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and Jack Dorsey

16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
18

19 LAURA LOOMER, as an individual, LAURA
LOOMER, in her capacity as a Candidate for
20 United States Congress, and LAURA LOOMER
FOR CONGRESS, INC.,

21 Plaintiffs,

22 v.

23 META PLATFORMS, INC., MARK
24 ZUCKERBERG, in his capacity as CEO of Meta
Platforms, Inc. and as an individual, TWITTER,
25 INC., and JACK DORSEY, in his capacity as
former CEO of Twitter, Inc. and as an individual,

26 Defendants.
27
28

Case No. 3:22-cv-02646-LB
The Honorable Laurel Beeler

**TWITTER, INC. AND JACK
DORSEY'S NOTICE OF MOTION
AND MOTION TO DISMISS;
MEMORANDUM OF POINTS &
AUTHORITIES**

Hearing Date: September 15, 2022

Hearing Time: 9:30 AM

Courtroom: B, 15th Floor

1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on September 15, 2022 at 9:30 AM, or as soon thereafter as
3 the Court is available, Defendants Twitter, Inc. (“Twitter”) and Jack Dorsey (collectively, “Twitter
4 Defendants”) will appear before the Honorable Laurel Beeler and will, and hereby do, move to
5 dismiss, in full and with prejudice, Plaintiffs Laura Loomer and Laura Loomer for Congress, Inc.’s
6 Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Complaint
7 fails to state any plausible claim on which relief can be granted. In addition, the Court lacks subject
8 matter jurisdiction over Loomer’s claims because she lacks standing to bring this action.

9 The Twitter Defendants’ motion to dismiss is based on this Notice of Motion and Motion,
10 the following Memorandum of Points and Authorities, any additional briefing on this subject
11 (including their reply brief), relevant arguments made by co-defendants which the Twitter
12 Defendants may incorporate by reference, and any evidence and arguments that may be presented
13 to the Court at a hearing on this matter.

14 **STATEMENT OF ISSUES**

15 1. Whether the Court should dismiss this action for failure to state a claim because it
16 is barred by the doctrine of res judicata.

17 2. Whether the Court should dismiss this action for failure to state a cognizable claim
18 under Sections 1962(c) or (d) of the Racketeer Influenced and Corrupt Organizations (“RICO”)
19 Act, 18 U.S.C. §§ 1962(c)-(d).

20 3. Whether the Court should dismiss this action for lack of subject matter jurisdiction
21 because Plaintiffs lack constitutional standing.

22 4. Whether the Court should dismiss this action for failure to state a claim because it
23 is barred by Section 230(c)(1) of the Communications Decency Act of 1996, 47 U.S.C.
24 § 230(c)(1).

25 5. Whether, in the event the Court does not dismiss this action in full, the Court should
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28 U.S. Const. amend. I18

18 U.S.C. § 195119

18 U.S.C. § 195219

18 U.S.C. § 1961(1)17

18 U.S.C. § 1962(c) *passim*

1 18 U.S.C. § 1962(d)2, 20
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11 **Other Authorities**

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 13 No. 18-cv-2030 (D.D.C. Dec. 6, 2018), ECF No. 284, 6–7, 8
 14 Gregory P. Joseph, *CIVIL RICO: A DEFINITIVE GUIDE* (5th ed. 2018)6
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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 The Court should dismiss plaintiff Laura Loomer’s complaint (ECF No. 1, the
3 “Complaint”) against Twitter and its former CEO, Jack Dorsey (collectively, “Twitter
4 Defendants”), because it is barred by the doctrine of res judicata, fails to state a RICO claim upon
5 which relief should be granted, and is barred by federal law. It also seeks to hold the Twitter
6 Defendants liable for acts that did not cause Loomer any harm, depriving Loomer of standing and
7 this Court of subject matter jurisdiction. Because of these multiple pleading failures, which are
8 enumerated further below and which are each independently fatal to this action, the Court should
9 dismiss the Complaint with prejudice.

10 First, the doctrine of res judicata precludes the relitigation of Loomer’s ban from Twitter
11 in this court. Loomer has already twice pursued legal actions against Twitter to overturn her ban.
12 She filed her first case in the federal district court for the District of Columbia in 2019, alleging
13 that her ban violated antitrust and non-discrimination laws. The trial judge ruled for Twitter on the
14 merits, a unanimous panel of the D.C. Circuit affirmed, and the Supreme Court denied certiorari.
15 Her second attempt was filed against Twitter, also in 2019, in the Southern District of Florida
16 (though she never served Twitter). Because a plaintiff cannot file suit in a new court seeking
17 redress for the same harm she sought to remedy in her prior failed litigation, Loomer’s suit is
18 barred, and the Court should dismiss it with prejudice. *See Monterey Plaza Hotel Ltd. P’ship v.*
19 *Loc. 483 of Hotel Emps. & Rest. Emps. Union, AFL-CIO*, 215 F.3d 923, 928 (9th Cir. 2000).

20 Second, Loomer fails to state a colorable civil RICO claim or establish the Court’s
21 jurisdiction over this action. Loomer asserts that a RICO conspiracy between Twitter, Dorsey,
22 Facebook, Zuckerberg, and a variety of non-defendants, named and unnamed, exists. But she does
23 not plead, as she must, that any of the alleged predicate acts concretely injured her business or
24 property—either proximately or factually, as RICO requires. This defect also fatally deprives her
25 of constitutional standing (and thus this Court of subject matter jurisdiction) because her alleged
26 injuries are not “fairly traceable” to the complained-of conduct. Nor does she allege, as she must,
27 that the Twitter Defendants associated with anyone else to form a RICO enterprise. She does not
28 allege, as she must, that the Twitter Defendants agreed to participate in or conduct the business of

1 such an enterprise, which is also fatal to her allegations of a RICO conspiracy under 18 U.S.C.
 2 § 1962(d). And she does not plausibly allege, again, as she must, that the Twitter Defendants
 3 committed any of the purported predicate acts for which she seeks to hold the enterprise
 4 accountable.

5 And third, Section 230(c)(1) of the Communications Decency Act of 1996 (the “CDA”)
 6 bars all of Loomer’s claims against the Twitter Defendants because the claims rest entirely on
 7 Twitter’s decisions about which content to allow, moderate, or block on its platform. Claims
 8 arising from decisions like Twitter’s decision to remove Loomer from the platform are immune
 9 from liability under Section 230(c)(1). *See Fair Hous. Council of San Fernando Valley v.*
 10 *Roommates.Com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008). For that threshold reason, the
 11 Complaint fails to state a claim and must be dismissed with prejudice.

12 Because the Complaint is incurably defective, the Court should dismiss it with prejudice.

13 **BACKGROUND**¹

14 ***Twitter.*** Twitter is a private enterprise that operates a global Internet platform for public
 15 self-expression and conversation. Jack Dorsey is Twitter’s former Chief Executive Officer. Compl.
 16 ¶ 9. After agreeing to Twitter’s User Agreement, which includes the Terms of Service (the
 17 “Terms”), any individual who is 13 years of age or older can create an account and post on the
 18 platform.² The Terms provide Twitter with the right to moderate content posted to its platform by
 19 account holders (“third-party content”) and to ban account holders from the platform “for any or
 20 no reason.” Compl. ¶ 246 & n.210. All account holders agree to be bound by these Terms when
 21 creating their accounts. The Terms incorporate Twitter’s Hateful Conduct Policy, which prohibits
 22 the use of hateful language, tropes, images, and other similar content on the platform.³

23 _____
 24 ¹ The allegations set forth in this brief are taken from the Complaint and are assumed to be true
 solely for purposes of this motion. *See Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

25 ² Twitter, Inc., Terms of Service, available at <https://twitter.com/en/tos>. Loomer incorporates these
 26 Terms into her Complaint by reference at paragraph 246, footnote 210, and the Court may consider
 them in adjudicating the Twitter Defendants’ motion. *See Northstar Fin. Advisors Inc. v. Schwab*
Invs., 779 F.3d 1036, 1043 (9th Cir. 2015).

27 ³ The Terms link to and expressly incorporate the Twitter Rules and Policies,
 28 <https://help.twitter.com/en/rules-and-policies#twitter-rules>, which themselves link to and
 expressly include the Hateful Conduct Policy, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>.

