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SUPERIOR COURT OF STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
CIVIL UNLIMITED JURISDICTION

MAURY BLACKMAN, 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

PLAINTIFF'S OPPOSITION TO DEFENDANT SUBSTACK'S MOTION TO STRIKE UNDER THE ANTI-SLAPP STATUTE (CCP § 425.16)

REDACTED

Date: **February 4, 2025**
Time: **9:30 AM**
Dept.: **301**
Judge: **Hon. Joseph M. Quinn**

PUBLIC

REDACTS MATERIALS PURSUANT TO COURT'S JANUARY 7, 2025 ORDER

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PLAINTIFF'S OPPOSITION TO DEFENDANT SUBSTACK, INC.'S SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT

Date: **February 4, 2025**
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I. INTRODUCTION

Plaintiff commenced this action because Defendants continue to engage in illegal conduct. They are in receipt and possession of and continue to disseminate a sealed arrest report that did not result in a conviction. California criminal and civil laws and public policy safeguard the rights of individuals arrested without a conviction. These Defendants, however, refuse to comply with the law. The First Amendment does not protect them, and a motion under the anti-SLAPP statute is not appropriate in light of Defendants' illegal activities. Plaintiff incorporates by reference and joins in his concurrently filed oppositions to the Defendants' anti-SLAPP motions. For all the reasons stated in the memoranda, Plaintiff respectfully requests that the Court deny Defendant's motion.

II. STATEMENT OF FACTS

A. Defendants' Illegal Dissemination Of A Sealed Report

This case arose from Defendants' ongoing dissemination of a document and information contained in it (the "Sealed Report") that was subject to an uncontested sealing order entered by San Francisco Superior Court Judge Carolyn Gold dated February 17, 2022. (Compl. ¶19; *see* Declaration of Plaintiff In Further Support of Motion to Seal, dated January 14, 2025 ("Plaintiff Decl.") ¶16, Exh. A ("Sealing Order")) California law "deemed the arrest not to have occurred." *See* Sealing Order; Pen. Code § 851.91(e). In addition to the protections afforded by the Sealing Order, Pen. Code §§ 851.92(b)(5) and (c) prohibit and criminalize the unauthorized dissemination of such a Sealed Report. Pen. Code § 11143 and Labor Code § 432.7(g)(3) prohibit the receipt and possession of these documents and information. At no time has any person or entity challenged Judge Gold's Sealing Order. (Plaintiff Decl. ¶17)

B. Defendant's Arrest Was Never Newsworthy

Plaintiff was the CEO of Premise Data, a private company, in December 2021 when he had an encounter with the San Francisco Police Department at his residence. (*Id.* ¶¶4, 9) Although the matter was public between December 2021 and February 2022, no media reported on these events. (*Id.* ¶¶18-20) After the charges were quickly dismissed, at which time Plaintiff was petitioning the Court under Cal. Pen. Code § 851.91 to have the record sealed, no media reported on the events and no third parties challenged the Sealing Order. (*Id.*) Nineteen months later, in September 2023, Poulson publicly disseminated the Sealed Report, and at that time, no media reported on Poulson's blog posts. (*Id.* ¶20) In December 2023, Poulson reported that the Premise Data Board demanded Plaintiff's termination in substantial part because of Plaintiff's [redacted] and no media

reported on the termination. (Declaration of Jack Poulson In Support of Special Motion to Strike dated December 6, 2024 ("Poulson Decl.") Exhs. D, H; Plaintiff Decl., ¶20) In fact, between December 2021 and October 3, 2024 (when this Complaint was filed), no one other than Defendants publicly disseminated the Sealed Report or reported on it. (*Id.*)

In addition, between 2019 and 2024, Premise Data was involved in a lawsuit against former employees in Santa Clara County (the "Santa Clara Litigation"). No one other than Poulson reported when this case was filed, during the litigation, or when it settled. (Plaintiff Decl. ¶ 35)

