (2007) 40 Cal.4th 683, 712.) This threshold showing is not onerous; "[i]nstead, a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis." (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1089.) ***Second***, once the threshold showing has been made, "the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384; *Nygard*, 159 Cal.App.4th at 1035.)

B. PLAINTIFF'S CLAIMS ARISE FROM SUBSTACK'S PROTECTED ACTIVITY, AND THE ANTI-SLAPP STATUTE APPLIES.

Under prong one of the anti-SLAPP statute, Substack must show that "the acts underlying the plaintiff's cause of action fall within one of the four categories of conduct described in section 425.16, subdivision (e)." (*Nygard*, 159 Cal.App.4th at 1036.) One such category of protected conduct is "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." (§ 425.16(e)(3).) Subsection (e)(3)'s threshold criteria are easily met here: Substack is a public forum, and Poulson's article was in connection with a matter of public interest.

1. Substack Is A Public Forum

It is black letter law that "[w]eb sites accessible to the public … are 'public forums' for purposes of the anti-SLAPP statute." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4 [collecting cases]; see also, e.g., *Muddy Waters, LLC v. Superior Court* (2021) 62 Cal.App.5th 905, 917 [websites are public forums]; *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1252 [posts on the defendant's Facebook page and Instagram account were "made 'in a place open to the public or a public forum' within the meaning of [§] 425.16, subd[.] (e)(3)"]; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1007 [same].) So are newsletters generally. (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476 ["newsletter … distributed to … approximately 3,000" recipients "was also a 'public forum' within the meaning of section 425.16, subdivision (e)(3)"].) Poulson's Substack newsletter is no exception. It has approximately 3,000 subscribers (Poulson Decl. ¶ 1), and covers the technology sector and those who govern it, with special attention to ethics concerns and the relationship between technology companies and governments. (See Baskin Decl. Exs. 3-6; Poulson Decl. ¶¶ 2, 4-10.) It is "a vehicle for communicating a message about public matters to a large and interested community." (*Damon*, 85 Cal.App.4th at 476.) This quintessential public forum is available to anyone with an internet connection.

2. Poulson's Article Was In Connection With A Matter of Public Interest

Likewise, Poulson's news articles about Plaintiff's arrest for felony domestic violence while serving as CEO of a company with reportedly lucrative contracts with U.S. Special Forces, and while holding a security clearance, were published in connection with an issue of public interest. (See generally *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 164 ["[n]ews reports concerning current criminal activity serve important public interests"].) Events that cast doubt on the trustworthiness of people charged with protecting national security, or senior business people who benefit from substantial government contracts, are also clearly an issue of legitimate interest to the public. (See generally *Henry v. Lake Charles Am. Press, L.L.C.* (5th Cir. 2009) 566 F.3d 164, 181 [holding that "loss of a government contract and the investigation of an entity doing business with the [government]" were "matters of public interest" for purposes of Louisiana's anti-

SLAPP statute]; *N.Y. Times Co. v. United States* (1971) 403 U.S. 713, 724 (Douglas, J., concurring) [emphasizing importance of public debate on national security].)

The articles are equally related to the public's interest in journalism about the status of women in the technology sector generally, and efforts to improve accountability for men who engage in abusive behavior toward women. This, in turn, is related to a broader set of issues about powerful men using their power to gain control over, and abuse, women—a topic of widespread interest, especially in the wake of the #MeToo movement. As the Court of Appeal held in *Sipple v. Found. for Nat'l Progress* (1999) 71 Cal.App.4th 226, 238, "[d]omesic violence is an extremely important public issue in our society" and constitutes an "issue of public interest" under § 425.16(e)(3). The public interest is particularly strong when domestic violence involves powerful individuals who may be able to misbehave with impunity. (See *id.* at 238-39 [Section 425.16(e)(3) satisfied where the article in question not only addressed "the issue of domestic violence" but also the "theme that rich and powerful men may use the legal system to their advantage over women who may have been abused by them"]; see also *Coleman v. Grand* (E.D.N.Y. 2021) 523 F.Supp.3d 244, 259 ["sexual impropriety and power dynamics in the music industry, as in others, were indisputably an issue of public interest"], app. filed (2d Cir., Mar. 26, 2021, No. 21-800); cf. *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 375 [holding that speech related to child sexual abuse can be considered speech on a matter of public concern].)