1 **Loomer and Twitter.** On November 21, 2018, Twitter banned Laura Loomer from its
2 platform for engaging in “hateful” conduct.⁴ Compl. ¶ 210. On August 19, 2020, Twitter provided
3 a statement to Breitbart News confirming that Loomer’s ban remained in place after her victory in
4 the Republican primary election in Florida’s 21st congressional district. Compl. ¶ 240 & n.208.
5 (Neither allegation mentions Dorsey, and the Complaint does not allege that Dorsey had anything
6 to do with Loomer’s Twitter ban.). These two paragraphs are the only paragraphs in the 369-
7 paragraph Complaint that allege any connection between Loomer and Twitter.⁵

8 The Complaint’s remaining allegations as to the Twitter Defendants are either irrelevant
9 quotes and paraphrases from news articles, or legal conclusions that have nothing to do with
10 Loomer. Compl. ¶¶ 24–25, 28, 30, 35, 40, 48, 50–55, 59, 61–63, 68, 71–72, 76, 81, 84, 86–91, 93–
11 96, 108–09, 130–33, 144–45, 163–68, 172, 179, 181–86, 193–95, 197, 199–202, 204, 207–08,
12 246–51, 290, 294, 296, 298–300, 303, 307, 309, 311–12, 320, 326, 344, 346, 354, 356–58. In the
13 interest of judicial economy, the Twitter Defendants will not summarize them all here because
14 they have nothing to do with Loomer—but generally, Loomer recounts scores of Twitter’s content
15 moderation decisions and alleges those decisions suggest material support for terrorism and a plot
16 to overthrow the United States government. Compl. ¶¶ 288–312. Critically, the Complaint does
17 not even attempt to tie any of these allegations to Loomer’s ban. *See generally id.* Loomer also
18 alleges that conduct undertaken by other parties to this action—but not the Twitter Defendants—
19 amounted to extortion, transportation in aid of racketeering, and wire fraud. Compl. ¶¶ 245–87.
20 The Complaint draws no cognizable connection between these allegations and Twitter.

21 **Loomer’s Prior Litigation Against Twitter.** This action is not the first time that Loomer
22 has sued Twitter based on her November 21, 2018 removal from the platform for violating
23 Twitter’s Hateful Conduct Policy, as she herself acknowledges. Compl. ¶¶ 13–14, 16. In *Freedom*
24

25 ⁴ Loomer sues in her personal capacity, in her “official” capacity (which does not exist, as
26 explained *infra* at Part I.C), and on behalf of her 2020 congressional campaign. Because the
27 Complaint does not meaningfully differentiate between these three purportedly separate plaintiffs,
the Twitter Defendants refer to them collectively as “Loomer.”

28 ⁵ Paragraph 180 includes an additional allegation that collaterally involves Loomer—an individual
named Josh Lekach allegedly lost verified Twitter status after posting an interview with Loomer.

1 *Watch v. Google*, Loomer and others sued Twitter, Facebook, Google, and Apple, alleging that by
2 banning her from their platforms they had violated the Sherman Act, the District of Columbia
3 Human Rights Act, the First Amendment, and 42 U.S.C. § 1983. Am. Class Action Compl.,
4 *Freedom Watch, Inc. et al. v. Google, Inc. et al.*, No. 18-cv-2030 (D.D.C. Dec. 6, 2018), ECF No.
5 28 (hereinafter “Freedom Watch Am. Compl.”). The court dismissed Loomer’s complaint on the
6 merits, concluding that Plaintiffs had “failed to state viable legal claims” against Twitter. *Freedom*
7 *Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 37 (D.D.C. 2019). The D.C. Circuit affirmed that
8 dismissal, 816 F. App’x 497 (D.C. Cir. 2020), and the Supreme Court denied certiorari, 141 S. Ct.
9 2466 (2021).

10 In *Illoominate Media v. CAIR*, Loomer sued Twitter and the Muslim-American advocacy
11 group CAIR in Florida state court, alleging various claims in tort arising from Loomer’s ban from
12 Twitter. *Illoominate Media, Inc. v. CAIR Found.*, 2019 WL 13168767, at *3 (S.D. Fla. Nov. 19,
13 2019), *aff’d*, 841 F. App’x 132 (11th Cir. 2020). CAIR removed the case to federal court. Loomer
14 never served Twitter, and voluntarily dismissed it from the case. The district court ultimately
15 concluded as to the served defendants that her complaint was barred by Section 230 of the CDA
16 and otherwise failed to state viable claims. *Id.* at *3.

17 LEGAL STANDARD

18 ***Failure to State a Claim.*** A complaint must be dismissed where the plaintiff fails to allege
19 sufficient facts to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).
20 Mere “labels and conclusions” are insufficient to state a claim for relief, nor will a “formulaic
21 recitation of the elements” suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
22 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Instead, a plaintiff must “plead[] factual content
23 that allows the court to draw the reasonable inference that the defendant is liable for the misconduct
24 alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for
25 more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550
26 U.S. at 556). Where a RICO plaintiff alleges claims premised on fraudulent predicate acts, she
27 must satisfy the heightened pleading standard of Rule 9(b) by stating the circumstances of the
28 fraud “with particularity[.]” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004).

1 “Although there is a general rule that parties are allowed to amend their pleadings, it does
 2 not extend to cases in which any amendment would be an exercise in futility, or where the amended
 3 complaint would also be subject to dismissal.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293,
 4 1298 (9th Cir. 1998) (internal citations omitted). Amendment is futile when the plaintiff’s
 5 complaint contains a legal deficiency that cannot be cured by additional factual pleadings. *See*
 6 *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008).

7 ***Constitutional Standing.*** “Article III standing requires that (1) the plaintiffs suffered an
 8 injury in fact, i.e., ‘an invasion of a legally protected interest which is (a) concrete and
 9 particularized, and (b) actual or imminent, not conjectural or hypothetical’; (2) the injury is “‘fairly
 10 traceable’ to the challenged conduct’; and (3) the injury is ‘likely’ to be ‘redressed by a favorable
 11 decision.’” *Doe v. Walmart Inc.*, 2019 WL 499754, at *8 (N.D. Cal. Feb. 8, 2019) (quoting *Lujan*
 12 *v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

13 Article III standing is essential to “the constitutional limitation of federal-court jurisdiction
 14 to actual cases or controversies,” *Simon v. E. KY Welfare Rights Org.*, 426 U.S. 26, 37 (1976), and
 15 claims without constitutional standing must be dismissed pursuant to Rule 12(b)(1), *White v. Lee*,
 16 227 F.3d 1214, 1242 (9th Cir. 2000). The plaintiff bears the burden of establishing all three
 17 elements of constitutional standing. *Meland v. Weber*, 2 F.4th 838, 843 (9th Cir. 2021).

18 ARGUMENT

19 **I. THE DOCTRINE OF RES JUDICATA BARS THIS ACTION.**

20 Loomer’s claims must be dismissed under the doctrine of res judicata because she
 21 previously sued Twitter in a different court for the same harm ostensibly claimed here—banning
 22 her from the platform—and lost. *See Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30
 23 (D.D.C. 2019), *aff’d*, 816 F. App’x 497 (D.C. Cir. 2020), *cert. denied*, 141 S. Ct. 2466 (2021). “In
 24 order for res judicata to apply there must be: 1) an identity of claims, 2) a final judgment on the
 25 merits, and 3) identity or privity between parties.” *W. Radio Servs. Co. v. Glickman*, 123 F.3d
 26 1189, 1192 (9th Cir. 1997). All three requirements are met here.⁶

27 _____
 28 ⁶ Because “any amended complaint that [Loomer] could bring would be [equally] barred by the
 application of res judicata,” the Court should dismiss the Complaint without leave to amend. *See*

1 **A. There Is an Identity of Claims Between This Case and the Prior *Freedom***
 2 ***Watch* Case.**

3 “Res judicata bars relitigation of all grounds of recovery that were asserted, *or could have*
 4 *been asserted*, in a previous action between the parties, where the previous action was resolved on
 5 the merits. It is immaterial whether the claims asserted subsequent to the judgment were actually
 6 pursued in the action that led to the judgment; rather, the relevant inquiry is whether they *could*
 7 have been brought.” *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir.
 8 1998) (emphasis added) (internal citations omitted); *see also Tahoe-Sierra Pres. Council, Inc. v.*
 9 *Tahoe Reg’l Plan. Agency*, 322 F.3d 1064, 1078 (9th Cir. 2003) (same).