Not only was Plaintiff unknown, but also Premise Data – and the use of technology surveillance by the U.S. Special Operations Forces – was not in the public interest. (Declaration of Cameron Scherer dated January 14, 2025 ("Scherer Decl.") ¶6; Plaintiff Decl. ¶4) Poulson admitted that "there appears to be little appetite in the U.S. media to interrogate the roles of Premise Data and Two Six Technologies in ongoing U.S. information operations." (Poulson Exh. A; I) According to Poulson, "[d]espite journalist Byron Tau using primary sources to expose the California-based gig-work information gathering company Premise Data in 2021 as a covert front for intelligence gathering for U.S. Special Operations Forces around the globe, the reporting never captured broad public attention." (Poulson Exh. I)

C. Poulson's Blog Posts Create False Implications Of Facts.

[redacted]

[redacted]

D. Plaintiff's Efforts To Remove The Sealed Report; Plaintiff's Damages.

Since Plaintiff learned Defendants were disseminating the Sealed Report, he and San Francisco City Attorney made repeated, unsuccessful requests to Defendants to remove the Sealed

Report and related information. (*Id.*, ¶¶49-69) Defendants continue to disseminate the Sealed Report and information contained in it, long after Plaintiff's employment terminated. (*Id.*)

As a result of Defendants' ongoing dissemination of the Sealed Report and Poulson's blog posts, Plaintiff has suffered severe financial and non-financial injuries. (Id. ¶¶73-75)

III. ARGUMENT

A. The Anti-SLAPP Statute Does Not Apply.[1]

1. Illegal Activities Fall Outside the Protection of Anti-SLAPP.

Speech that is "illegal as a matter of law" is not constitutionally protected and falls outside the protection of the anti-SLAPP statue. *Flatley v. Mauro*, 39 Cal.4th 299, 320 (2006). Defendants' ongoing conduct from which the Complaint arises – including, receiving, possessing, and disseminating the Sealed Report and the information contained in it – is illegal because it violates California Penal Code §§ 851.91, 851.92, 11143, and 166. Specifically, Sections 851.92 (b)(5) and 851.92(c) make it illegal for an unauthorized person to disseminate a sealed record or information related to it. Defendants do not dispute that they possessed, disseminated, and continue to disseminate the Sealed Report and the information contained in it. Section 11143 makes it a misdemeanor for any person "who, knowing he is not authorized by law to receive a record or information obtained from a record, knowingly buys, receives, or possesses the record or information". Defendants do not dispute that they were not authorized by law to receive the Sealed Report or the information contained in it. Section 166(a) makes it unlawful to disregard a court order. Defendants do not dispute that a valid Sealing Order existed prohibiting disclosure of the Sealed Report. Any argument by Defendants that these statutes are unconstitutional must be rejected for the reasons addressed herein.

2. The Challenged Speech Does Not Concern an Issue of Public Interest.

Defendants bear the initial burden of demonstrating that the conduct alleged in the complaint is arising from protected activity within the meaning of the statute. *Navellier v. Sletten*, 29 Cal.4th 82, 88 (2002). The statute must be construed broadly; however, the statute is not intended to apply to purely private transactions. *See e.g., Weinberg v. Feisel*, 110 Cal.App.4th 1122 (2003 (complaint

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[1] Code of Civ. Proc. §425.16(c) also mandates that a prevailing plaintiff on a SLAPP motion "shall" recover attorney's fees and costs upon the successful dismissal of Defendant's frivolous motion to strike the entire Complaint. Here, Defendants' decision to bring a SLAPP motion despite their blackletter violations of the law, renders the motion frivolous. *See Moore v. Shaw*, 116 Cal.App.4th 182, 199 (2004), *as modified* (Mar. 26, 2004) (applying substantive standards of section 128.5 in awarding attorney fees to prevailing Plaintiff under the anti-SLAPP statute). If the Court denies the Motion, then Plaintiff will file a separate fee motion and memorandum of costs.

relating to false allegations of criminal conduct against party who is not public figure nor has thrust himself into a public issue is a private matter not subject to anti-SLAPP statute). If Defendants fail to meet this burden, the motion must be denied. *Blackburn v. Brady*, 116 Cal.App.4th 670 (2004).

Section 425.16(e)(3) and (4) only protect speech that concerns an "issue of public interest".[2] Defendants must establish, first, that the speech at issue implicated an issue of public interest, and then, if it did, the existence of a "functional relationship … between the speech and the public conversation about some matter of public interest." *FilmOn.com Inc. v. DoubleVerify Inc.,* 7 Cal.5th 133, 145 (2019) (denying anti-SLAPP protection for speech that bore some relationship to issues of public interest was nonetheless private as between parties and "never entered the public sphere"). Here, the challenged speech is not an issue of public interest, and, even if it is, has no functional relationship with the public conversation on such issue.

