

1 Michael P. Esser (SBN 268634)  
KIRKLAND & ELLIS LLP  
2 555 California Street  
San Francisco, CA 94104  
3 United States  
Telephone: +1 415 439 1400  
4 Facsimile: +1 415 439 1500  
michael.esser@kirkland.com  
5

6 K. Winn Allen, P.C. (admitted *pro hac vice*)  
Devin S. Anderson (admitted *pro hac vice*)  
KIRKLAND & ELLIS LLP  
7 1301 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
8 United States  
Telephone: +1 202 389 5000  
9 Facsimile: +1 202 389 5200  
winn.allen@kirkland.com  
10 devin.anderson@kirkland.com

11 *Attorneys for Defendants Instagram, LLC,*  
*Facebook Operations, LLC, and Meta*  
12 *Platforms, Inc.*

13  
14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**  
16 **SAN FRANCISCO DIVISION**

17 DAWN DANGAARD, *et al.*,  
18  
19 Plaintiffs,  
20 v.  
21 INSTAGRAM, LLC, *et al.*,  
22 Defendants.

CASE NO. 3:22-cv-01101-WHA

**DEFENDANTS INSTAGRAM, LLC,  
FACEBOOK OPERATIONS, LLC,  
AND META PLATFORMS, INC.’S  
NOTICE OF MOTION AND MOTION  
TO DISMISS AND STRIKE THE  
SECOND AMENDED CLASS ACTION  
COMPLAINT**

Complaint Filed Date: Sept. 28, 2022  
Judge: William Alsup  
Hearing Date: November 16, 2022  
Time: 11:30 am  
Courtroom: 12, 19th Floor

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 Please take notice that on November 16, 2022 at 11:30 am, pursuant to this Court’s April 9, 2022  
3 order, the undersigned will appear before the Honorable William Alsup of the United States District Court  
4 for the Northern District of California in Courtroom 12, 19th Floor, at the San Francisco Courthouse, 450  
5 Golden Gate Avenue, San Francisco, CA 94102, and shall then and there present defendants Instagram,  
6 LLC, Facebook Operations, LLC, and Meta Platforms, Inc.’s Motion to Dismiss and Strike the Second  
7 Amended Class Action Complaint (the “Motion”).

8 The Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points  
9 and Authorities, the Supporting Declaration of Devin S. Anderson (the “Anderson Decl.”) and exhibits  
10 attached thereto, the pleadings and other papers on file in this action, any oral argument, and any other  
11 evidence the Court may consider in hearing this Motion.

12 **RELIEF REQUESTED**

13 Instagram, LLC, Facebook Operations, LLC, and Meta Platforms, Inc. (collectively, “Meta”)   
14 request that the Court strike or dismiss the second amended complaint with prejudice.

15 **STATEMENT OF THE ISSUES TO BE DECIDED**

16 On September 28, 2022, plaintiffs, who seek to represent a class of adult-entertainment performers,  
17 filed a second amended complaint alleging that Meta employees have engaged in a multi-layered scheme  
18 to “blacklist” or remove, block, and otherwise reduce the visibility of plaintiffs’ posts and accounts on  
19 social media. Plaintiffs bring claims for tortious interference with contract, tortious interference with  
20 business relationships, and a violation of California’s Unfair Competition Law (UCL), Business and  
21 Professions Code, § 17200 et seq. Meta moves to dismiss the second amended complaint under Federal  
22 Rule of Civil Procedure 12(b)(6), or alternatively, to strike the second amended complaint under  
23 California’s anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16. This Motion raises the following issues:

- 24 1. Whether plaintiffs’ claims should be dismissed under Federal Rule of Civil Procedure  
25 12(b)(6), because:
- 26 a. Plaintiffs have not plausibly alleged facts showing entitlement to relief.
  - 27 b. Plaintiffs’ claims are barred by Section 230 of the Communications Decency Act  
and the First Amendment of the U.S. Constitution.
  - 28 c. Meta is not vicariously liable for the alleged conduct of John Doe defendants.

- 1 2. Whether plaintiffs' claims should be stricken under California's anti-SLAPP statute,  
2 Section 425.16, because:
  - 3 a. Plaintiffs' claims arise from allegations about conduct that is protected under the  
4 First Amendment of the U.S. Constitution and is in connection with an issue of  
5 public interest, and therefore falls within the scope of Section 425.16.
  - 6 b. Plaintiffs have not shown a reasonable probability of prevailing on their claims.  
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**MEMORANDUM OF POINTS AND AUTHORITIES****PRELIMINARY STATEMENT**

1  
2  
3 This Court dismissed plaintiffs’ original complaint because they failed to “plead ‘enough facts to  
4 state a claim to relief that is plausible on its face’ and to ‘nudge[] their claims across the line from  
5 conceivable to plausible.” ECF No. 71 at 1–2 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
6 (2007)). The Court directed plaintiffs to come forward with “their best case.” *Id.* at 1. Plaintiffs filed a  
7 second amended complaint, but it only confirms that plaintiffs’ best case is no case at all. It turns out  
8 there was a reason why plaintiffs “chose not to” plead more than they had in their prior complaint, *id.*: the  
9 “information” that supposedly backed up their information-and-belief allegations in no way contains  
10 “factual information that makes the inference of culpability plausible.” *Soo Park v. Thompson*, 851 F.3d  
11 910, 928 (9th Cir. 2017). Plaintiffs still have no *facts* that plausibly support their story that OnlyFans paid  
12 Meta employees to place plaintiffs on internal terrorist lists—and thereby remove or deprioritize plaintiffs’  
13 content—because plaintiffs linked to pornographic websites that were not OnlyFans.

14 Plaintiffs’ “new” evidence only confirms that their claims fail the plausibility test. The “wire  
15 transfer” evidence is not a wire transfer at all but a conspiracy-theory-tinged email that says “Follow the  
16 money” and has account information that does not even line up with a Meta employee that plaintiffs claim  
17 is at issue. *See* Second Am. Compl. (ECF No. 74) (“SAC”) Ex. D. Elsewhere, plaintiffs refer to an  
18 attorney who reviewed “more than 200 pages of internal Facebook documents,” SAC, ¶ 1(d), but those  
19 documents are not quoted or attached, the attorney is unnamed and conspicuously absent from plaintiffs’  
20 pleadings, and the counsel who actually signed plaintiffs’ complaint conspicuously avoids alleging those  
21 facts himself. Another piece of evidence is simply a list of names of adult entertainers and pornographic  
22 companies—nothing else. And plaintiffs cite a BBC article that simply recites and relies on the allegations  
23 plaintiffs are making in this case. *See id.* at Exs. B–C. This is not the stuff of a well-pled complaint.

24 Plaintiffs ultimately offer their “belie[f]” that the “allegations . . . will likely have evidentiary  
25 support after a reasonable opportunity for . . . discovery,” which is a formulation they use at least 13 times  
26 in the second amended complaint. *See, e.g.*, SAC ¶¶ 8, 27, 64, 66, 67, 73, 88. That gets things backwards.  
27 Federal-court class actions do not proceed on a hope and a prayer that plaintiffs might develop support for  
28



1 *id.* ¶ 5 (adult entertainers “rely on interactions on social media platforms such as Instagram and Twitter to  
2 guide customers to their pages on AE Platforms”). “Consumers are charged to access the content on” the  
3 pornographic websites, “with the revenue split between” the platform and the adult entertainer. *Id.* ¶ 5.  
4 Plaintiffs’ use of Facebook and Instagram to “drive traffic” to their pornographic content is the “lifeblood”  
5 of their businesses. *E.g., id.* ¶¶ 7, 41. Plaintiffs allege that they link to websites like cams.com (“Hook  
6 up online with hot cam models around the world for live adult chat and video sex here”), chaturbate.com  
7 (a hybrid of two words that speaks for itself), and streamate.com (also self-explanatory). *Id.* ¶¶ 98, 104.