10 A civil RICO claim is considered identical to claims brought in an earlier civil suit where
 11 “[t]he harm alleged” is “fundamentally the same” as the harms which were or “could have been
 12 raised” in the prior litigation. *Monterey Plaza Hotel Ltd. P’ship v. Loc. 483 of Hotel Emps. & Rest.*
 13 *Emps. Union, AFL-CIO*, 215 F.3d 923, 928 (9th Cir. 2000) (affirming dismissal of RICO claim
 14 where harms alleged were previously litigated); *see also* Gregory P. Joseph, CIVIL RICO: A
 15 DEFINITIVE GUIDE § 30.A (5th ed. 2018) (“If the parties to a RICO action have previously litigated
 16 over the facts giving rise to the RICO claim, the prior litigation bars the subsequent RICO claim
 17 even if RICO was not invoked in the earlier action.”). The test, in other words, is whether the new
 18 action “seeks redress for the same wrongs as alleged in” the earlier case. *See Eichman v. Fotomat*
 19 *Corp.*, 880 F.2d 149, 155 (9th Cir. 1989); *accord United States v. Gurley*, 43 F.3d 1188, 1196 (8th
 20 Cir. 1994); *see also Adam Bros. Farming v. Cnty. of Santa Barbara*, 604 F.3d 1142, 1149 (9th Cir.
 21 2010) (“The focus of our analysis is on the harm suffered.”) (internal quotation marks omitted).

22 The harms Loomer alleges in this suit are identical to those Loomer alleged in her
 23 complaint in *Freedom Watch*, which was dismissed on the merits. Here, Loomer alleges harm
 24 arising from her ban from social media, with additional consequential harms suffered as a result.
 25 *See* Compl. ¶¶ 243–44.⁷ This is the same harm she alleged in *Freedom Watch*. *Compare* *Freedom*

26 _____
 27 *Conway v. Geithner*, 2012 WL 1657156, at *4 (N.D. Cal. May 10, 2012); *see also Davis v. Cnty.*
 28 *of Maui*, 454 F. App’x 582, 583 (9th Cir. 2011) (same).

⁷ Loomer actually attributes these harms only to Facebook’s actions and does not mention any
 specific harms that Twitter caused her. This failure to attribute harm to Twitter makes clear that

1 Watch Am. Compl. ¶ 81 (“As a direct and proximate result of Defendants’ illegal discriminatory
2 conduct . . . Ms. Loomer has and will continue to suffer severe financial injury, as the loss of her
3 over 260,000 Twitter followers and Facebook account will prevent her from reaching her audience
4 with her investigative work.”), *with* Compl. ¶ 243 (“Ms. Loomer has suffered significant and
5 continuing damages . . . in the form of reputational damage, lost employment opportunities . . .
6 and lost future profits.”).⁸ The fact that Loomer did not attempt to plead a civil RICO claim arising
7 from her Twitter ban in *Freedom Watch* is immaterial. She cannot evade her prior dismissal for
8 the same alleged harm by simply pleading a new legal theory in a new court—this is the very type
9 of inefficiency and unfairness the doctrine of res judicata is meant to prohibit. *See McClain v.*
10 *Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986) (“[Plaintiff] cannot avoid the bar of res judicata
11 merely by alleging conduct by the defendant not alleged in his prior action or by pleading a new
12 legal theory.”); *Intermedics, Inc. v. Ventritex, Inc.*, 804 F. Supp. 35, 43 (N.D. Cal. 1992) (“A
13 primary purpose of the doctrine of res judicata . . . is to prevent parties (as well as courts) from
14 suffering the unreasonable expense of repetitive litigation by pressuring litigants to consolidate
15 into one proceeding as many contemporaneously knowable and reasonably related predicates for
16 relief as possible.”). Otherwise, Loomer could simply continue to file seriatim lawsuits, each
17 claiming a new cause of action for the same alleged harm. Because Loomer could have raised her
18 civil RICO claims in her prior failed action against Twitter for the same harm, she is barred from
19 doing so here.

20 That Twitter’s ban remained in place after Loomer’s victory in the 2020 congressional
21 primary is irrelevant to the analysis. “Simply identifying continuing harm from the same conduct
22 is insufficient to overcome res judicata.” *Deville v. Specialized Loan Servicing, LLC*, 2020 WL
23 7861974, at *6 (C.D. Cal. Nov. 20, 2020) (quoting *N. Cal. River Watch v. Humboldt Petroleum,*
24 *Inc.*, 162 F. App’x 760, 763 (9th Cir. 2006)) (formatting modified), *aff’d*, No. 20-56328, 2022 WL

25 _____
26 Loomer has alleged no injury—in-fact and that she lacks constitutional standing to press any claims
27 against Twitter—an independent basis for dismissal. *See Lujan*, 504 U.S. at 560; *see also infra* at
28 Part II.A. But only for purposes of determining the identity of claims in this *res judicata* analysis,
Twitter is considering the harm that Loomer attributes to Facebook: her ban from the platform.

⁸ *See Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002) (taking judicial notice of state court
decision and related filed briefs for purposes of determining prior judgment’s preclusive effect).

1 259939 (9th Cir. Jan. 27, 2022); *see also* *N. Cal. River Watch v. Redwood Oil Co.*, 2008 WL
2 4601016, at *4 (N.D. Cal. Oct. 15, 2008) (“To defeat a claim preclusion defense, the new wrong
3 cannot be related in origin to the [pre-judgment] violations.”). Loomer’s complaint is simply one
4 of continuing harm: Twitter banned her from the platform in 2018, and that ban continued in 2020.
5 It cannot be the law that a defendant is subject to permanent potential liability for conduct that a
6 plaintiff has already unsuccessfully challenged in a prior case. Otherwise, Loomer would be able
7 to bring identical lawsuits forever, deeming herself injured anew each day by the persistence of
8 the status quo—an absurd result. *See Silva v. Yosemite Cmty. Coll. Dist.*, 2019 WL 6878237, at *7
9 (E.D. Cal. Dec. 17, 2019) (where “new” allegations “merely comprise the same course of conduct
10 in previously litigated claims, application of res judicata is proper”).

11 **B. There Was a Final Judgment on the Merits in *Freedom Watch*.**

12 Judge McFadden dismissed Loomer’s complaint in *Freedom Watch* on the merits pursuant
13 to Rule 12(b)(6). 368 F. Supp. 3d at 41. “Supreme Court precedent confirms that a dismissal for
14 failure to state a claim under Rule 12(b)(6) is a ‘judgment on the merits’ to which
15 res judicata applies.” *Stewart v. U.S. Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002) (quoting
16 *Federated Dep’t Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981)).

17 **C. There Is Privity Between the Parties in This Case and in the *Freedom Watch*
18 Case.**

19 “Privity between parties exists when the parties in both actions are identical or substantially
20 identical, ‘that is, when there is sufficient commonality of interest.’” *Aquino v. Cal. Reconveyance*
21 *Co.*, 2014 WL 5494446, at *4 (N.D. Cal. Oct. 30, 2014) (quoting *Tahoe-Sierra*, 322 F.3d at 1077).
22 Here, Loomer was the plaintiff in *Freedom Watch* and Twitter was a defendant. Loomer is the
23 plaintiff in this case and Twitter is a defendant. That is privity between the parties.

24 While Dorsey was not a defendant in *Freedom Watch*, as Twitter’s CEO, he was in privity
25 with Twitter in that action. *See Freedom Watch Am. Compl.* ¶ 50 (Dorsey was Twitter’s chief
26 executive). A corporate officer is in privity with his company in an earlier litigation that (1)
27 concerned the same alleged corporate activities as the new suit and that (2) “relate[d] to actions
28 taken in [his] official, rather than [his] individual, capacit[y].” *Pedrina v. Chun*, 97 F.3d 1296,

1 1302 (9th Cir. 1996). Both conditions are satisfied here. Loomer seeks redress for the same harm
2 as in her previous suit, *see* Part I.A, *supra*, and she mentions Dorsey only in his capacity as
3 Twitter’s CEO, *see* Compl. ¶¶ 9, 40, 84, 131, 311–12; *accord Fox v. Maulding*, 112 F.3d 453, 459
4 (10th Cir. 1997) (“A director’s close relationship with the corporation will generally establish
5 privity.”). Because Dorsey and Twitter were in privity in *Freedom Watch*, he may invoke res
6 *judicata* to bar Loomer’s suit against him here. *See Pedrina*, 97 F.3d at 1302.

7 The fact that Loomer purports to pursue this action, in part, “in her capacity as a candidate
8 for Congress” and by her campaign committee does not help her evade the preclusive effects of
9 res *judicata*. As an initial matter, Loomer has no “official” capacity. Loomer is a private citizen
10 who does not allege that she has ever held any public office. An individual who decides to seek
11 political office does not suddenly create a separate juridical entity that can sue and be sued
12 independent from herself. *See Darby v. Los Angeles Cnty.*, 2018 WL 6074555, at *4 (C.D. Cal.
13 Aug. 6, 2018) (official capacity allegations are a “legal nullity” for private citizens who never
14 worked for the government). Accordingly, Loomer sued in her personal capacity alone in this case
15 and in *Freedom Watch*.