The public interest here is further demonstrated by the extensive media coverage of this case. (E.g., *Cross*, 197 Cal.App.4th at 378, fn. 13 ["extensive media coverage" of speech established public interest]; *Sipple*, 71 Cal.App.4th at 238-39 ["public interest can be 'evidenced by media coverage'"]; see also, e.g., Baskin Decl. Ex. 7.)

Accordingly, the burden now shifts to Plaintiff to establish his probability of success on his claims. He cannot satisfy that burden.

C. PLAINTIFF CANNOT DEMONSTRATE A PROBABILITY OF PREVAILING ON ANY OF HIS CLAIMS.

1. The First Amendment Bars Plaintiff's Claims.

The First Amendment[6] bars Plaintiff's claims, all of which arise from the publication of information Poulson lawfully obtained from a confidential source on a matter of public significance.

The Supreme Court has repeatedly reaffirmed that the First Amendment bars legal action against media organizations for publishing lawfully obtained information that is a matter of public significance, absent extraordinary circumstances. As the Court explained in a seminal case: "our synthesis of prior cases involving attempts to punish truthful publication: '[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.'" (*Florida Star v. B.J.F.* (1989) 491 U.S. 524, 533 [quoting *Smith v. Daily Mail Publ'g Co.* (1979) 443 U.S. 97, 103].). Similarly, in *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 495, the Supreme Court held that the First Amendment barred civil damages against a television station for broadcasting the name of a rape-murder victim lawfully obtained by a reporter from a court proceeding because "[s]tates may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." (See also *Okla. Publ'g Co. v. Okla. Cnty. Dist. Ct.* (1977) 430 U.S. 308 [First Amendment barred injunction blocking publication of the name and photograph of minor charged in a juvenile proceeding lawfully obtained by reporters]; *Daily Mail*, 443 U.S. at 103 [under First Amendment, statute barring publication of information about juvenile criminal defendant could not be applied to newspaper publisher that obtained information by monitoring police band and interviewing witnesses]; *Landmark Commc'ns, Inc. v. Virginia* (1978) 435 U.S. 829 [striking down law criminalizing publication of information from confidential judicial misconduct commission proceedings].)

[6] Substack uses "First Amendment" to refer both to the United States Constitution ((U.S. Const. am. I ["Congress shall make no law … abridging the freedom of speech, or of the press"]), and the California Constitution (Cal. Const., art. I, § 2(a) ["A law may not restrain or abridge liberty of speech or press."]).

In *Florida Star*, a local police department mistakenly released the name of a rape victim to a reporter, who published the rape victim's name in the newspaper in violation of a state statute. The Supreme Court held that the statute violated the First Amendment's protection for the press, reaffirming that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability" on the press. (491 U.S. at 541.) The Court held that the statute violated the First Amendment because the newspaper lawfully obtained the rape victim's name from the police; its article concerned a matter of public importance because it reported about "the commission, and investigation, of a violent crime that had been reported to authorities" (*id.* at 525); and the rape victim had not shown that imposing liability on the newspaper was a "punishment … narrowly tailored to a state interest of the highest order" (*id.* at 541).

These principles have been reaffirmed in the California courts. The California Supreme Court has recognized that "state officials may not constitutionally punish publication of [truthful] information" that "a newspaper lawfully obtains … about a matter of public significance" absent "a need to further a state interest of the highest order," and that the interest of alleged criminals and crime victims in remaining anonymous is generally ***not*** a state interest "of the highest order." (See *Gates v. Discovery Commc'ns, Inc.* (2004) 34 Cal.4th 679, 690, 692-93 & fn. 6 [quoting *Daily Mail*, 443 U.S. at 103].) Just as the United States Supreme Court did not prioritize the privacy and anonymity interests of juvenile offenders in *Daily Mail*, or those of rape victims in *Cox* and *Florida Star*, so too the California Supreme Court did not prioritize "the long-term anonymity of former convicts." (*Id.* at 693.) All of these interests give way to the interest of the press in publishing truthful stories on matters of public significance.