8 Plaintiffs complain about the removal of some of their posts (the content of which they notably  
9 omit) or that their accounts were suspended altogether. *Id.* ¶¶ 98–110. Each plaintiff links to OnlyFans  
10 as well as other pornographic websites that are not affiliated with OnlyFans. *Id.* ¶¶ 103–04, 109. Evans  
11 claims that “her followers were receiving many fewer of her posts than they had previously received” and  
12 that her Instagram account was deleted. *Id.* ¶¶ 99, 101. The account was restored “three days later.” *Id.*  
13 ¶ 101. Over the course of the purported scheme, Evans alleges that the number of her followers has  
14 *increased* from “105,000 in July 2020” to “almost 300,000 followers” today, but that “many of her posts  
15 are viewed by less than 2,000 users.” *Id.* ¶¶ 101–02. Evans has used both cams.com and OnlyFans. *Id.*  
16 ¶ 103.

17 Pierce has used Instagram to link to OnlyFans, chaturbate.com, and streamate.com. *Id.* ¶ 104.  
18 Pierce claims that her Instagram site was deleted, but that Instagram allowed her to set up a new account  
19 after meeting with her union’s lawyer about the enforcement of Meta’s policies concerning sexually  
20 explicit content. *Id.* ¶ 105. She alleges that Twitter and Snap deleted her accounts, too, after she used  
21 those sites to link to pornographic websites. *Id.* ¶¶ 105–06. Pierce “thinks social media companies are  
22 gaining too much power on data as well as censorship hurting thousands of adult models all over the world  
23 every day.” *Id.* ¶ 107.

24 Ruby says she uses sexpanther.com (“Explore your fantasies and sext with your favorite models  
25 today!”), loyalfans.com, OnlyFans, and two defunct websites (unfiltered.com and stars.avn.com). *Id.*  
26 ¶ 109. She claims that some of her Instagram posts were deleted and that she has “been blocked from  
27  
28

1 posting on Facebook for 30 day periods because of purported violations of Community Standards” that  
 2 she disagrees with. *Id.* ¶ 110.

3 Plaintiffs’ business model has at all relevant times violated Meta’s Community Standard governing  
 4 Sexual Solicitation. Under that policy, users may not post content that offers “[s]ex chat[s] or  
 5 conversations,” or “[n]ude photos/videos/imagery/sexual fetish items.”<sup>1</sup> Nor may users link to outside  
 6 websites that contain that sort of content. Meta’s Sexual Solicitation Community Standard expressly tells  
 7 users that they must “not post” content that “links to external pornographic websites.”<sup>2</sup> *Id.* If a user posts  
 8 content that violates the Sexual Solicitation (or any other) Community Standard, “Meta will remove it.”  
 9 Meta tracks users’ violations (what Meta calls “strikes”), and depending on a user’s “number of strikes,”  
 10 Meta may “restrict[] or disable[]” that user’s account.<sup>3</sup>

11 Plaintiffs allege that their content or accounts were removed or deprioritized by Meta not for their  
 12 violations of the Sexual Solicitation standard, but rather because their content linked to adult-  
 13 entertainment platforms that were not affiliated with OnlyFans (even though plaintiffs themselves linked  
 14 to OnlyFans, too). They claim that their content or accounts were deleted or deprioritized as part of a  
 15 “blacklisting” scheme, which plaintiffs define as “a process whereby social media platforms suspend or  
 16 delete particular accounts or otherwise reduce their visibility.” SAC ¶ 33. Plaintiffs allege that this  
 17 “blacklisting” was accomplished by adding “false classifier/filtering information to . . . individual  
 18 databases/training data and/or lists of dangerous organizations and individuals . . . , some or all of which  
 19 were then included in one or more shared databases or lists,” thereby “falsely identifying” adult  
 20 entertainers or the adult-entertainment platforms they use as related to terrorism. *Id.* ¶ 66. Each plaintiff  
 21 claims their “revenue” was “adversely affected” by the blacklisting, but no plaintiff provides specifics.  
 22 *Id.* ¶¶ 102, 107, 110.

23  
 24  
 25 <sup>1</sup> Anderson Decl. Ex. 1, Meta’s Community Standards – Sexual Solicitation. Plaintiffs’ complaint  
 26 references and relies upon Meta’s Community Standards, SAC ¶¶ 36, 110, which are therefore  
 incorporated into the complaint by reference. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

27 <sup>2</sup> Anderson Decl. Ex. 1.

28 <sup>3</sup> Anderson Decl. Ex. 2, How Meta enforces its policies – Taking down violating content.

1 The alleged purpose of this blacklisting scheme was to promote OnlyFans at the expense of the  
 2 other adult-entertainment platforms. In support of this “blacklisting” theory, plaintiffs allege (1) that in  
 3 late 2019, web traffic to OnlyFans began increasing; and (2) web traffic to three unidentified adult-  
 4 entertainment platforms began decreasing. *Id.* ¶¶ 7, 94, 96. While OnlyFans’ web traffic increased  
 5 moderately in late-2019, traffic on the site skyrocketed beginning in March of 2020, which was the onset  
 6 of the global COVID-19 pandemic. *See id.* ¶ 94. In March of 2020, 60,000 content creators flocked to  
 7 OnlyFans.<sup>4</sup> And in April of 2020, popular recording artists Beyoncé and Megan Thee Stallion released  
 8 the song “Savage Remix,” in which Beyoncé referenced OnlyFans.<sup>5</sup> In the 24-hour period following the  
 9 song’s release, OnlyFans experienced a 15% spike in internet traffic,<sup>6</sup> and observed daily sign-ups of  
 10 200,000 users and 7,000–8,000 creators.<sup>7</sup>

11 Meta moved to dismiss or strike plaintiffs’ prior complaint. After plaintiffs’ counsel referenced  
 12 “information outside the pleadings that may support their claims,” the Court directed plaintiffs to “re-  
 13 plead their complaint to meet the issues raised” in Meta’s prior motion. ECF No. 71 at 1. The Court  
 14 specifically referenced plaintiffs’ allegations made “on information and belief” when plaintiffs “could  
 15 have gathered such information from th[e] adult . . . performers themselves.” *Id.* at 2. The Court further  
 16 noted that the alleged “automated takedowns is only one potential explanation” for increased web traffic  
 17 to OnlyFans, and that “plaintiffs need to provide factual information that makes such an inference  
 18 plausible.” *Id.* Finally, the Court found “plaintiffs’ allegations of harm [to be] vague,” and thus directed  
 19 plaintiffs to “provide more detailed allegations regarding the extent of their injuries.” *Id.* Plaintiffs filed  
 20 a second amended complaint that includes “key additional allegations” and exhibits, all but one of which  
 21 plaintiffs submitted with the prior briefing. SAC ¶ 2; *see* ECF Nos. 43-1 through 43-7, 46–47.

22 \_\_\_\_\_  
 23 <sup>4</sup> Anderson Decl. Ex. 3, Gabrielle Drolet, *The Year Sex Work Came Home*, N.Y. Times, Apr. 10, 2020,  
<https://www.nytimes.com/2020/04/10/style/camsoda-onlyfans-streaming-sex-coronavirus.html>.

24 <sup>5</sup> Anderson Decl. Ex. 4, Marlow Stern, *Beyoncé Gives Adult Site OnlyFans Big Bump With ‘Savage’ Remix*  
*Shout-Out*, The Daily Beast, Apr. 30, 2020, <https://www.thedailybeast.com/adult-site-onlyfans-experiences-big-beyonce-bump-following-savage-remix>.

25 <sup>6</sup> *Id.*

26 <sup>7</sup> Anderson Decl. Ex. 5, Otilia Steadman, *Everyone Is Making Porn At Home Now. Will The Porn*  
*Industry Survive?*, BuzzFeed News, May 6, 2020, <https://www.buzzfeednews.com/article/otilliesteadman/coronavirus-amateur-porn-onlyfans>.

## LEGAL STANDARDS

In ruling on a motion to dismiss, courts “need not accept as true allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Tietzworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123, 1132 (N.D. Cal. 2010). And “when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim,” the analysis of plaintiff’s likelihood of success merges with the Rule 12(b)(6) analysis. *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018).