16 While Loomer’s campaign committee did not participate in the *Freedom Watch* case, it
17 stands in privity with Loomer in the prior case (as would Loomer’s “official capacity,” if that
18 existed). “[P]rivacy is a flexible concept dependent on the particular relationship between the
19 parties in each individual set of cases[.]” *Tahoe-Sierra*, 322 F.3d at 1081–82. “[F]ederal courts
20 will bind a non-party whose interests were represented adequately by a party in the original suit,”
21 including “where the interests of the nonparty and party are so closely aligned as to be ‘virtually
22 representative[.]’” *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (internal quotation marks
23 and citations omitted). Loomer, by definition, represented her campaign’s interests in *Freedom*
24 *Watch*, because a campaign committee has no purpose beyond advancing the interests of its
25 candidate. Indeed, the Supreme Court has made clear that Loomer should not be able to avoid res
26 *judicata* by subsequently naming a surrogate plaintiff, warning that “a party bound by a judgment
27 may not avoid its preclusive force by relitigating through a proxy.” *Taylor v. Sturgell*, 553 U.S.
28 880, 895 (2008). On this point, *Fulani v. Bentsen*, 862 F. Supp. 1140 (S.D.N.Y. 1994), is

1 illustrative. There, Fulani—an independent candidate for President in the 1992 election—her
2 running mate, and her campaign committee sued the Commission on Presidential Debates after it
3 refused to allow her to participate in the debates. The problem for Fulani was that she had already
4 sued the Commission in 1988 for the same harms and lost. The court held that Fulani was estopped
5 from raising the same issues again in 1992.⁹ Notably, though Fulani was a plaintiff in both the
6 1988 and 1992 cases, in 1992 she had a different running mate and a different campaign committee,
7 which were thus parties only to the second case. This did not matter. The court found that the
8 parties were in privity anyway (and the renewed claims barred), as “[w]hile Fulani’s running mate
9 and campaign committee may have varied between the 1988 and 1992 elections, Fulani herself
10 was primarily responsible for the initiation and continuation of both lawsuits.” *Id.* at 1148. The
11 situation here parallels *Fulani*, which means there is privity between the parties in this case and
12 *Freedom Watch*.

13 In sum, because every element of the doctrine of res judicata is met, Loomer is barred from
14 relitigating the same alleged harm, and her Complaint should be dismissed with prejudice.

15 **II. THE COMPLAINT FAILS TO STATE A RICO CLAIM.**

16 To state a RICO claim of any kind, Plaintiffs must first satisfy RICO’s statutory standing
17 provisions, which “require them to plausibly allege an injury to ‘business or property’ that is
18 proximately caused ‘by reason of a violation of section 1962.’” *Metaxas v. Lee*, 503 F. Supp. 3d
19 923, 935 (N.D. Cal. 2020); *see also Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th
20 Cir. 2008) (same). Then, to state a RICO claim under 18 U.S.C. § 1962(c), a plaintiff must show
21 the (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as
22 “predicate acts”). *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th
23 Cir. 2005); *see also* § 1962(c).

24 The four elements under Section 1962(c) “must be established as to each individual
25 defendant.” *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2017 WL
26 4890594, at *10 (N.D. Cal. Oct. 30, 2017) (citation omitted); *see also Eclectic Props. E., LLC v.*

27 _____
28 ⁹ While *Fulani* concerned collateral estoppel rather than res judicata, the standard for privity is the
same for both. *Mauro v. Fed. Exp. Corp.*, 2009 WL 1905036, at *4 (C.D. Cal. June 18, 2009)
(citing *United States v. Bhatia*, 545 F.3d 757, 759 (9th Cir. 2008)).

1 *Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014); *United States v. Persico*, 832 F.2d
2 705, 714 (2d Cir. 1987) (“The focus of section 1962(c) is on the individual patterns of racketeering
3 engaged in by a defendant, rather than the collective activities of the members of the enterprise.”).
4 Because Loomer fails to establish these elements as to the Twitter Defendants, her RICO claim
5 must be dismissed.

6 **A. Loomer Lacks Standing to Sue Twitter for the Alleged RICO Violations.**

7 As a threshold matter, Loomer lacks standing under the civil RICO statute to bring this
8 suit. To have statutory standing, a civil RICO plaintiff must show that her harm “was ‘*by reason*
9 *of*’ the RICO violation, which requires the plaintiff to establish proximate causation,” and that her
10 alleged harm “qualifies as injury to [her] business or property[.]” *Canyon Cnty.*, 519 F.3d at 972
11 (emphasis added) (citing *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992)). This is “an
12 even more rigorous standing requirement than Article III.” *Chaney v. Berkshire Hathaway Auto.*,
13 2017 WL 6520662, at *5 n.4 (D. Ariz. Sept. 25, 2017). Loomer cannot make either of these
14 mandatory showings.

15 As an initial matter, Loomer cannot establish that any harm she suffered was “by reason
16 of” the RICO violations alleged. RICO imposes a heightened causation standard that requires a
17 showing of both proximate and but-for causation. This means that the statute “demand[s] . . . some
18 direct relation between the injury asserted and the injurious conduct alleged.” *Painters & Allied*
19 *Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co. Ltd.*, 943 F.3d 1243, 1249 (9th
20 Cir. 2019) (quoting *Holmes*, 503 U.S. at 268). Indeed, “the central question [a court] must ask is
21 whether the alleged violation led directly to the plaintiff’s injuries.” *Anza v. Ideal Steel Supply*
22 *Corp.*, 547 U.S. 451, 461 (2006); see also *Sedima v. Imrex Co.*, 473 U.S. 479, 497 (1985) (“[T]he
23 compensable injury necessarily is the harm caused by predicate acts sufficiently related to
24 constitute a pattern, for the essence of the violation is the commission of those acts in connection
25 with the conduct of an enterprise.”). Loomer cannot satisfy this standard because neither of the
26 predicate acts she attempts to allege against Twitter (assistance to terrorist organizations and
27 advocacy for the overthrow of the government, ¶¶ 288–300 & 301–12) directly gave rise to her
28

1 injuries (removal from Twitter and subsequent reputational and consequential harms).¹⁰ Because
2 Loomer does not allege any way in which the Twitter Defendants’ alleged RICO conduct harmed
3 her, the Complaint must be dismissed.

4 Loomer not only fails to meet the causation requirement (which proves fatal), but she also
5 fails to allege a concrete financial injury to her business or property that is cognizable under
6 Section 1964(c) (which independently proves fatal). “[I]t is well-established that not all injuries
7 are compensable under [the civil RICO statute]. . . . [A] showing of ‘injury’ requires proof of
8 concrete financial loss, and not mere ‘injury to a valuable intangible property interest.’” *Oscar v.*
9 *Univ. Students Co-op. Ass’n*, 965 F.2d 783, 785 (9th Cir. 1992) (citation omitted); *see also Canyon*
10 *Cnty.*, 519 F.3d at 975. Loomer alleges that, as an individual, she suffered “reputational damage,
11 lost employment opportunities due to employers’ fear of being similarly banned for mere
12 association per Defendants’ policies, and lost future profits,” Compl. ¶ 243, and that her candidacy
13 for Congress suffered “reputational damage, deprivation of equal access to voters and campaign
14 donations, and the loss of votes in a federal election,” *id.* ¶ 244. These “speculative and
15 amorphous” damages are not available in a civil RICO suit. *E.g., Evans v. City of Chicago*, 434
16 F.3d 916, 932 (7th Cir. 2006) (“[E]very court that has addressed this issue has held that injuries
17 proffered by plaintiffs in order to confer RICO standing must be ‘concrete and actual,’ as opposed
18 to speculative and amorphous.”); *see also Holloway v. Clackamas River Water*, 2015 WL
19 13678932, at *7 (D. Or. Oct. 2, 2015) (“[I]njury to reputation [is] not compensable injur[y] under
20 RICO’s requirement of a concrete harm to the plaintiff’s business or property interest.” (citing
21 *Bowen v. Olstead*, 125 F.3d 800, 806 (9th Cir. 1997))).

22 The Complaint does not even clear the lower threshold for Article III standing. To establish
23 constitutional standing, Loomer must demonstrate (*inter alia*) that she suffered an injury in fact
24 that is “fairly traceable” to the conduct challenged in this case. *Lujan*, 504 U.S. at 560. But the

25 _____
26 ¹⁰ Loomer has no standing to sue the Twitter Defendants for the alleged predicate acts of extortion,
27 transportation in aid of racketeering, or wire fraud or honest services fraud not only because none
28 of these acts gave rise to her Twitter ban and related harms, but also because she does not allege
that Twitter participated in any of these acts in any way. *See* Compl. ¶¶ 256–57, 259–61 (extortion
allegations against Facebook and Google); *id.* ¶¶ 262–70 (transportation in aid of racketeering
allegations against Facebook); *id.* ¶¶ 274–87 (wire fraud or honest services fraud allegations
against Facebook); *see also* Part II.C.3, *infra*.

