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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
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7 GEERTE M. FRENKEN,

8 Plaintiff,

9 v.

10 DAVID J. HUNTER, et al.,

11 Defendants.

Case No. [17-cv-02667-HSG](#)

**ORDER GRANTING DEFENDANTS'  
MOTIONS TO DISMISS PLAINTIFF'S  
SECOND AMENDED COMPLAINT**

Re: Dkt. Nos. 48, 49, 51

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13 Pending before the Court are three motions to dismiss Plaintiff Geerte Frenken's second  
14 amended complaint, Dkt. No. 23 ("SAC"), filed by Jody Dufur Hunter and Amy Hunter, Dkt. No.  
15 48 ("Hunter Mot."); Twitter, Inc. ("Twitter"), Dkt. No. 49 ("Twitter Mot."); and Christopher Perry  
16 Hunter ("CPH Mot."), Dkt. No. 51 (collectively, "Defendants"). Briefing on the motions is  
17 complete. See Dkt. Nos. 53 ("Hunter Opp."), 54 ("Hunter Reply"), 52-1 ("Twitter Opp."), 56  
18 ("Twitter Reply"), 57 ("CPH Opp."), 62 ("CPH Reply"). The Court took the motions under  
19 submission on April 24, 2018. See Civ. L.R. 7-1(b). After carefully considering the parties'  
20 arguments, the Court **GRANTS** Defendants' motions.

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22 **I. BACKGROUND**

23 On May 9, 2017, Plaintiff, proceeding pro se, filed suit against her then recently deceased  
24 former husband, David Hunter ("the Decedent"), asserting claims for defamation and false  
25 invasion of privacy. See Dkt. No. 1.<sup>1</sup> Shortly after filing her initial complaint, Plaintiff amended  
26 her complaint twice, partly to account for the Decedent's passing. The operative complaint now  
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28 <sup>1</sup> David Hunter passed away on April 30, 2017. SAC ¶ m.

1 names the above described parties as Defendants. As they relate to the Decedent and each other,  
2 Defendant Jody Dufur Hunter is the Decedent’s sister-in-law, and Defendant Christopher Perry  
3 Hunter’s wife. SAC at 3. Amy Hunter is the Decedent’s sister. Id. Christopher Perry Hunter is  
4 the Decedent’s brother. Id. The gravamen of Plaintiff’s complaint is that the Decedent sent  
5 messages through Twitter (i.e., “tweets”) that disparaged Plaintiff and tarnished her personal and  
6 professional reputation. SAC at 2. As pled, the Decedent’s tweets relate broadly to an underlying  
7 custody dispute involving Plaintiff, the Decedent, and Christopher Perry Hunter. SAC ¶¶ a-1; see  
8 Frenken v. Hunter, Case No. 4:17-cv-03125.

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10 **II. LEGAL STANDARD**

11 Federal Rule of Civil Procedure (“Rule”) 8(a) requires that a complaint contain “a short  
12 and plain statement of the claim showing that the pleader is entitled to relief[.]” A defendant may  
13 move to dismiss a complaint for failing to state a claim upon which relief can be granted under  
14 Rule 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a  
15 cognizable legal theory or sufficient facts to support a cognizable legal theory.” Mendiondo v.  
16 Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6)  
17 motion, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.”  
18 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is facially plausible when a  
19 plaintiff pleads “factual content that allows the court to draw the reasonable inference that the  
20 defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In  
21 reviewing the plausibility of a complaint, courts “accept factual allegations in the complaint as  
22 true and construe the pleadings in the light most favorable to the nonmoving party.” Manzarek v.  
23 St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless, courts do not  
24 “accept as true allegations that are merely conclusory, unwarranted deductions of fact, or  
25 unreasonable inferences.” In re Gilead Scis. Secs. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008).

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27 **III. DEFENDANTS JODY DUFUR HUNTER AND AMY HUNTER’S MOTION**

28 The SAC names Jody Dufur Hunter (“Jody”) and Amy Hunter (“Amy”) in their individual

1 capacities “and in their capacities as Executor, Fiduciary, Grantor, Guardian, Trustees and  
2 Beneficiaries of the Estate of the Decedent.” SAC at 1–2. As Jody and Amy highlight, Plaintiff  
3 fails to allege that they are liable as individuals based on their own tweets or by participating in the  
4 Decedent’s tweeting. Hunter Mot. at 4. In addition, Jody and Amy highlight that they have never  
5 served as settlors, trustors, or fiduciaries for the Decedent. Id.