## ARGUMENT

Plaintiffs’ second amended complaint does not remedy the problems with the prior version, and their claims should be dismissed with prejudice. First, none of plaintiffs’ new allegations pushes their claims across the plausibility line. Indeed, most of the purportedly new allegations are simply restatements of the same “information and belief” allegations about which this Court previously expressed skepticism. And what additional information plaintiffs supply only underscores the bankruptcy of their theory. There are simply no allegations of *fact* that plausibly show that plaintiffs’ posts and accounts were removed because Meta employees were working at the behest of OnlyFans to suppress content that linked to non-OnlyFans websites. The alleged experiences of plaintiffs—who each used OnlyFans themselves and were still subject to enforcement—show the opposite. Second, plaintiffs have not adequately pleaded that they experienced an actionable injury caused by the purported scheme. Plaintiffs have declined the Court’s invitation to be more specific about their injuries. Third, even if plaintiffs’ allegations were true, an editorial decision by Meta not to subject OnlyFans-related content to enforcement is protected twice over by the First Amendment and Section 230(c)(1) of the CDA. Fourth, plaintiffs’ claims also suffer from state-law-specific defects. Plaintiffs’ speech-targeting claims also fall squarely within California’s anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16.

### **I. Plaintiffs’ Blacklisting Theory Is Not Plausible**

Plaintiffs’ second amended complaint does not bring plaintiffs any closer to clearing the threshold plausibility requirement. “Under Rule 12(b)(6), a complaint should be dismissed if it fails to include ‘enough facts to state a claim to relief that is plausible on its face.’” *Weston Fam. P’ship LLLP v. Twitter, Inc.*, 29 F.4th 611, 617 (9th Cir. 2022) (quoting *Twombly*, 550 U.S. at 570). Claims are plausible only

1 when the well-pleaded facts “allow[] the court to draw the reasonable inference that the defendant is liable  
2 for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The need at the pleading stage  
3 for allegations plausibly suggesting (not merely consistent with) [liability] reflects the threshold  
4 requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is  
5 entitled to relief.’” *Twombly*, 550 U.S. at 557. “Where a complaint pleads facts that are ‘merely consistent  
6 with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement  
7 to relief.’” *Iqbal*, 556 U.S. at 678. “[I]t is only by taking care to require allegations that reach the level  
8 suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases  
9 with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence.’” *Twombly*,  
10 550 U.S. at 559. And claims are not plausible when based on “‘naked assertion[s]’ devoid of ‘further  
11 factual enhancement.’” *Iqbal*, 556 U.S. at 678.

12 *Twombly* itself is right on point here. In that case, the plaintiffs alleged facts that were merely  
13 “consistent with [a] conspiracy” to engage in anticompetitive conduct, but were “just as much in line with  
14 a wide swath of rational and competitive business strategy.” 550 U.S. at 554. And plaintiffs’ “ultimate  
15 allegations” that defendants had in fact entered into an anticompetitive contract or combination was  
16 alleged exclusively “upon information and belief.” *Id.* at 551. The Supreme Court held that “a bare  
17 assertion of conspiracy” did not “nudge[] [the plaintiffs’] claims across the line from conceivable to  
18 plausible.” *Id.* at 556, 570.

19 As Meta’s prior motion to dismiss emphasized, plaintiffs allege a sensational, multi-faceted  
20 conspiracy between Meta employees and individuals or entities affiliated with OnlyFans involving covert  
21 payments and manipulation of both shared terrorism-related databases and Meta’s own internal  
22 algorithms. But each of the critical links in this alleged scheme was supported only by allegations “on  
23 information and belief”—a pleading crutch that was employed 39 times in the prior complaint. “For a  
24 conspiracy of the scale alleged by this complaint, one would expect at least some evidentiary facts to have  
25 been located and pled.” *Kelsey K. v. NFL Enters., LLC*, 254 F. Supp. 3d 1140, 1144 (N.D. Cal. 2017).  
26 Plaintiffs had none. Instead, plaintiffs’ allegations that their content was removed or their accounts  
27 suspended were easily explained by Meta’s enforcement of its Sexual Solicitation Community Standard,  
28



1 which flatly prohibits content that links to pornographic material. Anderson Decl. Ex. 1. And the fact  
2 that OnlyFans grew in popularity was most obviously explained by the fact that prominent celebrities  
3 became early adopters or endorsers of OnlyFans, catapulting the platform into the pandemic-era zeitgeist.  
4 In response to Meta’s prior motion and plaintiffs’ references at the hearing to evidence that they apparently  
5 had but did not plead, this Court gave plaintiffs another shot. But the Court warned plaintiffs that they  
6 needed to come forward with “factual information that makes” plaintiffs’ theory “plausible.” ECF No. 71  
7 at 2.

8 Plaintiffs’ second amended complaint confirms that they do not have the goods. In many places,  
9 their complaint simply replaces what plaintiffs previously alleged “on information and belief” with a  
10 statement that plaintiffs “believe” their “allegations will likely have evidentiary support after a reasonable  
11 opportunity for discovery.” SAC at 1,; *id.* ¶¶ 8, 27, 64, 66, 73, 88. Some version of this formulation  
12 appears at least 13 times in plaintiffs’ complaint. But this please-let-us-take-discovery formulation is no  
13 better than the information-and-belief formulation this Court faulted plaintiffs for on the prior complaint.  
14 Plaintiffs do not get to make outrageous allegations about a conspiracy while acknowledging in the same  
15 breath that they need discovery to actually come forward with evidence of that conspiracy. Plaintiffs must  
16 plead facts plausibly showing a claim and *then* they get discovery—not the other way around. *See, e.g.,*  
17 *Mujica v. AirScan Inc.*, 771 F.3d 580, 593 (9th Cir. 2014) (“The Supreme Court has stated, however, that  
18 plaintiffs must satisfy the pleading requirements of Rule 8 *before* the discovery stage, not after it.”);  
19 *Pallamary v. Elite Show Servs., Inc.*, 2018 WL 3064933, at \*4 (S.D. Cal. June 19, 2018) (“[T]he Ninth  
20 Circuit Court of Appeals and the United States Supreme Court have both determined that a plaintiff must  
21 satisfy the pleading requirements of [Rule 8] *before* proceeding to discovery.” (emphasis added)).  
22 Plaintiffs’ new amended complaint identifies several “key additional allegations.” SAC ¶ 2. But none of  
23 these allegations supplies the missing factual information that would make their far-fetched conspiracy  
24 theory plausible.

25 **BBC article.** Plaintiffs added quotes from a BBC article that was published on the eve of the filing  
26 of plaintiffs’ first amended complaint. SAC ¶¶ 2(a), 9; SAC Ex. A (“OnlyFans accused of conspiring to  
27 blacklist rivals”). But the BBC article is simply reporting on a related case that plaintiffs’ counsel had  
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1 filed in Florida state court against the Fenix defendants. The article restates the allegations from the  
2 complaint in the Florida case, which contained the same allegations that were already in this complaint.  
3 SAC Ex. A at 2 (“BBC News has learned that rival adult website FanCentro has begun legal action”); *id.*  
4 (“[t]he claim . . . alleges”); *id.* (“FanCentro claims”); (“[a]ccording to the legal action”); *id.* (“according  
5 to the filing”); *id.* at 3 (“it is alleged”). The article goes on to quote plaintiffs’ counsel about his plans to  
6 issue a subpoena, and quotes one of the named plaintiffs in this case, Evans, who said “[w]e were seeing  
7 mass deletions without any real clear reason as to what was happening or why.” *Id.* at 3–4. The article  
8 also reports on an individual named “Camila” who posted photos linking to a pornographic website and  
9 who “began receiving violation notifications for content removed by Instagram.” *Id.* at 4–5. BBC claims  
10 to have “learned that Camila’s Instagram account status - only visible by engineering staff - was changed  
11 to ‘critical,’” which “meant it was not promoted as prominently any more [sic].” *Id.* at 5. BBC also spoke  
12 to another pornographic platform that “felt like a ‘bomb’ had been placed under his business,” when  
13 Instagram accounts stopped driving traffic to the site. *Id.* at 5–6. The article includes quotes from Meta,  
14 which stated that the “allegations were without merit” and that Meta “had investigated and found no  
15 evidence the shared hash database had been abused.” *Id.* at 3. The Global Internet Forum to Counter  
16 Terrorism (GIFCT)—the entity that plaintiffs claim was used to effectuate the scheme—also commented:  
17 “[w]e are not aware of any evidence to support the theories presented in this lawsuit.” *Id.* at 6.