1 injury Loomer alleges the Twitter Defendants caused her is not “fairly traceable” to the predicate
2 acts she alleges to support her civil RICO claim against them. “There must be a link” between the
3 Twitter Defendants’ challenged conduct and Loomer’s injury. *Smith v. Block*, 784 F.2d 993, 995
4 (9th Cir. 1986). For the reasons already explained above, however, there is no link between
5 Twitter’s alleged provision of material support to terrorists and conspiracy to overthrow the
6 government, on the one hand, and the consequential injuries Loomer allegedly suffered from the
7 deprivation of her Twitter account on the other. *See also Abdulaziz v. Twitter, Inc.*, 2020 WL
8 6947929, at *6 (N.D. Cal. Aug. 12, 2020) (Beeler, M.J.) (no Article III standing based on similar
9 failure to plead causation). And she provides no basis at all to infer that *Dorsey* personally
10 participated in any activities described in the Complaint—whether they had anything to do with
11 her (*e.g.*, her removal from Twitter) or not (*i.e.*, the putative RICO predicate acts)—much less any
12 injury “fairly traceable” to Dorsey’s personal actions.

13 As it did in *Abdulaziz*, the Court should grant the Twitter Defendants’ motion to dismiss
14 both because Plaintiffs fail to state a claim pursuant to Rule 12(b)(6)—here, because they have not
15 established statutory standing—and because Plaintiffs lack constitutional standing pursuant to
16 Rule 12(b)(1). *See id.* at *6–7.

17 **B. Loomer Fails to Allege a Cognizable Association-in-Fact Enterprise.**

18 Separate from the Complaint’s standing infirmities, Loomer fails in multiple ways to
19 sufficiently plead a RICO claim. To make out the essential “enterprise” element of a Section
20 1962(c) claim, Loomer must plead an association-in-fact enterprise with “at least three structural
21 features: a purpose, relationships among those associated with the enterprise, and longevity
22 sufficient to permit these associates to pursue the enterprise’s purpose.” *Boyle v. United States*,
23 556 U.S. 938, 946 (2009). The Complaint does not plausibly allege that the Twitter Defendants
24 associated with *anyone* in the putative enterprise, for any reason, for any length of time.

25 Loomer references a so-called “Community Media Enterprise” made up of Facebook,
26 Twitter, their respective CEOs, YouTube, Google, possibly Procter & Gamble, and unnamed
27 others. *See, e.g.*, Compl. ¶¶ 30, 332, 366. But the Complaint lacks any plausible allegation that the
28 Twitter Defendants (or anyone else named as a member of that enterprise) had any relationship,

1 association, or even *contact* with the other putative members. It thus does not and cannot allege
2 what RICO requires: “that these alleged associates functioned as a unit, as opposed to a collection
3 of unrelated individuals.” *Hunt v. Zuffa, LLC*, No. 19-17529, 2021 WL 4355728, at *2 (9th Cir.
4 Sept. 24, 2021).

5 Nor does Loomer allege that the Twitter Defendants or any other member of the putative
6 enterprise knew the purpose and “general nature of the enterprise and . . . that the enterprise
7 extend[ed] beyond [its] individual role.” *United States v. Christensen*, 828 F.3d 763, 780 (9th Cir.
8 2015). Plaintiffs must “allege something more than the fact that individuals were all engaged in
9 the same type of illicit conduct during the same time period,” as otherwise, “the RICO statute’s
10 allowance for association-in-fact enterprises becomes an open gateway to the imposition of
11 potentially massive costs on numerous defendants, regardless of whether there is even a hint of the
12 collaboration necessary to trigger liability.” *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300,
13 369–70 (3d Cir. 2010) (cited with approval in *In re Countrywide Fin. Corp. Mortg.-Backed Sec.*
14 *Litig.*, 2012 WL 10731957, at *10 n.15 (C.D. Cal. June 29, 2012)) (internal quotation marks and
15 citations omitted); *see also Boyle*, 556 U.S. at 947 n.4 (that “several individuals, independently
16 and without coordination, engaged in a pattern of crimes listed as RICO predicates” does not by
17 itself show an enterprise existed and the defendants worked on its behalf). Loomer’s allegations
18 that Twitter moderated the content on its platform, and that the other defendants engaged in similar
19 conduct on their own platforms, do not plausibly allege an enterprise.

20 Loomer thus has failed to allege the central element of a RICO claim—the existence of a
21 racketeering enterprise—and her RICO claim must therefore be dismissed. *See Hunt*, 2021 WL
22 4355728, at *2 (affirming dismissal of RICO claim where plaintiff failed to allege an enterprise).

23 **C. Loomer Fails to Allege That the Twitter Defendants “Conducted” Any**
24 **Enterprise.**

25 The Complaint similarly cannot establish that the Twitter Defendants *conducted* any RICO
26 enterprise because it does not plausibly allege that the Twitter Defendants’ alleged activities were
27 part of a coordinated effort with Facebook, Google, or anyone else. “Simply naming a string of
28 defendants,” as the Complaint does here, “does not allege an enterprise”—much less that the listed

1 entities conducted one together. *Salazar v. Hoefel*, 2005 WL 8156291, at *4 (C.D. Cal. Feb. 25,
2 2005); *accord Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 646 (7th Cir. 1995) (same).

3 A civil RICO claim requires allegations that not only show an enterprise existed, but also
4 demonstrate that each defendant “conduct[ed] or participate[d], directly or indirectly, in the
5 conduct of” the RICO enterprise’s affairs. 18 U.S.C. § 1962(c). “In order to ‘participate, directly
6 or indirectly, in the conduct of such enterprise’s affairs,’ one must have some part in directing
7 those affairs.” *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). The Complaint does not allege
8 that the Twitter Defendants did anything other than direct Twitter’s *own* affairs by moderating
9 content on and access to its platform. Such actions do not constitute the “conduct[.]” of an
10 enterprise. *Oxford St. Props., LLC v. Robbins*, 2011 WL 13214282, at *7 (C.D. Cal. Feb. 24, 2011).

11 Even if Twitter’s moderation of its platform was illegal (and it certainly is not), Loomer
12 does not allege Twitter or Dorsey coordinated the moderation of its platform with any other
13 participant in the putative conspiracy. “RICO does not penalize parallel, uncoordinated” acts.
14 *Gilbert v. MoneyMutual, LLC*, 2018 WL 8186605, at *13 (N.D. Cal. Oct. 30, 2018) (quoting
15 *United Food & Com. Workers Unions & Emps. Midwest Health Benefits Fund v. Walgreen Co.*,
16 719 F.3d 849, 855 (7th Cir. 2013)). As in *United Food*, Loomer does not allege that defendants
17 “involved themselves in the affairs of the other” defendants. 719 F.3d at 854. Rather, “the activities
18 the complaint describes are entirely consistent with . . . each going about its own business,” *see id.*
19 at 854–55, the exact antithesis of conducting or directing the affairs of the enterprise. *See also In*
20 *re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 609 (N.D. Cal.
21 2020) (dismissing RICO complaint for want of allegations that defendants “specifically conducted
22 the affairs of [a] distinct Enterprise” as opposed to affairs of their own business). This is especially
23 true as to Dorsey, who is not alleged to have conducted the operations of any enterprise besides
24 Twitter. *See id.* Since Loomer fails to plead the essential conduct element of § 1962(c), the
25 Complaint must be dismissed.

26 **D. Loomer Fails to Allege a Pattern of Racketeering Activity.**

27 To show a “pattern” of racketeering activity, Loomer must demonstrate that the alleged
28 predicate acts were sufficiently related to one another and continuous. *H.J. Inc. v. Nw. Bell Tel.*

1 Co., 492 U.S. 229, 239 (1989). And because she alleges that the defendants engaged in an
2 enterprise with “open-ended continuity,” Compl. ¶ 336, she must allege “a form of predicate
3 misconduct that by its nature projects into the future with a threat of repetition.” *Turner v. Cook*,
4 362 F.3d 1219, 1229 (9th Cir. 2004) (internal quotation marks and citations omitted).