This case falls clearly within the principle expressed in *Florida Star*, *Daily Mail*, and *Gates*, and Plaintiff's claims accordingly fail. All Plaintiff's claims arise from harm allegedly caused by "disseminating the sealed Incident Report or information related to the sealed Incident Report."

(Compl. ¶ 53; see also *id.* ¶¶ 58, 69, 105, 110, 122, 136, 141, 153, 164, 170, 175.)[7] There is no dispute that the published information is truthful. Indeed, Plaintiff implicitly acknowledges that Poulson published an accurate copy of the Incident Report. (See Compl. ¶ 14.) And he nowhere alleges that any of the information is factually incorrect—despite his frivolous claim that "any statement that the arrest did occur is, by operation of law, not truthful." (Compl. ¶ 20.) Poulson also lawfully obtained the Incident Report from a confidential source (Poulson Decl. ¶¶ 13-15), and Plaintiff does not allege otherwise. Regardless, even if Plaintiff had alleged that Poulson obtained the Incident Report in an unlawful manner (which, again, he does not), Plaintiff certainly does not—and cannot—allege that ***Substack*** obtained the Incident Report unlawfully. Poulson's reporting about the Incident Report is also about a matter of public significance. The public significance of a powerful man being arrested for felony domestic violence—without suffering job-related consequences for his role as a CEO with government contracts and a role in national security—is obvious. (See *ante*, at pp. 15-16.)

Further, the First Amendment protects one's right to disclose material received from a source regarding a matter of public concern even if the *source* obtained it unlawfully. (*Bartnicki v. Vopper* (2001) 532 U.S. 514, 535). In *Bartnicki*, the U.S. Supreme Court held that the First Amendment protected journalists who repeatedly reported the contents of a telephone conversation about a public issue, which they obtained from a source who illegally intercepted the conversation. (*Id.* at 517-18.) Despite the journalists knowing, or having reason to know, that their source obtained the conversation unlawfully, they were free to disclose its contents because "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." (*Id.* at 535; see also *Jean v. Mass. State Police* (1st Cir. 2007) 492 F.3d 24, 31-32 [holding that defendants "made the decision to proceed with their disclosures knowing that the tape was

[7] Plaintiff cannot evade the First Amendment by arguing that his claims do not arise from publication, but rather "possession" of the Incident Report, "allow[ing] the sealed Incident Report … to remain publicly accessible," or "refusal to remove" the report from the internet. (Compl. ¶ 58.) Such actions and omissions—maintaining a digital copy of the information, making it publicly accessible, and not subsequently removing it—are encompassed within the act of publication.

illegally intercepted, yet the Supreme Court held in Bartnicki that such a knowing disclosure is protected by the First Amendment"]; *Democratic Nat'l Comm. v. Russian Fed'n* (S.D.N.Y. 2019) 392 F.Supp.3d 410, 435-36, 449 ["A person is entitled [to] publish stolen documents that the publisher requested from a source so long as the publisher did not participate in the theft."]); *Bowley v. City of Uniontown Police Dep't* (3d Cir. 2005) 404 F.3d 783, 787 ["[a]lthough [the source] violated Pennsylvania law prohibiting the release of juvenile arrest records by doing so, his unlawful release of the information does not make receipt of that information by the Herald Standard unlawful"].)

Bartnicki, which itself dealt with a statutory command of secrecy, controls even if the government requires that information be kept confidential. As the Court of Appeal has recognized, "it may not impose criminal or civil liability upon the press for obtaining and publishing newsworthy information through routine reporting techniques," which "of course, include asking persons questions, including those with confidential or restricted information." (*Nicholson v. McClatchy Newspapers* (1986) 177 Cal.App.3d 509, 511, 519-20.) Plaintiff "cannot distinguish[] the 'wealth of both State and Federal case law, discussing the protection journalists and the press enjoy under the First Amendment where there have been allegations that published or disclosed content had been illegally obtained.'" (*Ass'n for L.A. Deputy Sheriffs v. L.A. Times Commc'ns LLC* (2015) 239 Cal.App.4th 808, 819-20 [collecting cases].)