18 The BBC article does not advance the ball. The only facts the article adds are: (1) an adult  
19 entertainer who used Instagram to link to pornography had posts removed and her account’s visibility  
20 diminished, and (2) a pornography website saw diminished traffic from Instagram. These facts mirror  
21 what plaintiffs have already alleged in this case: they use Instagram to drive traffic to pornographic  
22 websites and their Instagram posts were removed or suppressed. The most obvious explanation for that  
23 phenomenon isn’t a conspiracy to secretly manipulate terrorist databases. It is enforcement of Meta’s  
24 Sexual Solicitation Community Standard, which at all relevant times expressly prohibited content that  
25 “links to external pornographic websites.” Anderson Decl. Ex. 1. If anything, the BBC article  
26 significantly undermines plaintiffs’ claims because it reports—accurately—that Meta and GIFCT  
27 investigated these claims and found no evidence to support plaintiffs’ theories. And the fact that one of  
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1 the named plaintiffs admitted to the BBC that she did not see “any real clear reason as to what was  
2 happening or why” only further underscores that plaintiffs’ alleged conspiracy is make-believe. SAC Ex.  
3 A at 4.

4 **“Follow the money” email.** Plaintiffs next point to “detailed information about some of the  
5 alleged wire transfers” from the Fenix Defendants to Meta employees. SAC ¶ 2(c). Plaintiffs claim these  
6 are “cop[ies] of . . . genuine wire transfer[s],” *id.* ¶ 77, but the exhibit they cite is not a wire transfer at all.  
7 It is an email with the conspiracy-theory-laden subject line “Follow the money,” and the information about  
8 the email’s provenance (who sent it to whom and when) is redacted. SAC Ex. D at 1. [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 The “Follow the money” email contains obvious indicia of unreliability and provides no plausible  
14 support for plaintiffs’ allegation that there were payments. [REDACTED]

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED] Even plaintiffs recognize

4 how far-fetched their claim really is, acknowledging that “[p]laintiffs need discovery to ascertain whether”

5 these accounts “indeed are associated with those executives.” *Id.* ¶ 2(c).

6 Other indicators abound that drain any semblance of credibility from the “Follow the money”

7 email. [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED] The document’s

15 “format[ting],” containing peculiar bold emphases in random letters, itself bears indicia of unreliability.

16 In addition, plaintiffs claim that they have “retained” “[b]anking experts” who have “concluded

17 that the level of detail and format of the information had indicia of reliability sufficient to merit further

18 inquiry.” SAC ¶ 2(c). But that is hardly a ringing endorsement, and plaintiffs notably did not provide any

19 actual statements or evidence from these purported experts. Plaintiffs also reference a “phone call” from

20 a “very experienced and credible” “attorney who said he reviewed wire transfer records that appear to

21 have included at least some of the same transfers, and they appeared to him to have sufficient indicia of

22 reliability in that they did not appear to be faked.” *Id.* The extensive hedging in these statements and the

23 absence of that attorney’s name and signature from the complaint is all the evidence this Court needs to

24 disregard these allegations.

25 Moreover, plaintiffs’ complaint does not actually connect the alleged payments to any actions by

26 [REDACTED]. They do not allege that these individuals engaged in any “blacklisting.”

27 They do not allege that these individuals have any involvement with the databases at issue. And they

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1 certainly do not tie anything that these three individuals did to harm experienced by the plaintiffs  
2 themselves. The “Follow the money” email is so devoid of reliability and relevance that it cannot  
3 “nudge[]” plaintiffs’ claims any closer to the plausibility line. *Twombly*, 550 U.S. at 570.

4 ***The “200 pages” of Facebook documents.*** Plaintiffs next reference a conversation with this same  
5 unnamed attorney who “stated that he also reviewed a sample of what appeared to be more than 200 pages  
6 of internal Facebook documents concerning an inquiry into possible abuse of the shared hash database of  
7 the GIFCT.” SAC ¶ 2(d). The paragraph goes on to use the word “appeared” (or “appear”) two more  
8 times and adds an “on information and belief” statement for good measure. *Id.* These 200 pages of  
9 documents are not included with the complaint, nor are their contents quoted or referenced anywhere. The  
10 attorney remains unidentified. The attorney was not willing to sign a pleading in federal court under Rule  
11 11 that details what these “app[arently]” internal Facebook documents said. Plaintiffs’ counsel was not  
12 willing to allege those facts either, as shown by the careful wording in this paragraph. And it is of course  
13 no secret that Meta conducted an investigation into plaintiffs’ allegations. As the BBC article plaintiffs  
14 attach notes, Meta did not find any supporting evidence. SAC Ex. A at 3.

15 ***The alleged coverup.*** Although plaintiffs were supposed to provide factual information in this  
16 new complaint, they revert to form with the next allegation: “[o]n information and belief, at some point,  
17 there was an attempted coverup of the scheme, after some of the datasets were sufficiently corrupted, in  
18 which affected performers and platforms were shifted from a dangerous organization (terrorist)  
19 designation to a new sexual solicitation category (used also for trafficking).” SAC ¶ 2(e). This  
20 “information and belief” allegation should not be credited, and plaintiffs advance no actual facts to support  
21 it. Plaintiffs even acknowledge that they need discovery to develop support for this claim. *Id.* ¶ 88. And  
22 to reiterate, Meta has always had a Sexual Solicitation policy during the relevant time period, and by their  
23 own allegations, plaintiffs’ actions were always in violation of that policy.

24 ***The “whistleblower.”*** Plaintiffs next allege that they “have been informed that at some point, a  
25 whistleblower made a report to intergityline.facebook.com [sic] that overlaps with some of the allegations  
26 alleged herein.” SAC ¶ 2(f). Plaintiffs do not explain how, when, or by whom they were “informed” of  
27 the alleged existence of a “whistleblower” report or what the report says. It does not sound like they have  
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1 this information, because they immediately admit they “need copies of all internal analyses and writing  
2 related to the allegations of this Second Amended Complaint to plead with greater particularity.” *Id.*

3 ***The 21,000 Instagram accounts.*** Plaintiffs allege that their counsel received an anonymous email  
4 setting forth the usernames of more than 21,000 Instagram users. SAC ¶¶ 67. This tip allegedly bears the  
5 following heading: “20k+ ig users that FB labeled ‘dangerous individuals’ because they used sites that  
6 competed with onlyfans...most pages either deleted or shadow banned.” *Id.* ¶¶ 2(g), 67. But plaintiffs  
7 did not submit this email to the Court. They simply rely on a report prepared by a retained expert Jonathan  
8 Hochman, which is the same report he submitted in opposition to Meta’s first motion to dismiss. Mr.  
9 Hochman’s own description of the list makes clear that it could not possibly contain “users that FB labeled  
10 ‘dangerous individuals’ because they used sites that competed with onlyfans,” as the anonymous tipster  
11 claims. *Id.* *OnlyFans itself* appears on the list, along with Instagram’s *own* account (@instagram), as well  
12 as an unknown number of “famous Instagram personalities and other major brands” whom Mr. Hochman  
13 declines to identify. SAC Ex. B at 8 n.5. It is facially implausible that a list containing Instagram’s own  
14 account, OnlyFans, and other “famous Instagram personalities” and “major brands” is actually a list of  
15 usernames designated as “dangerous individuals” because the sites compete with OnlyFans. Mr.  
16 Hochman breezes past this obvious point and urges that the list of names is “authentic” because he  
17 ***“infer[s] that the 21K list is unlikely to be a recent creation, but more likely an authentic list of accounts  
18 that was created after the alleged scheme was implemented.”*** *Id.* ¶ 85 (emphasis Hochman’s). But this  
19 opinion, unsupported as it is, says nothing about whether the accounts were in fact designated as  
20 “dangerous individuals.” Again, the list of Instagram accounts that plaintiffs chose not to provide to the  
21 Court does nothing to fill the holes between plaintiffs’ conspiracy story and the actual facts that are  
22 pleaded.