5 But Loomer does not allege that any of the supposed racketeering predicates were related
6 to one another—there is no thread in the Complaint connecting the Twitter Defendants’ supposed
7 purpose in materially supporting terrorism to their purpose in putatively seeking to overthrow the
8 government. *See Howard v. Am. Online Inc.*, 208 F.3d 741, 749 (9th Cir. 2000) (racketeering acts
9 are not related when “[t]he purpose, result, victim and method” are different from one another).
10 Nor does she show a pattern that naturally continues into the future. The Complaint incorporates
11 facts demonstrating that Twitter changed its policy relating to foreign terrorist organizations years
12 ago, Compl. ¶ 296 n.252, so there is no threat of continuing relevant activity as to the alleged
13 Section 2339B predicate. *See Turner*, 362 F.3d at 1230 (no open-ended continuity when relevant
14 activity had ended) (collecting cases). And the Complaint does not contain any allegation
15 suggesting that Twitter’s supposed efforts to overthrow the American government—which, as
16 explained in Part I.C.1, *infra*, is not even a predicate act under the RICO statute—either
17 “specifically threaten[s]” to be repeated or constitutes Twitter’s “regular way of doing business.”
18 *See Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995). None of the other predicates can
19 establish a pattern as to the Twitter Defendants because Loomer does not allege that the Twitter
20 Defendants committed any of them. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 2012 WL
21 713289, at *9 (N.D. Cal. Mar. 5, 2012) (“The pattern requirement must be satisfied as to each
22 defendant individually.”), *aff’d*, 751 F.3d 990 (9th Cir. 2014); *see* Part I.C.2, *infra*.

23 Because the Complaint does not plausibly allege a pattern of racketeering activity, it does
24 not state a RICO claim and should be dismissed. *Turner*, 362 F.3d at 1231.

25 **E. Loomer Fails to Sufficiently Allege Racketeering Activity.**

26 “A plaintiff alleging a RICO violation also must allege the essential elements of each
27 predicate act of racketeering activity.” *Mazur v. eBay Inc.*, 2008 WL 2951351, at *2 n.2 (N.D. Cal.
28 July 25, 2008); *Cnty. of Marin v. Deloitte Consulting LLP*, 836 F. Supp. 2d 1030, 1044 n.10 (N.D.

1 Cal. 2011); *see also Craig Outdoor Advert., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027–
2 28 (8th Cir. 2008) (“The requirements of § 1962(c) must be established as to each individual
3 defendant,” and “[t]he focus of § 1962(c) is on the individual patterns of racketeering engaged in
4 by a defendant, rather than the collective activities of the members of the enterprise.”) (internal
5 citations and quotation marks omitted). Each predicate act must be supported by specific factual
6 allegations from which the Court could find a plausible claim for relief, *Yagman v. Wunderlich*,
7 2021 WL 6804219, at *5 (C.D. Cal. Oct. 4, 2021) (quoting *Iqbal*, 556 U.S. at 679), and for those
8 predicate acts sounding in fraud, Loomer must satisfy the heightened pleading standards of Rule
9 9(b), *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991).
10 The Complaint lacks specific factual allegations to show that the Twitter Defendants committed
11 the predicate acts, under the heightened pleading standards for fraud or otherwise.

12 **1. Loomer’s Allegations About Twitter Do Not Establish a Predicate Act.**

13 The Complaint alleges that Twitter advocated for the overthrow of the government of the
14 United States in violation of the Smith Act, 18 U.S.C. § 2385. Compl. ¶¶ 301–12. But the Smith
15 Act is not a statutorily defined RICO predicate. The only cognizable predicate acts under RICO
16 are those listed in 18 U.S.C. § 1961(1), which defines “racketeering activity.” *Murillo-Prado v.*
17 *Holder*, 735 F.3d 1152, 1156 (9th Cir. 2013) (statutory definition is exhaustive). Section 2385 is
18 not listed in that provision, and thus cannot give rise to a RICO claim.

19 Even if violating the Smith Act were a racketeering predicate, the Complaint does not
20 allege a violation. A person can be held liable for advocating for overthrowing the government
21 only by “force or violence” or “assassination of any officer of any such government.” § 2385. This
22 must take the form of affirmative “advocacy of concrete violent action,” and such advocacy must
23 be likely to incite or produce such “imminent lawless action.” *United States v. Rahman*, 189 F.3d
24 88, 115 (2d Cir. 1999) (first citing *Yates v. United States*, 354 U.S. 298, 318 (1957); and then
25 quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). The Complaint does not contain a single
26 allegation that the Twitter Defendants ever advocated for concrete violent action to overthrow the
27 United States government—much less that Twitter’s actions were likely to foment an *imminent*
28 *rebellion*. *See* Compl. ¶¶ 303, 307, 309, 311–12 (alleging generally that former President Trump

1 accused Twitter of interfering with the 2020 election, that former President Trump was banned
2 from Twitter on January 8, 2021 due to risk of further incitement of violence after the violent
3 storming of the U.S. Capitol on January 6, 2021, and that a congressman had previously sent
4 Twitter a letter relating to Taliban Twitter accounts).

5 The only other predicate act that Loomer alleges as to Twitter is material support for
6 terrorism in violation of 18 U.S.C. § 2339B, which also fails. Not only is Loomer’s reliance on
7 Section 2339B foreclosed by Section 230 (*see* Part III, *infra*) and Loomer’s lack of standing (*see*
8 Part II.A, *supra*), but it fails on First Amendment grounds as well. *See* § 2339B(i) (“Nothing in
9 this section shall be construed or applied so as to abridge the exercise of rights guaranteed under
10 the First Amendment[.]”); *O’Handley v. Padilla*, 2022 WL 93625, at *14 (N.D. Cal. Jan. 10, 2022)
11 (“Like a newspaper or a news network, Twitter makes decisions about what content to include,
12 exclude, moderate, filter, label, restrict, or promote, and those decisions are protected by
13 the First Amendment.”) (collecting cases). Further, Loomer’s Section 2339B factual allegations
14 are deficient. Most of them concern the Taliban (Compl. ¶¶ 297–300), which she concedes is not
15 a “designated foreign terrorist organization” as required by Section 2339B(a)(1) (Compl. ¶ 297).
16 And Loomer herself cites a source noting that when Twitter identifies an account affiliated with
17 Hamas or Hezbollah, Twitter’s policy is to terminate that account. Compl. ¶ 296 n.252.

18 Because the Complaint does not plausibly allege that Twitter violated either statute (one of
19 which is not even a RICO predicate) it does not state a viable RICO claim. *See Abcarian v. Levine*,
20 972 F.3d 1019, 1028 (9th Cir. 2020).

21 **2. Loomer Does Not Allege That Twitter Played Any Part in Any**
22 **Transportation in Aid of Racketeering, Wire Fraud, or Extortion.**

23 The Complaint does not allege that the Twitter Defendants participated in the predicate
24 acts of transportation in aid of racketeering, wire fraud, or extortion. *See* Compl. ¶¶ 245–87. The
25 Twitter Defendants thus cannot be liable for those acts.

26 Loomer does not even mention the Twitter Defendants in describing the transportation in
27 aid of racketeering and wire fraud predicate acts. Compl. ¶¶ 262–87. For this reason alone, these
28 allegations cannot form the basis of the Twitter Defendants’ liability. *See, e.g., Keys v. Pearson*

1 *Affiliated, Inc.*, 2013 WL 12205581, at *3 (C.D. Cal. May 14, 2013) (dismissing RICO claims
2 against defendants where allegations of predicate acts “fail[ed] to mention” those defendants);
3 *Rouse v. Rouse*, 1990 WL 160194, at *5 (N.D.N.Y. Oct. 17, 1990) (same). Allegations which do
4 not mention Twitter cannot suffice to demonstrate that Twitter used “the mail or any facility in
5 interstate or foreign commerce” to carry out any “unlawful activity,” and thus cannot show that
6 Twitter engaged in transportation in aid of racketeering in violation of 18 U.S.C. § 1952. *See*
7 *United States v. Rogers*, 389 F. Supp. 3d 774, 786 (C.D. Cal. 2019). And they certainly cannot
8 demonstrate that Twitter committed any acts of wire fraud at the heightened level of specificity
9 demanded by Federal Rule of Civil Procedure 9(b). *See Mostowfi v. I2 Telecom Int’l, Inc.*, 269 F.
10 App’x 621, 624 (9th Cir. 2008) (“[G]eneral statements about actions committed by the defendants
11 that fail to identify the ‘who, what, when, where and how’ of the misconduct charged” do not
12 satisfy Rule 9(b.); *Lancaster Cmty. Hosp.*, 940 F.2d at 405 (RICO plaintiff must detail “the role
13 of each defendant in each [fraudulent] scheme.”). Even setting aside Rule 9(b)’s heightened
14 pleading standard, a plaintiff must fundamentally allege a “scheme to defraud” which includes an
15 “affirmative, material misrepresentation.” *United States v. Green*, 592 F.3d 1057, 1064 (9th Cir.
16 2010). The Complaint contains no plausible allegations of any affirmative, material
17 misrepresentations by anyone—let alone by the Twitter Defendants.