"The most commonly articulated definitions of 'statements made in connection with a public issue' focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest." *Wilbanks v. Wolk*, 121 Cal.App.4th 883, 898 (2004) (internal citations omitted), *see also Weinberg*, 110 Cal.App.4th at 1131-32 ("a 'public controversy' does not equate with any controversy of interest to the public"), citing *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (holding that a divorce action between two well-known people may have piqued the public's interest but was not a public controversy); *Rand*, 6 Cal.5th at 616-9.

Using this analysis, Poulson's blog posts concerning and disseminating the Sealed Report and information contained in it – the challenged speech – do not concern an issue of public interest. Cases that have been found to address a person in the public eye refer to celebrities or nationally known figures or entities. *See Sipple v. Found. for Nat'l Progress,* 71 Cal.App.4th 226, 239 (1999) ("nationally known figure"); *Church of Scientology v. Wollersheim,* 42 Cal.App.4th 628, 650 (1996)

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[2] An "issue of public interest" as that phrase is used in § 425.16(e)(3) and (4) is broader than "matter of public significance" as that phrased in used in Supreme Court jurisprudence on the First Amendment. See *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001); *See also* Section 425.16(e); *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.App.4th 1106, 1117-1120 (1999) ("Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning."). Thus, even if the Court found that Defendants' speech constituted "an issue of public interest", the speech still is not a "matter of public significance".

(matters of public interest include "when a large, powerful organization may impact the lives of many individuals"). Plaintiff is not in the public eye, and Substack makes no argument and presents no evidence that he is.

Defendants do not argue that the challenged speech directly affected a large number of people.

Further, Poulson's speech about the Sealed Report does not concern a topic of widespread, public interest. *See World Fin. Grp., Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal. App. 4th 1561, 1570 (2009), *as modified* (May 7, 2009) (requiring consideration of the specific nature of the speech and the context). Cases that fall into this category include *M.G. v. Time Warner, Inc.*, 89 Cal.App.4th 623 (2001) (concerning media coverage that featured a coach, who pled guilty to child molestation, in a story "about adult coaches who molest youths playing team sports); *Carney v. Santa Cruz Women Against Rape*, 221 Cal.App.3d 1009, 1021 (1990) ("content, form and context" of the speech "portray a publication dedicated to addressing the general topic of sexual assault and harassment," including "a list of certain [counseling and defense] services provided by SCWAR"); or *Sipple,* 71 Cal.App.4th at 239 (article protected because it focused on domestic abuse by a nationally known person who was involved in the national debate on domestic violence) and involve plaintiffs that were directly connected to a discussion of topics of widespread public interest. *See e.g.*, *Dyer v. Childress*, 147 Cal.App.4th 1273, 1281 (2007). Here, the challenged speech concerns the dissemination of the Sealed Report and the information contained in it published nearly two years after the occurrence. *See Jeppson v. Ley*, 44 Cal.App.5th 845 (2020) (dispute between private people, even if it made an appearance on the internet and defendant argued it had "lofty justifications," was not transformed into an issue of public interest); *Rivero v. Am. Fed'n of State, Cty. and Mun. Employees, AFL-CIO*, 105 Cal.App.4th 913, 924-26 (2003) (speech accusing public employee of illegal activity, including "soliciting bribes" at a publicly financed institution, was not an issue of public interest); *Abuemeira v. Stephens*, 246 Cal.App.4th 1291 (2016) (publicizing a dispute between private people did not transform the dispute into an issue of public interest).

Contrary to Defendants' arguments, the challenged speech was not "about the status of women in the technology sector generally, and efforts to improve accountability for men who engage in abusive behavior toward women,". (Poulson Motion, pp. 14-15); *FilmOn*, 7 Cal.5th at 150 (statute "demands 'some degree of closeness' between the challenged statements and the asserted public interest"). Poulson's blogposts included no references to issues of domestic violence or violence against women. Whereas Substack's lawyer (at Motion p. 15) refers to "the #MeToo movement,"

Poulson himself referred to no such thing. Indeed, *FilmOn* instructs that the Court must look at the context of the speech – "including the audience, speaker, and purpose" – and here Poulson admits he wrote a blog about the technology surveillance industry, and Defendants offer no evidence that Poulson's blog post was concerned with the issue of women in the technology sector.