23 ***The list of adult-content platforms.*** Plaintiffs’ final piece of information is a spreadsheet they  
24 claim they received from a tipster. SAC ¶¶ 2(h), 68. This document is just a list of pornographic websites.  
25 SAC Ex. C. Plaintiffs do not include the submission from the tipster. Plaintiffs do not include any factual  
26 information that would tie this list to anything relating to Meta. All they allege is that the list does not  
27 include OnlyFans. But a list of pornographic companies does nothing to fill in the factual information  
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1 that is actually missing here: evidence that plaintiffs' accounts were removed not for linking to  
2 pornographic websites in violation of Meta's policies, but instead because there was a covert effort  
3 directed by senior Meta executives to remove accounts that were not affiliated with OnlyFans.

4 \* \* \*

5 Stripped of "allegations that are conclusory, unwarranted deductions of fact, or unreasonable  
6 inferences," *Tietsworth*, 720 F. Supp. 2d at 1132, what do plaintiffs have? Just the following:  
7 (1) plaintiffs' business model involves using Meta's platforms to link to pornographic websites;  
8 (2) plaintiffs were also linking to OnlyFans; (3) plaintiffs had posts removed and, in some instances, their  
9 accounts suspended; and (4) OnlyFans experienced an increase in popularity, while other subscription-  
10 based pornographic websites saw more of a decline. SAC ¶¶ 36, 94, 96, 98, 101, 103–06, 109–10.  
11 Plaintiffs are back where they started: the actual allegations of fact are more consistent with enforcement  
12 of Meta's Community Standards, not a conspiracy. Indeed, the fact that plaintiffs were linking to  
13 OnlyFans alongside other sites and were still subject to removal makes this explanation far and away the  
14 most obvious one.

15 This case therefore involves a straightforward application of *Twombly*. Plaintiffs' "ultimate  
16 allegations" regarding the underlying cause driving these claims "are precisely the kinds of conclusory  
17 allegations that *Iqbal* and *Twombly* condemned and thus told [courts] to ignore when evaluating a  
18 complaint's sufficiency." *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 506 (6th  
19 Cir. 2013) (affirming dismissal of complaint where allegations of racially disparate treatment were made  
20 exclusively on information and belief). "When faced with two possible explanations, only one of which  
21 can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely  
22 consistent with' their favored explanation but are also consistent with the alternative explanation." *In re*  
23 *Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013). Rather, "[s]omething more is  
24 needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to  
25 render plaintiffs' allegations plausible within the meaning of *Iqbal* and *Twombly*." *Id.* Plaintiffs have not  
26 come close to clearing this hurdle, despite this Court inviting them to bring their "best case." ECF No. 71  
27 at 1.

## 1 II. Plaintiffs Have Not Pleaded Actionable Injuries

2 Plaintiffs have also not sufficiently alleged that they were injured by any purported scheme.  
 3 Plaintiffs can recover under their UCL claim only if they have “lost money or property as a result of the  
 4 unfair competition.” Cal. Bus. & Prof. Code § 17204. Under California law, “[l]ost profits are damages,  
 5 not restitution, and are unavailable in a private action under the UCL.” *Eco Elec. Sys., LLC v. Reliaguard,*  
 6 *Inc.*, 2022 WL 1157481, at \*10 (N.D. Cal. Apr. 19, 2022) (brackets in original) (quoting *Lee v. Luxottica*  
 7 *Retail N. Am., Inc.*, 65 Cal. App. 5th 793, 797 (2021)). Plaintiffs’ economic-tort claims likewise are viable  
 8 only if they can establish that they were injured because of the defendants’ conduct. *See Hahn v. Diaz-*  
 9 *Barba*, 194 Cal. App. 4th 1177, 1196 (2011) (reciting elements of intentional interference with contract,  
 10 including “resulting damage”); *Multimedia Patent Tr. v. Microsoft Corp.*, 525 F. Supp. 2d 1200, 1215  
 11 (S.D. Cal. 2007) (reciting elements of tortious interference with prospective economic advantage,  
 12 including “damages”). This Court previously noted that “plaintiffs’ allegations of harm” such as reduced  
 13 revenue “[we]re vague” and “lack[ed] specificity.” ECF No. 71 at 2. Plaintiffs have not remedied that  
 14 problem.<sup>8</sup>

15 **Evans.** Evans alleges that in 2019, she had 100,000 followers on Instagram. SAC ¶ 98. Despite  
 16 alleging that her account was deleted and reinstated three days later in January of 2020, Evans confirms  
 17 that her follower count in fact substantially *increased* from 2019 to present: “Her follower count was at  
 18 105,000 in July 2020, 199,000 in April 2021, . . . 283,000 in October 2021,” and “almost 300,000” at  
 19 present day. *Id.* ¶¶ 101–02. Evans insists that she was harmed, however, because “her posts were not  
 20 reaching as many of her followers as had been the case before 2019.” *Id.* The complaint contains no  
 21 specific allegations regarding the “reach” of Ms. Evans’ posts today in relation to their “reach” in 2019,  
 22 much less explain how that reduced reach has translated into lost revenue. In fact, the complaint  
 23 acknowledges that Evans has simply transferred her business from cams.com to OnlyFans. *Id.* ¶ 103.

24  
 25  
 26  
 27 <sup>8</sup> The named plaintiffs resubmit the same affidavits they (improperly) attached in opposition to Meta’s  
 28 first motion to dismiss and strike, which do no more than attest to the accuracy of the harm allegations  
 contained in the operative complaint. *See* SAC Exs. G–I



1           **Ruby.** Ruby does not even try to articulate specific harm. All she claims is that she now has  
2 “about 2,000 followers on Instagram.” She does not compare that count to prior years, nor does she  
3 explain how she has lost money or property as a result of any action taken against her account. *Id.* ¶ 110.

4           **Pierce.** Pierce provides the most specific allegations of harm, but she fails to tie that harm to  
5 anything Meta did. Pierce alleges that she suffered a reduction in followers following the deletion of her  
6 Instagram account in March of 2021, from 75,000 followers to 6,000 followers. *Id.* ¶¶ 104–05. Pierce  
7 alleges that this reduction caused her revenue to decline “from \$74,000 in 2020 to \$61,000 in 2021, to  
8 only \$43,000 in the first eight months of 2022.” *Id.* ¶ 108. That means Pierce is on track to earn \$64,500  
9 this year, which is an *increase* from the prior year. And Pierce does not allege facts showing that the  
10 alleged scheme between Meta and OnlyFans was the reason her Instagram account was deleted. The  
11 deletion of Ms. Pierce’s Instagram account is equally, if not more, consistent with Meta’s enforcement of  
12 its Sexual Solicitation Community Standard, which prohibits offers of “pornographic material (including,  
13 but not limited to, sharing of links to external pornographic websites.” Anderson Decl. Ex. 1. Pierce  
14 herself acknowledges that action had been taken against her account “for sexual [sic] explicit content.”  
15 SAC ¶ 105. Nor does the complaint allege facts suggesting that the deletion of Ms. Pierce’s account and  
16 the significant reduction in her follower count caused her minor variations in revenue. The decrease and  
17 subsequent increase in Pierce’s revenue is equally consistent with normal market fluctuations caused by  
18 shifting consumer preferences. Plaintiffs’ failure to plead actionable harm is fatal to each of their claims.

### 19   **III. CDA 230 And The First Amendment Bar Claims Seeking To Hold Meta Liable For Decisions** 20   **To Remove Content**

21           Even if plaintiffs had adequately pleaded facts to make their purported scheme plausible, their  
22 claims still fail because they are ultimately complaining about content-moderation decisions that are  
23 legally protected. Stripped of boilerplate allegations and legal conclusions, the alleged “scheme” boils  
24 down to this: Meta employees took actions to remove or demote plaintiffs’ content that linked to  
25 pornographic websites but did not do so as aggressively against other, unnamed individuals who linked to  
26 OnlyFans. SAC ¶ 7 (alleging “[t]he deletion and hiding of posts”); *id.* ¶ 8 (social media platforms  
27 “suspend[ed] or delete[d] [plaintiffs’] accounts or otherwise reduce[d] their visibility”); *id.* ¶¶ 33, 40–41,  
28 56, 60, 92, 95 (similar). Plaintiffs claim Meta accomplished this scheme by identifying their content for



1 inclusion in shared databases for dangerous or terrorism-related content. *Id.* ¶¶ 8, 57, 62–63. Plaintiffs  
2 allege that Meta employees took those actions out of greed or avarice, in exchange for payment from  
3 OnlyFans. *Id.* ¶¶ 73, 79. While the alleged technical mechanics of the purported “blacklisting” and  
4 payments are convoluted, the bottom line is not. The operative and dispositive allegations are that Meta  
5 engaged in identification, flagging, removal, and classification of content or user accounts. That action is  
6 doubly protected by both Section 230 of the CDA and the First Amendment.