18 Moreover, the Complaint’s allegations focus on honest services fraud. *See* Compl. ¶¶ 272–
19 75. But that predicate cannot give rise to RICO standing, *Ove v. Gwinn*, 264 F.3d 817, 825 (9th
20 Cir. 2001), and it also requires a “scheme[] to deprive another of honest services through bribes or
21 kickbacks supplied by a third party who ha[s] not been deceived[,]” *Skilling v. United States*, 561
22 U.S. 358, 404 (2010), which the Complaint does not allege the Twitter Defendants (or anyone else)
23 perpetuated.

24 As to the extortion predicate, Loomer only mentions Twitter in referencing (a) Twitter’s
25 right to moderate its platform, and (b) its account verification process. Compl. ¶¶ 246–51. Loomer
26 does not allege that Twitter obtained any of her property, nor that Twitter used force, violence or
27 fear to do so—“wrongful[ly]” or otherwise. The Hobbs Act, 18 U.S.C. § 1951(b)(2), requires that
28 Loomer allege each of these elements. *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 404

1 (2003); *United States v. Enmons*, 410 U.S. 396, 400 (1973) (the statutory term “wrongful” limits
2 the application of the Hobbs Act to “instances where the obtaining of the property would itself be
3 ‘wrongful’ because the alleged extortionist has no lawful claim to that property”). In short, there
4 is no allegation that Twitter or Dorsey committed any extortion predicate act.

5 For all of these reasons, Loomer fails to state a claim under 18 U.S.C. § 1962(c).

6 **3. Loomer Does Not Allege That Dorsey Played Any Part in Any Alleged
7 Predicate Act.**

8 The Complaint does not attempt, even in the most conclusory terms, to allege that any
9 conduct on Dorsey’s part constituted a RICO predicate act. In the 68 paragraphs (¶¶ 245–312) that
10 purport to describe predicate acts, Dorsey’s name appears only twice, and only as the addressee of
11 a letter from a member of Congress complaining about Twitter. *See* Compl. ¶¶ 311–12. The failure
12 to allege any act on Dorsey’s part is fatal to Loomer’s attempt to state a claim against him.

13 **F. Loomer Does Not State a Section 1962(d) Conspiracy Claim.**

14 Loomer brings a second tag-along count alleging a RICO conspiracy. Compl. ¶¶ 363–69;
15 *see* 18 U.S.C. § 1962(d). But “Plaintiffs cannot claim that a conspiracy to violate RICO existed if
16 they do not adequately plead a substantive violation of” Section 1962(c). *Sanford v.*
17 *MemberWorks, Inc.*, 625 F.3d 550, 559 (9th Cir. 2010) (quoting *Howard v. Am. Online Inc.*, 208
18 F.3d 741, 751 (9th Cir. 2000)). Because Loomer has not stated a Section 1962(c) claim for all the
19 reasons explained above, her pendent Section 1962(d) claim necessarily fails.

20 The Complaint also independently fails to allege a RICO conspiracy claim. A defendant
21 can be found liable for conspiring to violate RICO only where it is demonstrated that the defendant
22 knowingly and personally “agreed to facilitate a scheme which includes the operation or
23 management of a RICO enterprise.” *United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir.
24 2004). Loomer does not allege that the Twitter Defendants agreed to do anything with anyone,
25 much less that such agreement included a scheme to operate or manage a RICO enterprise. And as
26 explained above, Loomer was not injured by any of the alleged predicate acts, *see* Part II.A, *supra*,
27 which is a necessary element of a RICO conspiracy claim. *See Reddy v. Litton Indus., Inc.*, 912
28 F.2d 291, 295 (9th Cir. 1990). Therefore, the Complaint’s RICO conspiracy claim also fails.

1 **III. SECTION 230 OF THE CDA BARS LOOMER’S COMPLAINT.**

2 The Complaint must be dismissed with prejudice because it is an attempt to hold Twitter,
3 an interactive computer service provider, and its former CEO liable for Twitter’s decisions
4 concerning the removal of third-party content posted on Twitter’s platform. Under well-
5 established precedent, Section 230(c)(1) of the CDA bars all such claims. *Roommates*, 521 F.3d at
6 1170–71 (“[A]ny activity that can be boiled down to deciding whether to exclude material that
7 third parties seek to post online is perforce immune under section 230.”).

8 District courts may (and routinely do) grant Rule 12(b)(6) motions on Section 230
9 immunity grounds and need not wait for that defense to be raised at summary judgment. *See Dyroff*
10 *v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096–97 (9th Cir. 2019). “[C]ourts aim to resolve
11 the question of § 230 immunity at the earliest possible stage of the case so that defendants entitled
12 to § 230 immunity are saved from having to fight costly and protracted legal battles.” *Morton v.*
13 *Twitter, Inc.*, 2021 WL 1181753, at *3 (C.D. Cal. Feb. 19, 2021) (quoting *Nemet Chevrolet, Ltd.*
14 *v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009)) (internal quotation marks
15 omitted). Indeed, Section 230 was “inten[ded] to promote active screening by service providers of
16 online content provided by others” and prevent “regulation compelled at the sword point of tort
17 liability.” *Barrett v. Rosenthal*, 146 P.3d 510, 522–23 (Cal. 2006). Courts thus routinely dismiss
18 claims under Section 230 with prejudice. *See, e.g., Fyk v. Facebook, Inc.*, 2019 WL 11288576, at
19 *3 (N.D. Cal. June 18, 2019); *Morton*, 2021 WL 1181753, at *6; *Lewis v. Google LLC*, 461 F.
20 Supp. 3d 938, 963 (N.D. Cal. 2020), *aff’d*, 851 F. App’x 723 (9th Cir. 2021).

21 Section 230(c)(1) of the CDA “protects from liability (1) a provider or user of an interactive
22 computer service (2) whom a plaintiff seeks to treat. . . as a publisher or speaker (3) of information
23 provided by another information content provider.” *Dyroff*, 934 F.3d at 1097 (citation omitted);
24 *see* 47 U.S.C. § 230(c)(1) (providing that “[n]o provider or user of an interactive computer service
25 shall be treated as the publisher or speaker of any information provided by another information
26 content provider.”). All three prongs are met here, and the claims at issue thus fall squarely within
27 this definition.

1 On Section 230(c)(1)'s first prong, Twitter is a provider of an interactive computer service.
2 As the Ninth Circuit has held, "[t]he prototypical service qualifying for [CDA] immunity is an
3 online messaging board (or bulletin board) on which Internet subscribers post comments and
4 respond to comments posted by others." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016).
5 This aptly describes Twitter, a website where account holders post content and engage with the
6 content of other account holders. Courts in this circuit have thus repeatedly found that Twitter is
7 an "interactive computer service provider." *E.g., Brittain v. Twitter, Inc.*, 2019 WL 2423375, at *2
8 (N.D. Cal. June 10, 2019) (dismissing plaintiff's claim against Twitter with prejudice pursuant to
9 § 230(c)(1)); *Dehen v. Does 1-100*, 2018 WL 4502336, at *3 (S.D. Cal. Sept. 19, 2018) (same);
10 *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1120–22 (N.D. Cal. 2016) (same), *aff'd*, 881 F.3d
11 739 (9th Cir. 2018).

12 With regard to Section 230(c)(1)'s second and third prongs, Loomer's Complaint seeks to
13 treat Twitter as a publisher of information provided by another information content provider, and
14 the claim is thus barred. A plaintiff treats the defendant as a publisher when it attempts to hold a
15 defendant liable for "reviewing, editing, and deciding whether to publish or to withdraw from
16 publication third-party content." *Gonzalez v. Google LLC*, 2 F.4th 871, 892 (9th Cir. 2021). Here,
17 Loomer's RICO allegations against Twitter all target Twitter for actions it took as a publisher in
18 determining which individuals (and the content they produce) are allowed to remain on its
19 platform. The only allegations involving both Twitter and Loomer concern Twitter's decisions
20 about whether to exclude third-party content from its platform—namely, its decision to ban
21 Loomer from the platform for posting hateful content. *See* Compl. ¶¶ 210, 240. And the only
22 allegations Loomer says constitute racketeering activity—which Loomer has no standing to pursue
23 because they caused her no injury, *see* Part II.A, *supra*—exclusively concern Twitter's moderation
24 of third-party content.¹¹

25
26 ¹¹ *See id.* ¶¶ 30, 88–91, 94, 163–68, 172, 179, 180–186, 193–95, 197, 202, 204, 207–08, 294, 299–
27 300 (allegations about Twitter's moderation of content on platform); *id.* ¶¶ 50, 52–53, 61–63, 71–
28 72, 76, 81, 86, 93, 109, 199–200, 246, 250 (allegations about Twitter's adoption of content
moderation policies); *id.* ¶¶ 40, 48, 51, 55, 59, 68, 84, 87, 95–96, 108, 130–31, 144–45, 296
(allegations about public statements from Twitter representatives regarding content moderation);
id. ¶¶ 35, 54, 132–33, 201, 247–49, 251, 290, 298, 303, 307, 309, 311–12, 320, 326 (allegations