Defendants also argue that Poulson's speech is a matter of public interest because a CEO who holds security clearance who works for a company with government contracts arrested for felony domestic violence is automatically an issue of public interest. The court rejected the idea that "criminal activity is always a matter of public interest," *Weinberg*, 110 Cal.App.4th at 1134, and here there was no finding of any criminal activity, as the charges were dismissed. Poulson claimed that he decided to disseminate the Sealed Report because he had concerns about Premise Data's ethics and failure to keep its employees safe.[3] (Poulson Motion p. 9) Further, Poulson admits that Premise Data was not in the public interest. (Poulson Decl. Exh. I) Poulson does not make any connection between the Sealed Report and his issues with Premise Data, and Defendants provided no evidence that anyone other than Poulson was raising these concerns, undermining any argument that these issues concerned public interests.

Substack cannot credibly compare these facts to those in *Lieberman v. KCOP Television, Inc.* 110 Cal.App.4th 156 (2003). *Lieberman* involved reporting on a doctor who was allegedly *presently* prescribing controlled substances without a legitimate medical purpose. *Id.*; *see also Du Charme v. Int'l Bhd of Elec. Workers*, 110 Cal. App. 4th 107, 119 (2003) ("protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion"). Here, the challenged speech occurred more than 18 months after the charges were dismissed. Further, California rejects the argument that an employee who was arrested without a conviction is an issue of public interest because it might affect his work. *See* Lab. Code § 432.7 (prohibiting employer from taking adverse action against an employee arrested without a conviction); Penal Code § 851.91.

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[3] This malicious claim that Plaintiff failed to address the safety of Premise Data employees resulted in Tech Inquiry, where Poulson is Executive Director and Founder, making the false contention in its motion *and amended motion* that Poulson decided to disseminate the Sealed Report because, in substantial part, Plaintiff failed to prevent the deaths of 19 Premise Data employees were executed on the side of the road in Iraq. (Tech Inquiry Motion, p. 7-8, citing Poulson Decl.) This statement is an outrageous misrepresentation that Poulson and Tech Inquiry use to justify that Poulson's decision to disseminate the Sealed Report was an issue of public interest. Further, Poulson's statement in his Declaration (¶16) that Plaintiff was "eager" to do business with a company, who had an owner, whose previous company allegedly failed to prevent the deaths of its employees in Iraq was offered as evidence that Plaintiff was willfully ignorant about the safety of his workers. The statement is misleading and irrelevant.

Substack also argues that the public interest is demonstrated "by the extensive media coverage of this case." (Substack Motion, p. 16) The media coverage of this case, however, centers on the First Amendment issues, not the protected speech. Moreover, Substack cited to one article that covered this case, which is hardly extensive media coverage. (Baskin Decl., Exh. 7) Further, the converse of Substack's argument is true: where Plaintiff's arrest resulted in no media coverage, nor Poulson's dissemination of the Sealed Report or the termination of Plaintiff's employment, it is incredulous to argue this is an issue of public interest, let alone a matter a matter of public significance.

Moreover, Poulson's continued dissemination of the Sealed Report and the information contained in it after Premise Data terminated Plaintiff's employment undermines the argument that the speech was of widespread interest in "high-powered tech CEO" or Premise Data. *See Cole*, 206 Cal.App.4th at 1121 (speech about *defunct* company not an issue of widespread public interest).

Indeed, even if the Court finds that the challenged speech concerned an issue of public interest, Defendants still cannot satisfy the second prong under *FilmOn*. Defendants would need to establish that Poulson's speech "participated in, or furthered, the discourse that makes an issue one of public interest." *FilmOn*, 7 Cal.5th at 151. Here, Poulson's blog posts and the dissemination of the Sealed Report do not engage in a discussion or analysis of violence against women. Rather, Poulson demonstrated a total disregard for the woman by publishing her identifying characteristics, infantilizing her by repeated comments about her and Plaintiff's age, and suggesting without evidence that she lied to the police. Further, the challenged speech does not further the discourse about CEOs arrested for domestic violence. In addition, the challenged speech did not participate in or further discourse on Premise Data or the technology surveillance industry because Defendants offer no evidence that any such discourse existed.