7 Section 230(c)(1) of the CDA protects from liability “(1) a provider or user of an interactive  
8 computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or  
9 speaker (3) of information provided by another information content provider.” *Barnes v. Yahoo!, Inc.*,  
10 570 F.3d 1096, 1100–01 (9th Cir. 2009); *see* 47 U.S.C. § 230(c)(1). At bottom, this provision bars any  
11 claims that rest on “any activity that can be boiled down to deciding whether to exclude material that third  
12 parties seek to post online.” *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521  
13 F.3d 1157, 1170–71 (9th Cir. 2008). “Courts have routinely rejected a wide variety of civil claims . . .  
14 that seek to hold interactive computer services liable for removing or blocking content or suspending or  
15 deleting accounts (or failing to do so) on the grounds they are barred by the CDA.” *Murphy v. Twitter,*  
16 *Inc.*, 60 Cal. App. 5th 12, 27 (2021). Courts have applied these principles to dismiss claims brought  
17 against Meta for its decisions to remove content. *See, e.g., Fyk v. Facebook, Inc.*, 808 F. App’x 597, 598;  
18 *Ebeid v. Facebook, Inc.*, 2019 WL 2059662, at \*3–5 (N.D. Cal. May 9, 2019); *Sikhs for Just. “SFJ”, Inc.*  
19 *v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1092–96 (N.D. Cal. 2015).

20 Decisions to remove or deprioritize content posted by others are also protected by Meta’s First  
21 Amendment right to exercise editorial discretion over its private forums. *See Manhattan Cmty. Access*  
22 *Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (“when a private entity provides a forum for speech,” it  
23 may “exercise editorial discretion over the speech and speakers in the forum”). Such publication choices  
24 by private entities—“whether fair or unfair—constitute the exercise of editorial control and judgment”  
25 protected by the First Amendment. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).  
26 Courts have employed the First Amendment to dismiss lawsuits challenging Facebook’s content-  
27 moderation decisions. *See, e.g., Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 202 (2017) (“[T]he source  
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1 of . . . alleged injuries . . . is the content of the pages and Facebook’s decision not to remove them, an act  
2 ‘in furtherance of the . . . right of petition or free speech.’”); *La’Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d  
3 981, 991 (S.D. Tex. 2017) (acknowledging “Facebook’s First Amendment right to decide what to publish  
4 and what not to publish on its platform”); *Davison v. Facebook, Inc.*, 370 F. Supp. 3d 621, 629 (E.D. Va.  
5 2019) (“Facebook has, as a private entity, the right to regulate the content of its platforms as it sees fit.”).  
6 “[W]hatever the reason” a speaker may have for choosing to display (or not to display) particular speech,  
7 that decision “is presumed to lie beyond the government’s power to control.” *Hurley v. Irish-Am. Gay,*  
8 *Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995).

9 This case involves a straightforward application of these principles. When the complaint’s rhetoric  
10 and conclusory allegations are disregarded, the factual allegations are nothing more than complaints about  
11 content-moderation decisions. The relevant content here for purposes of both the CDA and the First  
12 Amendment is the plaintiffs’ content that was allegedly removed from Facebook or Instagram. It is the  
13 removal of that content that purportedly injured plaintiffs. Because “removing content is something  
14 publishers do, . . . to impose liability on the basis of such conduct necessarily involves treating” Meta as  
15 a publisher of content created by plaintiffs in violation of the CDA. *Barnes*, 570 F.3d at 1103. Likewise,  
16 decisions by Meta to remove content created by others from its platforms falls within the heartland of the  
17 editorial decision-making protected by the First Amendment. *See, e.g., Hurley*, 515 U.S. at 575; *Tornillo*,  
18 418 U.S. at 258; *O’Handley v. Padilla*, 579 F. Supp. 3d 1163, 1186–87 (N.D. Cal. 2022).

19 The protections afforded by Section 230(c)(1) and the First Amendment are not contingent on the  
20 alleged motives underlying Meta’s decision to remove content posted by others. Courts have repeatedly  
21 held that it is immaterial for Section 230(c)(1) purposes whether the plaintiff claims that Facebook’s  
22 removal of content was made for allegedly illegitimate reasons. *See Sikhs for Justice*, 144 F. Supp. 3d at  
23 1095–96 (applying Section 230(c)(1) to bar claims alleging that Facebook’s removal of third-party content  
24 was motivated by racial discrimination and political pressure); *Fyk*, 808 F. App’x at 598 (“That Facebook  
25 allegedly took its actions for monetary purposes” is immaterial because “nothing in § 230(c)(1) turns on  
26 the alleged motives underlying the editorial decisions of the provider of an interactive computer service.”).  
27 The same principle holds in the First Amendment context. In *Hurley*, an LGBTQ group claimed that the  
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1 defendant’s refusal to allow the group to participate in a parade violated a Massachusetts anti-  
2 discrimination law. 515 U.S. at 561. The Supreme Court emphasized that, even if the parade organizers  
3 excluded the group on grounds that would otherwise violate the law, the “general rule of speaker’s  
4 autonomy,” *id.* at 578, means that “[w]hatever the reason[s]” a speaker may have for choosing *not* to  
5 repeat speech, that decision is “presumed to lie beyond the government’s power to control”—whether the  
6 reasons for the choice are good or bad, *id.* at 575.

7       It is therefore of no moment that plaintiffs claim the conduct was “anticompetitive” and violated  
8 the UCL. At no point has the Ninth Circuit ever held that the protections of Section 230(c)(1) dissipate  
9 whenever a plaintiff merely characterizes the conduct at issue as “unfair” or “anticompetitive.” To the  
10 contrary, courts routinely apply Section 230(c)(1) to bar UCL claims, including claims alleging unfair or  
11 anticompetitive conduct. *See, e.g., Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 932 (N.D. Cal. 2021);  
12 *Ginsberg v. Google Inc.*, 2022 WL 504166, at \*2, \*5 (N.D. Cal. Feb. 18, 2022) (applying Section 230 to  
13 bar “violation of the unfair prong of California’s UCL”); *Calise v. Meta Platforms, Inc.*, 2022 WL  
14 1240860, at \*2, \*4 (N.D. Cal. Apr. 27, 2022) (applying Section 230 to bar UCL and tort claims because  
15 all claims were “premised on Meta’s publication of . . . third-party advertisements”); *Caraccioli v.*  
16 *Facebook, Inc.*, 700 F. App’x 588, 590 (9th Cir. 2017) (affirming application of Section 230 to bar UCL  
17 claim); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1121 (9th Cir. 2007) (“The district court’s decision  
18 [granting] CDA immunity is affirmed as to the unfair competition and false advertising claims . . . .”);  
19 *Enhanced Athlete Inc. v. Google LLC*, 479 F. Supp. 3d 824, 828–30, (N.D. Cal. 2020) (applying Section  
20 230(c)(1) to bar claim for “unfair competition, in violation of California’s Unfair Competition Law”);  
21 *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 836 (2002) (similar).