1 The Ninth Circuit and district courts in California have held time and again that Section
 2 230(c)(1) bars suits like Loomer’s, which seek to hold Twitter and other social media platforms
 3 liable for “activity that can be boiled down to deciding whether to exclude material that third
 4 parties seek to post online.” *See Roommates*, 521 F.3d at 1170–71. These courts have consistently
 5 found that plaintiffs who, like Loomer, challenge their removal from social media platforms are in
 6 fact challenging decisions that Section 230 immunizes from review. *See, e.g.:*

- 7 • *Brittain*, 2019 WL 2423375, at *3 (“Twitter argues that Brittain’s claims ‘ultimately
 8 arise from Twitter’s alleged decision to suspend’ the Brittain Accounts and therefore
 9 seek to treat Twitter as a publisher under the CDA. . . .The Court agrees with Twitter.”);
- 10 • *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1117 (N.D. Cal.
 11 2020) (dismissing claims as precluded by 230(c)(1) where “Plaintiffs seek to hold
 12 Facebook liable for removing FAN’s Facebook account, posts, and content”);
- 13 • *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095 (N.D. Cal.
 14 2015) (“[R]emoving content is something publishers do, and to impose liability on the
 15 basis of such conduct necessarily involves treating the liable party as a publisher.”
 16 (citation omitted)), *aff’d*, 697 F. App’x 526 (9th Cir. 2017);
- 17 • *Riggs v. MySpace, Inc.*, 444 F. App’x 986, 987 (9th Cir. 2011) (social network’s
 18 decision to delete some profiles but not others protected from liability by § 230(c)(1));
- 19 • *See also Levitt v. Yelp! Inc.*, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011)
 20 (platform’s decision to delete some content but not others “immunized by
 21 § 230(c)(1)”), *aff’d*, 765 F.3d 1123 (9th Cir. 2014).

22 To the extent Loomer asserts that Twitter violated RICO by deciding not to remove certain
 23 third-party content or accounts, *see* Compl. ¶¶ 288–300, these decisions are similarly immune.¹²

24 _____
 25 about public statements from others regarding content on Twitter); *see also* ¶ 344 (concerning
 26 Twitter’s alleged application of content moderation policies); *id.* ¶ 346 (concerning Twitter’s
 27 alleged decision to remove third-party accounts from platform); *id.* ¶ 354 (concerning Twitter’s
 28 alleged decision to allow some third-party users to post on platform); *id.* ¶¶ 356–58 (concerning
 Twitter’s alleged decision to permit content on platform).

¹² Section 230(e)(1)’s exception for criminal conduct does not apply to civil actions brought under the RICO statute. *See Gonzalez*, 2 F.4th at 890 (collecting cases). No other statutory exception applies. *See* 47 U.S.C. § 230(e)(2)–(5) (irrelevant exceptions).

1 *See, e.g., Gonzalez*, 2 F.4th at 891–92 (affirming dismissal, under § 230(c)(1), of claims against
 2 Google for failing to block or remove content from ISIS on YouTube); *Fields*, 200 F. Supp. 3d at
 3 972 (plaintiffs’ attempts to impose liability on Twitter for providing accounts to ISIS members
 4 were barred by § 230(c)(1) because they were based on “the decision to permit third parties to post
 5 content” through the provision of accounts); *Ripple Labs Inc. v. YouTube LLC*, 2020 WL 6822891,
 6 at *6 (N.D. Cal. Nov. 20, 2020) (Beeler, M.J.) (YouTube not liable under § 230(c)(1) for failing
 7 to remove third-party content); *accord Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019)
 8 (Facebook immunized by § 230(c)(1) from Antiterrorism Act liability for hosting Hamas content).

9 Section 230(c)(1) therefore immunizes Twitter from liability for each of Loomer’s
 10 allegations. Because Loomer’s Complaint is premised entirely on Twitter’s third-party content
 11 moderation decisions, it cannot be amended to avoid Section 230 and should be dismissed with
 12 prejudice. *See Fyk*, 2019 WL 11288576, at *3 (“[G]ranting leave to amend would be futile in this
 13 instance as Plaintiff’s claims are barred” by § 230(c)(1)); *King v. Facebook, Inc.*, 572 F. Supp. 3d
 14 776, ---, 2021 WL 5279823, at *10 (N.D. Cal. 2021) (same).

15 Finally, Section 230’s protections apply equally to Twitter’s CEO as a “provider” of
 16 Twitter’s interactive computer service. § 230(c)(1); *Igbonwa v. Facebook, Inc.*, 2018 WL
 17 4907632, at *5 (N.D. Cal. Oct. 9, 2018) (“[W]here, as here, a plaintiff seeks to hold Zuckerberg
 18 liable only on the basis of Facebook’s actions or inaction, he too is a provider of an interactive
 19 computer service for the purposes of the CDA.”), *aff’d*, 786 F. App’x 104 (9th Cir. 2019); *accord*
 20 *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014). Because Loomer’s allegations
 21 related to Dorsey exclusively concern Twitter’s moderation decisions, *see* Compl. ¶¶ 40 & 84,
 22 Section 230 immunizes him from liability for all the reasons Twitter is immune.

23 **IV. IN THE EVENT THE ENTIRE COMPLAINT IS NOT DISMISSED WITH**
 24 **PREJUDICE, THE COURT SHOULD DISMISS LOOMER’S CLAIM FOR**
 25 **PUNITIVE DAMAGES.**

26 “The proper vehicle for challenging the sufficiency of a punitive damages claim is a motion
 27 to dismiss under Rule 12(b)(6).” *Oushana v. Lowe’s Cos., Inc.*, 2017 WL 5070271, at *2 (E.D.
 28 Cal. Nov. 3, 2017). Loomer seeks \$10 billion in punitive damages. Compl. at 132. This represents
 more than 94 percent of her total damages claims. Punitive damages are not available in RICO

1 cases. *See Sw. Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 810 (N.D. Cal. 1989)
 2 (dismissing claim for punitive damages because “[t]he civil remedy provision of RICO, 18 U.S.C.
 3 § 1964, provides for treble damages which are themselves punitive in character.”).¹³

4 If, for any reason, Loomer’s Complaint is not dismissed with prejudice for the multitude
 5 of reasons noted above, Loomer’s claim for punitive damages should be dismissed with prejudice.
 6 Courts in this circuit routinely dismiss claims for damages that are not permitted under the statute
 7 giving rise to the cause of action.¹⁴ *See, e.g., Powell v. Wells Fargo Home Mortg.*, 2017 WL
 8 2720182, at *7 (N.D. Cal. June 23, 2017), *aff’d*, 855 F. App’x 382 (9th Cir. 2021); *Fraser v. Mint*
 9 *Mobile, LLC*, 2022 WL 1240864, at *8 (N.D. Cal. Apr. 27, 2022).

10 CONCLUSION

11 For the foregoing reasons, the Complaint should be dismissed as to the Twitter Defendants.
 12 Because the Complaint seeks redress for the same harms that gave rise to Loomer’s prior failed
 13 litigation (and thus cannot be amended to avoid res judicata), and because it is premised entirely
 14 on Twitter’s third-party content moderation decisions (and thus cannot be amended to avoid
 15 Section 230), the Court should dismiss it with prejudice.

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 23 ¹³ *See also Neibel v. Trans World Assur. Co.*, 108 F.3d 1123, 1130 (9th Cir. 1997), *recognized as*
 24 *overruled on other grounds in Fernandez*, 388 F.3d at 1230; *accord Standard Chlorine of Del.,*
Inc. v. Sinibaldi, 821 F. Supp. 232, 252–53 (D. Del. 1992) (“[P]unitive damages are not proper
 under RICO since the Act already provides for treble damages.”).

25 ¹⁴ The Ninth Circuit has said that in most cases a defendant may not move to strike an improper
 26 damages claim under Rule 12(f). *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th
 27 Cir. 2010). It has instead suggested that such claims be dismissed pursuant to Rule 12(b)(6). *Id.*
 28 But *Whittlestone* did not involve a damages claim, like the one in this case, which was “redundant”
 of damages already claimed in the pleading—and Rule 12(f) expressly permits courts to strike
 “redundant” matters. *See Fed. R. Civ. P. 12(f); see also Sinibaldi*, 821 F. Supp. at 252–53 (punitive
 damages redundant of RICO treble damages). The Court thus may alternatively strike Loomer’s
 punitive damages claim under Rule 12(f).

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