B. Plaintiff Has a Probability of Success on His Claims

If Defendants demonstrate the challenged claims arise from protected activity, the burden shifts to Plaintiff to show a probability he will prevail on the merits. *City of Santa Monica v. Stewart*, 126 Cal.App.4th 43, 71 (2005), *as modified on denial of reh'g* (Feb. 28, 2005). Under an anti-SLAPP motion, a plaintiff is required to demonstrate only a minimal level of sufficiency and triability of the claim. *Lin v. City of Pleasanton*, 176 Cal.App.4th 408 (2009); *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal.App.4th 728 (2003) (complaint not stricken if supported by prima facie showing of facts).

1. The First Amendment Does Not Immunize Defendants' Illegal Activities.

Substack argues that its conduct is not illegal because "the First Amendment protects the right to publish lawfully obtained, truthful, newsworthy information." (Substack Motion, p. 17-21). *See The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989).[4] *Florida Star* involves allegations of harm caused by publication of facts obtained from public official records – not a sealed document. Substack's illegal conduct is not protected by the First Amendment because (i) Defendants continue, without obtaining an unsealing order, to disseminate the Sealed Report; (ii) Poulson's speech was not a "matter of public significance," (iii) Poulson's speech was not "truthful;" (iv) Poulson did not lawfully receive the Sealed Report; and (v) California has an interest of the highest order to safeguard sealed information concerning an arrest that did not lead to a conviction.

a. Defendants Are Publicly Disseminating The Sealed Report.

The Sealing Order granted pursuant to Section 851.91 remains in effect, unchallenged. *See* Rules of Court, rules 2.550 and 2.551 (establishing a standard and procedure for courts to use when request is made to seal a record, recognizing the First Amendment right of access to documents). Rule 2.551(h)(2) has a mechanism to challenge the Sealing Order, but Defendants never did so and could not meet that high burden. Accordingly, as this court has already recognized, the Sealed Report and the material contained in it cannot be publicly without first obtaining an unsealing order from Judge Gold. Order Granting Plaintiff's Motion to Seal, January 7, 2025. *See Phillips ex rel. Estates of Byrd v. G.M. Corp.*, 307 F.3d 1206, 1210 (9th Cir.2002) (recognizing that if there is a right of access to a document subject to a protective order it would "would surely undermine, and possibly eviscerate, the broad power of the district court to fashion protective order.").

b. Defendants' Speech Is Not A "Matter Of Public Significance."

The Supreme Court recognized that the First Amendment provides greater protection to speech that is "newsworthy" and "a matter of public significance." *See Bartnicki*, 532 U.S. 514 at 528, citing to *New York Times Co. v. United States*, 403 U.S. 713 (1971) (upholding the right of the

[4] Substack also cites to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). This case does not support Defendants' arguments because it stands for the proposition that "the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection". Here, the Sealed Report is not and was not at the time of Defendants' possession and dissemination a record open to public inspection.

press to publish "information of great public concern" like the Pentagon Papers)[5]; *see also Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (noting less rigorous First Amendment protections for matters of purely private significance which do not implicate the same constitutional concerns as matters of public concern) *citing Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758-759 (1985) (recognizing not all speech is of equal First Amendment importance and "speech on public issues occupies the highest rung of the hierarchy of First Amendment values").

Bartnicki plainly dealt with "newsworthy" matters. *Bartnicki*, 532 U.S. at 518 (involving publication of illegally recorded conversation where union President made threatening comments to School Board President during a highly publicized public union negotiation that "would have been newsworthy" had they "been made in a public arena"). The *Bartnicki* Court refused to determine broadly that truthful publication may never be punished, but it held that, after weighing the First Amendment interests against the competing interests in that matter, the interests served by the law at issue did not justify restricting a journalist's "truthful" speech on a "matter of public significance." *Id*. The speech in *Bartnicki*, unlike Defendants' dissemination of the Sealed Report, was an unsealed, newsworthy matter of public significance that concerned public issues; use of public funds; and ongoing threats of violence against members of the public School Board. That Court concluded that had the statements been made in a public arena they would have been "newsworthy," whereas here the arrest was initially public and then illegally made public again by Poulson's September 2023 post but was not newsworthy. Far from a public entity, Poulson admits that the public had no interest in Premise Data. And there was no suggestion of ongoing threats to members of a public board. Moreover, Substack offered no support for its conclusory contention that Poulson's blog posts and dissemination of the Sealed Report was a "matter of public significance."

c. Defendants' Speech Was Not "Truthful".