22       The D.C. Circuit’s decision in *Marshall’s Locksmith Service Inc. v. Google, LLC*, 925 F.3d 1263  
23 (D.C. Cir. 2019), is instructive. The plaintiffs in *Marshall’s* alleged that Google and other search engines  
24 had used their power in the market for search engine services to “flood” their search-engine results with  
25 advertisements for “scam locksmiths.” *Id.* at 1265. The plaintiffs further alleged that this conduct caused  
26 “[I]legitimate locksmith businesses” to suffer “significant economic losses due to competition from scam  
27 locksmiths.” *Id.* at 1266. Based on this conduct, the plaintiffs asserted a variety of state tort and unfair  
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1 competition claims, and Sherman Act claims under both Section 1 and Section 2 of that Act. *Id.* Even  
2 though the complaint alleged anticompetitive harm in the market for locksmith services, the D.C. Circuit  
3 had no problem concluding that the search-engine defendants were entitled to protection under the CDA  
4 where the entire basis for liability rested on decisions made by the defendants regarding the publication  
5 of third-party advertising content. *Id.* at 1268–71.

6 So too here. As in *Marshall's*, plaintiffs here seek to impose liability on Meta for harms suffered  
7 in a market—the online adult-entertainment industry—in which Meta does not compete. They do so,  
8 moreover, through claims that focus entirely on publication decisions that Meta allegedly made:  
9 publishing or promoting certain content, while not similarly publishing or promoting other content. As  
10 the D.C. Circuit concluded in *Marshall's*, Section 230(c)(1) bars such claims, despite plaintiffs' attempts  
11 to cloak their challenges to Meta's publication decisions in claims of “unfair” trade practices.

12 Moreover, plaintiffs have not actually pleaded actionable anticompetitive conduct. As this Court  
13 has repeatedly recognized, the California Supreme Court's decision in *Cel-Tech Communications, Inc. v.*  
14 *Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 186–87 (1999), supplies the relevant test for  
15 “determin[ing] whether a practice was unfair under Section 17200.” *Gutierrez v. Wells Fargo & Co.*, 622  
16 F. Supp. 2d 946, 953–54 (N.D. Cal. 2009). *Cel-Tech* requires plaintiffs to plead and prove “conduct that  
17 threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws  
18 because its effects are comparable to or the same as a violation of the law, or otherwise significantly  
19 threatens or harms competition.” *Gutierrez*, 622 F. Supp. 2d at 953–54. “It is well accepted that ‘the  
20 antitrust laws . . . were enacted for the protection of competition, not competitors.’” *Marsh v. Anesthesia*  
21 *Servs. Med. Grp., Inc.*, 200 Cal. App. 4th 480, 495 (2011). “Injury to a competitor is not equivalent to  
22 injury to competition; only the latter is the proper focus of antitrust laws.” *Cel-Tech Commc'ns*, 20 Cal.  
23 4th at 186. “A threshold step in any antitrust case is to accurately define the relevant market, which refers  
24 to ‘the area of effective competition.’” *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1014 (N.D.  
25 Cal. 2021). Indeed, without defining the relevant market, antitrust plaintiffs cannot meet their burden “to  
26 prove market power,” which “is a threshold consideration in an antitrust case and is the sine qua non of  
27 recovery.” *Exxon Corp. v. Super. Ct.*, 51 Cal. App. 4th 1672, 1681 (1997). And “where an antitrust  
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1 plaintiff alleges vertical restraints, facts must be pled showing ‘some anti-competitive effect in the larger,  
2 interbrand market.’” *Marsh*, 200 Cal. App. 4th at 495. “[I]t is plaintiff’s burden to make the required  
3 showing of a ‘substantially adverse effect on competition in the relevant market.’” *Exxon Corp.*, 51 Cal.  
4 App. 4th at 1681.

5 Plaintiffs have not even attempted to plead these foundational elements of an anticompetitive  
6 claim. Their operative complaint is wholly devoid of allegations establishing market definition, market  
7 power, or harm to *competition*. Nor is this a mere pleading deficiency that can be remedied: Meta does  
8 not now, nor has it ever, competed in the market for online adult entertainment, and plaintiffs could not  
9 possibly allege that Meta made the alleged publication decisions for the purpose or effect of gaining a  
10 competitive advantage in the markets in which it does compete.

#### 11 **IV. Meta Is Not Liable For The Alleged Conduct Of Its Employees Under Any Theory Of** 12 **Liability**

13 Plaintiffs’ claims should also be dismissed because they have not pleaded the facts necessary to  
14 establish that Meta is liable for the alleged conduct of the employees who allegedly abused Meta’s own  
15 internal processes. While plaintiffs now identify three Meta employees [REDACTED]  
16 [REDACTED] who allegedly received wire-transfer payments, the complaint does not allege that those  
17 individuals actually did anything. The complaint does not allege, for example, that the three individuals  
18 themselves took any content-moderation action or directed others to take such action. The actions of those  
19 three individuals are therefore not truly at issue. Instead, plaintiffs are claiming that some unidentified  
20 John Does at Meta placed plaintiffs on internal content-moderation lists designed for terrorist content.  
21 Plaintiffs claim Meta is liable for the John Does’ conduct under principles of agency liability and vicarious  
22 liability, but neither works.

23 **Agency.** A principal is liable for the conduct of an agent only when the agent acted with actual or  
24 ostensible authority. *See* Cal. Civ. Code § 2330. “Actual authority arises as a consequence of conduct of  
25 the principal which causes *an agent* reasonably to believe that the principal consents to the agent’s  
26 execution of an act on behalf of the principal.” *Tomerlin v. Canadian Indem. Co.*, 61 Cal. 2d 638, 643  
27 (1964) (citing Cal. Civ. Code § 2316). Plaintiffs do not allege any facts showing that the John Does  
28 engaged in the alleged scheme with actual authority from Meta. If anything, plaintiffs allege that these

1 John Does went rogue by manipulating and corrupting automated processes and databases that Meta had  
2 established for purposes of combating terrorism, deploying those methods to attack competitors of an  
3 adult-entertainment company, and then “attempt[ing] to cover their tracks” to ensure Meta could not learn  
4 of their aberrant behavior. SAC ¶ 88. Those allegations are flatly inconsistent with any argument that the  
5 employees were acting with actual authority.

6 A similar conclusion follows for apparent or ostensible authority. “Ostensible authority is such as  
7 a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent  
8 to possess.” Cal. Civ. Code § 2317. The “ostensible authority” analysis focuses on the conduct of *the*  
9 *principal* in causing *third parties* to believe that the principal’s agent possessed authority to engage in the  
10 alleged conduct. *See Mejia v. Cmty. Hosp. of San Bernardino*, 99 Cal. App. 4th 1448, 1456–57 (2002)  
11 (ostensible authority established only when a third party’s belief that the agent possesses its principal’s  
12 authority is “generated by some act or neglect of the principal sought to be charged”). Plaintiffs fail to  
13 allege how *Meta* did anything to lead third parties to believe that the John Does were authorized to  
14 manipulate Meta’s content-moderation tools for the purpose of benefitting one adult-entertainment  
15 platform over its competitors.

16 ***Vicarious Liability.*** The vicarious-liability analysis differs between plaintiffs’ UCL claim and  
17 their economic tort claims. Under the UCL, a “defendant’s liability must be based on his *personal*  
18 *‘participation in the unlawful practices’* and ‘unbridled control’ over the practices that are found to violate  
19 sections 17200 or 17500.” *Emery v. Visa Int’l Serv. Ass’n*, 95 Cal. App. 4th 952, 960 (2002) (emphasis  
20 added). Because of the “personal participation” requirement, the “concept of vicarious liability has no  
21 application to actions brought under the unfair business practices act.” *Id.* (quoting *People v. Toomey*,  
22 157 Cal. App. 3d 1, 14 (1984)); *see also In re Firearm Cases*, 126 Cal. App. 4th 959, 983 (2005); *Perfect*  
23 *10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 808–09 (9th Cir. 2007). Plaintiffs do not have a single  
24 allegation establishing Meta’s “personal participation” or “unbridled control” over the alleged conduct of  
25 the John Does. To the contrary: plaintiffs’ theory appears to be that individual rogue employees abused  
26 Meta’s systems and processes at the behest of OnlyFans.