Even considering Plaintiff's self-serving allegations, the conduct of all Defendants—and certainly Substack's—falls squarely within *Bartnicki*'s protection. It is undisputed that Poulson obtained the arrest report from a source. (Compl. ¶¶ 43, 46; Poulson Decl. ¶ 13.) Although the Complaint advances the conclusory allegation that "[u]pon information and belief, POULSON knew or should have known at all times that the report had been sealed" (Compl. ¶ 15), it is undisputed that Poulson himself did not himself illegally obtain the report from the San Francisco Police Department (Poulson Decl. ¶¶ 13-15). Nor did Poulson violate the law merely by receiving the report from his source. Obtaining confidential information from a source is a constitutionally protected newsgathering technique, and cannot be "stripped" of its constitutional shield by "calling"

it "tortious." (*Ass'n for L.A. Deputy Sheriffs*, 239 Cal.App.4th at 819 [quoting *Nicholson*, 177 Cal.App.3d at 513].)

As for Substack, there are no allegations that it acted unlawfully to obtain the report either. Their only alleged wrongdoing was to facilitate Poulson's journalism generally and then not act to take down the arrest report when posted online. (See Compl. ¶¶ 27, 32, 42, 141.)[8] And Plaintiff cannot evade Defendants' First Amendment protections by claiming that even if Poulson is protected for the act of writing news stories, the Defendants are not protected for their actions in allowing the dissemination of those stories and the underlying Incident Report. Both "creation and dissemination of information are speech within the meaning of the First Amendment." (*Sorrell v. IMS Health Inc.* (2011) 564 U.S. 552, 570.) And "[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference." (*Brown v. Ent. Merchs. Ass'n* (2011) 564 US 786, 792, fn. 1.)

Simply put, the First Amendment forecloses Plaintiff's claims in light of *Florida Star* and *Bartnicki*.

2. Section 230 Bars Plaintiff's Claims Against Substack.

Beyond the First Amendment, Plaintiff has no chance of success in his claims against Substack, all of which are barred by Section 230 of the Communications Decency Act. (See 47 U.S.C. § 230(c)(1).) Section 230 provides expansive immunity to internet service providers[9] against claims based on enabling third parties to publish content online, such as Poulson's blog and the arrest report linked therein. (See *Hassell v. Bird* (2018) 5 Cal.5th 522, 535, 538 [California courts have also construed Section 230 to "afford[] interactive service providers broad immunity from tort liability for third party speech"]; *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39 [Section 230 has

[8] Substack was allegedly "involved in reviewing" and "editing" Poulson's articles, but this is not alleged to be wrongdoing. The only changes allegedly made by Substack were to remove certain content or request that Poulson add the caveat that "the charges were later dropped." (Compl. ¶ 32.)

[9] Substack is a "provider … of an interactive computer service," and therefore entitled to Section 230 immunity in appropriate circumstances. (47 U.S.C. § 230(c)(1); see *Smith v. Substack, Inc.* (N.D.Cal., Aug. 12, 2024, No. 24-cv-727-AGT) 2024 WL 3757501, at *2 ["The parties agree that Substack is a provider of an interactive computer service."]).

"been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source"].). Indeed, just months ago, a court dismissed a complaint based on a Substack blog post after finding Substack was "an interactive computer service" entitled to Section 230 immunity. (*Smith*, 2024 WL 3757501, at *2-3, *5 ["Substack did not create the content nor decide to post material unintended for publication. Substack merely decided whether or not to withdraw the post from publication, which is lawfully within the purview of a publisher."].)