In determining truthfulness, the "pertinent question" is whether a "reasonable fact finder" could conclude that the statements "as a whole, or any of its parts, directly made or sufficiently implied a false assertion of defamatory fact that tended to injure" plaintiff's reputation. *James v. San Jose Mercury News, Inc.*, 17 Cal.App.4th 1, 13 (1993); *see also Wilbanks*, 121 Cal.App.4th at 902 (speech is not truthful if "a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion." Where a speaker states "incomplete" facts, the statements may

[5] Poulson rejected the comparison of his posts to the Pentagon Papers as an "an exaggerated claim." (Baskin Decl., Exh. 5, p. 3/7)

imply a false assertion of fact. *Id.*, at 903. Further, where the speaker "implies a knowledge of facts which may lead to a defamatory conclusion," the implied facts may constitute defamation. *Eisenberg v. Alameda Newspaper, Inc.*, 74 Cal.App.4th 1359 (1999). Here, Poulson's statements falsely imply that Plaintiff was guilty of having engaged [redacted] and state falsely that the arrest was deemed to have occurred. (Scherer Decl. ¶¶10-13; Plaintiff Decl. ¶¶30-31)

d. Defendants Did Not Legally Receive The Sealed Report.

Defendants did not – and could not – lawfully receive the Sealed Report, when doing so was unlawful under Penal Code § 11143 and Labor Code § 432.7(g)(3).[6] *See Loder v. Municipal Court*, 17 Cal.3d 859, 868 (1976) (comparing the sealed report to "contraband"). *See also Bartnicki*, 532 U.S. at 548 (dissent) (Scalia, A. dissenting) (recognizing that, even without an express prohibition on receipt, "knowingly receiving and disclosing" the protected speech is "hardly … law-abiding"). Further, the First Amendment does not protect illegal conduct in connection with newsgathering, and the press is not "immune from liability for crimes and torts committed in news gathering activities." *Nicholson v. McClatchy Newspapers*, 177 Cal.App.3d 509, 513 (1986).

e. The Ability to Seal an Arrest Record Serves a Compelling Interest.

Even if Defendants obtained truthful information lawfully, imposing liability for the dissemination of a Sealed Report serves the need to further state interest of highest order – i.e., giving meaning to the Legislature's decision to enact laws that allow for individuals who have suffered arrest without conviction to seal their records and giving meaning to an order by a court of competent jurisdiction. Section 851.91 and 851.92 provide specific parameters for who and how records can be sealed. The restriction of disseminating sealed information is not a content-based restriction because the restriction is not based on the topic discussed or the idea or message expressed. *See Loder*, 17

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[6] Labor Code § 432.7(g)(3) is not limited to employers or actions affecting employment. *Rutherford v. S.E.C.*, 842 F.2d 214 (9th Cir. 1988), referred to subsection (a)(1) when it stated that "[t]he California provision, by its own terms, is applicable only to employers." *Id.* at 216. The provision addressed by Rutherford – subsection (a)(1) – expressly applies only to "employers." See *Id.*; Cal. Lab. Code § 432.7(a)(1). Subsection (g)(3), by contrast, applies to any "person." See Cal. Lab. Code § 432.7(g)(2) and (3). The various subsections of section 432.7 impose different restrictions on different groups of people. So while (g)(1) is limited to law enforcement employees who act with an intent to affect employment, (g)(2) prohibits "any other person" from disclosing the information for any reason whatsoever and (g)(3) prohibits an unauthorized person from knowingly receiving or possessing the information. See Cal. Lab. Code § 432.7(g).

Cal.3d at 868. Moreover, the Supreme Court has recognized explicitly "California could decide not to give out arrestee information at all without violating the First Amendment." *See Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 40 (1999).