1 For their economic-tort claims, plaintiffs must plead facts sufficient to establish that the John Does’  
2 alleged economic torts were “engendered by” their employment with Meta. They have not done so.  
3 Plaintiffs seeking to impute liability to an employer for the tortious conduct of its employee must establish  
4 that the conduct was “engendered by or ar[o]se from the work.” *Lisa M. v. Henry Mayo Newhall Mem’l*  
5 *Hosp.*, 12 Cal. 4th 291, 298 (1995). “That the employment brought tortfeasor and victim together in time  
6 and place is not enough.” *Id.* Rather, “the risk of tortious injury must be ‘inherent in the working  
7 environment’ or ‘typical of or broadly incidental to the enterprise [the employer] has undertaken.’” *Id.*  
8 In determining whether an employee’s conduct was “engendered by” his work, the core inquiry is  
9 foreseeability: “Respondeat superior liability should apply only to the types of injuries that . . . ‘as a  
10 practical matter are sure to occur in the conduct of the employer’s enterprise.’” *Id.* at 299; *see also Hinman*  
11 *v. Westinghouse Elec. Co.*, 2 Cal. 3d 956, 959–60 (1970). “The employment, in other words, must be  
12 such as predictably to create the risk employees will commit intentional torts of the type for which liability  
13 is sought.” *Lisa M.*, 12 Cal. 4th at 299. Conduct is foreseeable, and therefore is “engendered by” the  
14 employment, only when “an employee’s conduct is not so unusual or startling that it would seem unfair  
15 to include the loss resulting from it among other costs of the employer’s business.” *Id.*; *see also Rodgers*  
16 *v. Kemper Constr. Co.*, 50 Cal. App. 3d 608, 618 (1975). “An act serving only the employee’s personal  
17 interest is less likely to arise from or be engendered by the employment than an act that, even if misguided,  
18 was intended to serve the employer in some way.” *Lisa M.*, 12 Cal. 4th at 292. Whether an employee has  
19 acted within the scope of employment is a question of law that can be resolved on a motion to dismiss if  
20 the necessary facts are absent from the face of the complaint. *See, e.g., Lusk v. Kellogg*, 2011 WL  
21 13225140, at \*2–3 (C.D. Cal. Aug. 10, 2011) (granting motion to dismiss).

22 Plaintiffs allege that the John Does manipulated a variety of tools for purposes of harming  
23 competitors of a subscription-based, adult-entertainment platform. It is eminently unforeseeable that  
24 employees tasked with identifying and eradicating harmful content on social-media apps would  
25 manipulate content-moderation tools for purposes of benefiting one adult-entertainment platform over its  
26 competitors. Neither is this conduct the type that “as a practical matter [is] sure to occur in the conduct  
27 of” Meta’s “enterprise[s].” *Lisa M.*, 12 Cal. 4th at 299. Rather, the alleged conduct of the John Does is  
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1 “so unusual [and] startling that it would seem unfair to include the loss resulting from it among other costs  
2 of the employer’s business.” *Id.*

3 *Lisa M.* is instructive. The plaintiff there sought to impose vicarious liability on a hospital for a  
4 sexual assault by an ultrasound technician. *See* 12 Cal. 4th at 296. But the “technician’s decision to  
5 engage in conscious exploitation of the patient did not *arise out of* the performance of the examination,  
6 although the circumstances of the examination made it possible.” *Id.* at 301. “The assault, rather, was the  
7 independent product of” the technician’s “aberrant decision to engage in conduct unrelated to his duties.”  
8 *Id.* at 303. *Lisa M.* confirms that plaintiffs’ claims fail. As in *Lisa M.*, the alleged conduct of the John  
9 Doe defendants was—by plaintiffs’ own allegations—the independent product of their “aberrant decision”  
10 to accept bribes to harm competitors of an adult-entertainment platform. While the alleged conduct was  
11 made possible by their employment and access to the shared databases at issue, plaintiffs have not alleged  
12 facts sufficient to establish that the Meta employees’ employment was “such as predictably to create the  
13 risk employees will commit intentional torts of the type for which liability is sought.” *Id.* at 299. To the  
14 contrary, the alleged conduct is “so unusual or startling that it would seem unfair to include the loss  
15 resulting from it among other costs of the employer’s business.” *Id.* Because the alleged conduct of the  
16 John Does was not foreseeable, and further because plaintiffs allege that those employees acted in their  
17 own pecuniary interest rather than that of their employer, the complaint does not allege facts sufficient to  
18 establish Meta’s vicarious liability for the alleged economic torts.

19 **V. Plaintiffs’ Claims Are Subject To And Should Be Stricken Under The Anti-SLAPP Statute**

20 Plaintiffs’ claims fall within California’s Anti-SLAPP statute and should be stricken. The statute  
21 “permits defendants to file a ‘special motion to strike’ any ‘cause of action against a person arising from  
22 any act of that person in furtherance of the person’s right of petition or free speech under the United States  
23 Constitution or the California Constitution in connection with a public issue.’” *Maloney v. T3Media, Inc.*,  
24 853 F.3d 1004, 1009 (9th Cir. 2017) (quoting Cal. Civ. Proc. Code § 425.16(b)(1)). Plaintiffs’ claims  
25 arise from Meta’s exercise of its First Amendment-protected editorial decision to block, filter, or de-  
26 prioritize certain content created and posted by adult-entertainment performers, and plaintiffs’ claims  
27 therefore “aris[e] from” acts in furtherance of Meta’s First Amendment rights. *See supra* Argument § III.



1 Meta’s editorial decisions about disseminating and presenting adult-entertainment content to  
2 millions of users on its apps constitutes conduct “in connection” with an issue of public interest under the  
3 anti-SLAPP statute. Cal. Civ. Proc. Code § 425.16(b)(1), (e)(4). Indeed, this action presents the  
4 paradigmatic public-interest case. Billions of people use Meta’s platforms, and they have a substantial  
5 interest in Meta’s policies and actions of removing or filtering adult-entertainment content. And the  
6 speech at issue—the alleged selective enforcement of Meta’s Community Standards against OnlyFans’  
7 competitors—is not only “in connection” with that issue of public interest, it is itself an issue of public  
8 interest. Given the wide reach of online platforms, courts have found that “Facebook’s ability to decisively  
9 police the integrity of its platforms is without question a pressing public interest.” *Stackla, Inc. v.*  
10 *Facebook, Inc.*, 2019 WL 4738288, at \*6 (N.D. Cal. Sept. 27, 2019). Courts routinely find the public-  
11 interest requirement met when “the statement or activity precipitating the underlying cause of action  
12 ‘involved conduct that could affect large numbers of people beyond the direct participants.’” *Cross v.*  
13 *Cooper*, 197 Cal. App. 4th 357, 373–74 (2011). And an action that “directly targets the way a content  
14 provider chooses to deliver, present, or publish” content is an issue of public interest, and such “action is  
15 based on conduct in furtherance of free speech rights and must withstand scrutiny under California’s anti-  
16 SLAPP statute.” *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 424–  
17 25 (9th Cir. 2014). Plaintiffs have not carried their burden to establish a reasonable probability of  
18 prevailing on the merits of their claims, and the complaint should thus be stricken.

## 19 CONCLUSION

20 This Court should strike or dismiss the second amended complaint with prejudice.  
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1 DATED: October 11, 2022

KIRKLAND & ELLIS LLP

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3 Respectfully submitted,

4  
5 /s/ K. Winn Allen

6 K. Winn Allen, P.C. (admitted *pro hac vice*)

7 Devin S. Anderson (admitted *pro hac vice*)

8 KIRKLAND & ELLIS LLP

9 1301 Pennsylvania Avenue, N.W.

10 Washington, D.C. 20004

11 United States

12 Telephone: +1 202 389 5000

13 Facsimile: +1 202 389 5200

14 winn.allen@kirkland.com

15 devin.anderson@kirkland.com

16 Michael P. Esser (SBN 268634)

17 KIRKLAND & ELLIS LLP

18 555 California Street

19 San Francisco, CA 94104

20 United States

21 Telephone: +1 415 439 1400

22 Facsimile: +1 415 439 1500

23 michael.esser@kirkland.com

24 *Attorneys for Defendants Instagram, LLC,*  
25 *Facebook Operations, LLC, and Meta*  
26 *Platforms, Inc.*

**CERTIFICATE OF SERVICE**

On October 11, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all persons registered for ECF. All copies of documents required to be served by Fed. R. Civ. P. 5(a) and L.R. 5-1 have been so served.

/s/ K. Winn Allen  
K. Winn Allen, P.C.