Section 230 states that "[n]o provider ... 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).) Congress enacted this provision because it "recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium." (*Hassell*, 5 Cal.5th at 536 [quoting *Zeran v. Am. Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330].) Section 230 aims "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." (*Ibid.*)

"[A]ny activity" by an internet service provider "that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." (*Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1170-71 (en banc).). Substack's decision not to take down Poulson's material falls squarely within this broad protection. This applies even if Plaintiff attempts to circumvent Section 230 immunity claiming that Substack is liable for "possession" of the Incident Report separate from any publishing activity. (Compl. ¶ 58.) Not so: the only thing Substack allegedly did to harm Plaintiff was enable publication of content by a third party (Poulson), and "possession" of Poulson's content on its servers is a necessary step in publishing that third-party content online—exactly what Section 230 protects. The totality of Plaintiff's Complaint is that Substack did not make decisions he likes

with respect to Poulson's newsletter, but Section 230 gives Substack the discretion to make that decision.[10]

Section 230 thus bars all of his claims regardless of labels, including: defamation (*Hassell*, 5 Cal.5th at 536), negligence (*Zeran*, 129 F.3d at 330 [holding that Section 230 immunity applies where allegations of negligence require publication of another's statement]; *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 573 [holding that claims for gross negligence are barred by Section 230 where they are based on decisions to "restrict or make available certain material"]), privacy-related torts (*Caraccioli v. Facebook, Inc.* (2016) 167 F.Supp.3d 1056, 1066 [holding that Section 230 bars claims for public disclosure of private facts, false light, intrusion into private affairs, and intentional and negligent infliction of emotional distress], affd. (9th Cir. 2017) 700 F.App'x 588), and business torts (*Jurin v. Google, Inc.* (E.D.Cal. 2010) 695 F.Supp.2d 1117, 1122 [holding that Section 230 bars claims for negligent and intentional interference with prospective economic relations and intentional interference with contractual relations]; *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 836 [barring plaintiff from bringing a cause of action against an interactive service provider under unfair competition law when the information originated with a third party]). Section 230 also bars Plaintiff's claims based on California criminal laws. (See *Voicenet Commc'ns, Inc. v. Corbett* (E.D.Pa., Aug. 30, 2006, No. 04-1318) 2006 WL 2506318, at *3-4 ["the plain language of the CDA provides internet service providers immunity from inconsistent state criminal laws"].)

Moreover, even if Plaintiff could show that Poulson violated the law by publishing the Incident Report and stories about it online (he cannot), that would not pierce Substack's immunity under the CDA. Section 230 immunity applies "even if a service provider knows that third parties are using such tools to create illegal content." (*Goddard v. Google, Inc.* (N.D.Cal., Dec. 17, 2008, No. C 08-2738JF(PVT)) 2008 WL 5245490, at *3.) In that case, "the service's provider's failure to intervene is immunized." (*Ibid.*; see also *Coffee v. Google, LLC* (N.D.Cal., Feb. 10, 2021, No. 20-

[10] This is true even if Substack allegedly requested edits to Poulson's stories. (See *Roommates.com*, 521 F.3d at 1169 ("A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality.").

CV-03901-BLF) 2021 WL 493387, at *8 [same]; *Voicenet*, 2006 WL 2506318, at *3-4 ["the plain language of the CDA provides internet service providers immunity from inconsistent state criminal laws"].) Plaintiff simply has no viable argument that Section 230 does not apply because Poulson's content violated criminal law.

Plaintiff also cannot argue that Section 230 does not protect Substack because it was engaged in illegal conduct. The only accusation against Substack is that it refuses to take down content posted by Poulson. But "deciding whether to publish or to withdraw from publication third-party content" is "*publishing conduct*" squarely protected by Section 230. (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1102-05 ("[Section 230](c)(1) … shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties."].) Because all Plaintiff's claims against Substack arise from its publishing conduct with respect to a third-party newsletter, they are all barred.

CONCLUSION

For these reasons, Plaintiff's SLAPP Complaint should be stricken, consistent with Code Civ. Proc., § 425.16, and the Court should award Substack its attorneys' fees and costs to defend this action.

Dated: December 6, 2024

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