Here, in determining whether to provide a legal pathway to sealing an arrest record, the Legislature contemplated the collateral consequences suffered by individuals who suffer an arrest but are not convicted alongside the right of public access to a record. See 2017 California Senate Bill No. 393, California 2017-2018 Regular Session.

2. 47 U.S.C. § 230 Does Not Immunize Substack.

While courts have held that 47 U.S.C. § 230(c)(1) ("Section 230") provides broad immunity in certain circumstances, "this immunity is not limitless." *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 739 (9th Cir. 2024) *citing Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (Section 230(c)(1) does not "declare[] a general immunity from liability deriving from third-party content" and reversing District Court's finding of immunity under Section 230 because all of the plaintiffs' claims are premised on Meta's publication of a third-party advertisement).

a. The Language Of Section 230 Provides For A Narrow Limitation On Liability.

Contrary to the approaches taken by many courts, Section 230(c)(1) is a narrow limitation on liability that applies only to speech actions, and even more specifically only to such actions that attempt to impose liability on a provider or user of an interactive computer service as though it were the original author of a third-party's speech. See CDA 230(c)(1) See *Rotkiske v. Klemm*, 589 U.S. 8, 13 (2019) (question of statutory interpretation must begin with plain text of the law). Entitled "Protection for 'Good Samaritan' blocking and screening of offensive material," Section 230(c) contains two subsections. Section 230(c)(1) provides 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). Section 230(c)(2), provides in relevant part that "[n]o provider or user of an interactive computer service shall be held liable on account of … any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* § 230(c)(2).

Section 230(c)(1) allows an ICSP to be held liable under common-law principles as the "distributor" of defamatory content "if, but only if, [it] knows or has reason to know of its defamatory

character." Restatement (Second) of Torts § 581 (1977). Section 230(c)(2) does not immunize ICSPs that do not act as Good Samaritans—namely, those that do nothing to address harm, that have a pre-existing duty to address harm yet fail to do so, or that contribute to or profit from harm.

Thus, on its face and contrary to Substack's argument, Section 230 does not broadly immunize ICSPs against any and all state-law claims involving content submitted by third parties. Rather, the text addresses two specific circumstances: (i) under Section 230(c)(1), merely providing access to third-party content does not make an ICSP the "publisher" or "speaker" of that content; and (ii) under Section 230(c)(2), an ICSP is immune from liability for actions taken voluntarily and in good faith to restrict access to objectionable content. Cases reading Section 230 to have a broader preemptive effect than provided for in (c)(1) and (c)(2) have departed from the statutory text.

Accordingly, in this instance, where Defendants knew that it was in receipt and possession of and disseminating the Sealed Report in violation of California law and its own policies, Section 230 does not immunize Defendants.

b. Section 230 Does Not Provide Immunity from the Statutory Prohibition on Receiving and Possessing The Sealed Report.

CDA Section 230 only applies to claims that "seek to treat [defendants] as a publisher or speaker." *Calise*, 103 F.4th at 739, citing *Barnes*, 570 F.3d at 1100 (immunity to an interactive computer service provider against claims that "seek to treat [the provider] as a publisher or speaker."); *see also In re Facebook Simulated Casino-Style Games Litig.*, No. 22-16888, 2024 WL 2287200, at *2 (9th Cir. May 21, 2024) ("To determine whether a particular claim should be dismissed under Section 230, a court must identify "the underlying legal duty" and determine whether "it seek[s] to hold the defendant liable as a 'publisher or speaker' of third-party content.") citing *HomeAway.com, Inc. v. City of Santa Monica,* 918 F.3d 676, 682 (9th Cir. 2019); *Doe v. Internet Brands* 824 F.3d 846, 851, 853(9th Cir. 2016); *Hassell v. Bird*, 5 Cal. 5th at 544 ("we recognize that not all legal duties owed by Internet intermediaries necessarily treat them as the publishers of third party content, even when these obligations are in some way associated with their publication of the material."). Here, California law prohibits any unauthorized person from being in possession of the Sealed Report. See Labor Code § 432.7(g)(3); Penal Code § 11143.

Here, Defendants' conduct violates these laws. Defendants are prohibited by California law from knowingly receiving or possessing information "pertaining to an arrest or other proceeding that did not result in conviction." Lab. Code § 432.7(g)(3). Penal Code § 11143 criminalizes this same conduct.

See Loder v Municipal Court, 17 Cal.3d 859, 873 (1976) (referring to a sealed arrest report that did not lead to a conviction as "contraband" because it is illegal to even possess it). Here, the unlawful nature of Defendants' conduct is exacerbated because this report and information were sealed by court order that Defendants never sought to unseal, and therefore the conduct also violates Penal Code § 166.

This illegal conduct forms the basis of Defendants' liability to Plaintiff because the source of their duty to Plaintiff arises from the statutes they violated. *See In re Apple Inc. App Store Simulated Casino-Style Games Litig.*, 625 F.Supp.3d 971, 994 (N.D. Cal. 2022) (permitting one theory of liability to proceed where Plaintiffs did not attempt to treat the Platforms as "the publisher or speaker" of third-party content, but rather sought to hold the Platforms responsible for their own illegal conduct), appeal dismissed and remanded sub nom. *In re Facebook Simulated Casino-Style Games Litig.* (9th Cir. May 21, 2024) No. 22-16888, 2024 WL 2287200. Thus, these statutes do not seek to hold these defendants liable a "publisher or speaker" of third-party content. Rather, they are liable for being knowingly in possession of contraband. The prohibition on receipt of the sealed document and the information contained in it is a separate legal duty than the prohibition on dissemination. See *Bartnicki v. Vopper*, 532 U.S. 514, 548 (2001) (dissent by J. Scalia) (recognizing the distinction between a law that prohibits dissemination and one that prohibits receipt).

Substack's demurrer must be denied because Substack simply ignores Plaintiff's allegations. Contrary to Substack's statement that "the only accusation against Substack is that it refuses to take down content posted by Poulson," (Demurrer, p. 17), Plaintiff actually violated the law by being in receipt and possession of the Sealed Report. (Complaint, ¶¶69, 175) *See Loder*, 17 Cal.3d at 873. Substack's ongoing violations of these provisions give rise to Plaintiff's claims. *See Jacobs Farm/Del Cabo, Inc. v. W. Farm Serv., Inc.*, 190 Cal.App.4th 1502, 1526 (2010) (recognizing negligence per se and noting the presumption of negligence arises if: (1) the defendant violated a statute; (2) the violation proximately caused the plaintiff's injury; (3) the injury resulted from the kind of occurrence the statute was designed to prevent; and (4) the plaintiff was one of the class of persons the statute was intended to protect).

c. Section 230 Does Not Provide In This Instance.

If "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). This presumption against preemption applies, not "only to the question whether Congress intended any pre-emption at all," but also to "questions concerning the scope of its intended invalidation of state law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphases

added; citations and quotation marks omitted). Thus, even though Congress expressly intended to displace state actions that are inconsistent with Section 230(c), see 47 U.S.C. § 230(e)(3), this Court must still apply a "narrow interpretation of such an express command" to ensure that the scope of displacement is consistent with this Court's presumption against preemption, *Lohr*, 518 U.S. at 485.

Moreover, "[n]one of the policies within section 230(b) state or suggest an express immunity from compliance with state court orders." *See Hassell v. Bird*, 5 Cal.5th 522, 568; 571 (2018), (dissent disagreeing with "plurality opinion's conclusion that section 230 protects an Internet platform from complying with a state court order simply because the platform operates as a publisher of third-party speech."). As explained by the dissent, Section 230(c)(2) "does not endow Internet platforms with a complete immunity from compliance with state court orders." *Id.*

Defendants are not immune because they "materially contribute" to the illegality in question – namely the possession and dissemination of the Sealed Report. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170 (9th Cir. 2008) (denying Section 230 immunity website required users to disclose protected characteristics to tailor results that steered users according to discriminatory preferences which limited access to housing in violation of housing antidiscrimination laws) Here, the facts are even more straightforward and do not require an analysis of whether Defendants induced discriminatory content because they are responsible for what makes the displayed content unlawful.

IV. CONCLUSION

For the reasons stated herein and in conjunction with arguments set forth in Plaintiff's Opposition to Defendants AWS, Tech Inquiry, and Poulson's Motions to Strike, Defendant Substack's Motion to Strike Plaintiff's entire Complaint must be denied.

Dated: January 14, 2025

Respectfully submitted,

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