6 Plaintiff acknowledges both points in her opposition. Plaintiff acknowledges that Jody and  
7 Amy did not independently tweet or participate in any of the tweets set forth in the SAC, and that  
8 these parties do not serve as fiduciaries or executors for the Decedent. Hunter Opp. at 3.  
9 Considering this agreement, the Court **GRANTS** Amy and Jody’s motion to dismiss. The only  
10 dispute between these parties pertains to whether the Court should dismiss Amy and Jody with  
11 prejudice. See *id.*; Hunter Reply at 2. Based on Plaintiff’s admissions, the Court concludes that  
12 Plaintiff has pled herself out of a claim against these defendants. See *Sprewell v. Golden State*  
13 *Warriors*, 266 F.3d 979, 988 (9th Cir.), opinion amended on *denial of reh’g*, 275 F.3d 1187 (9th  
14 Cir. 2001) (“We have held that a plaintiff can—as Sprewell has done here—plead himself out of a  
15 claim by including unnecessary details contrary to his claims.”). Because any amendment would  
16 be futile, the Court **DISMISSES WITHOUT LEAVE TO AMEND** the claims against Amy and  
17 Jody.

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19 **IV. DEFENDANT TWITTER’S MOTION**

20 In its dismissal motion, Twitter argues that it is immune from Plaintiff’s suit under the  
21 Communications Decency Act (“CDA”), 47 U.S.C. § 230. Twitter Mot. at 3. Section 230(c)(1) of  
22 the CDA states that “[n]o provider or user of an interactive computer service shall be treated as the  
23 publisher or speaker of any information provided by another information content provider.”  
24 Twitter argues that this section bars Plaintiff’s claims because “(1) [it is] a provider or user of an  
25 interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of  
26 action, as a publisher or speaker (3) of information provided by another information content  
27 provider.” See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009) (setting forth the  
28 elements of an immunity defense under Section 230(c)(1)).

1 Plaintiff here does not does not dispute that Twitter is a provider of an interactive computer  
2 service. See *id.* at 1102; Twitter Opp. at 4–5. Nor does Plaintiff dispute that the alleged tweets are  
3 “by another ‘information content provider,’” i.e., the Decedent. See Barnes, 570 F.3d at 1102 &  
4 n.6 (“The statute also tells us that this term ‘means any person or entity that is responsible, in  
5 whole or in part, for the creation or development of information provided through the Internet or  
6 any other interactive computer service.’” (quoting 47 U.S.C. § 230(f)(3)).

7 Thus, the primary question is whether Plaintiff “seek[s] to hold Twitter liable as ‘speaker’  
8 or ‘publisher’ of the content of Decedent’s” Twitter account. Twitter Opp. at 5. The SAC’s  
9 allegations compel the conclusion that she does. Plaintiff’s two causes of actions are predicated  
10 entirely on allegations that Twitter allowed the Decedent to send offensive and disparaging  
11 messages at or regarding Plaintiff. See SAC ¶¶ h–r; Barnes, 570 F.3d at 1102  
12 (“We have indicated that publication involves reviewing, editing, and deciding whether to publish  
13 or to withdraw from publication third-party content.” (citing *Fair Hous. Council of San Fernando*  
14 *Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008) (“[A]ny activity that can  
15 be boiled down to deciding whether to exclude material that third parties seek to post online is  
16 perforce immune under section 230.”))). Plaintiff asserts, for instance, that “Mr. Hunter smeared  
17 Ms. Frenken in his Twitter campaign of hate, by Twitter handle @Jasmijnisfree., claiming Ms.  
18 Frenken ‘hides in a foreign country,’ and ‘buys heroin for addict’ . . . .” SAC ¶ k. By way of  
19 another example, Plaintiff alleges that the Decedent “consistently tweeted outrageous and  
20 deranged statements” about Plaintiff. *Id.* ¶ l. The SAC is devoid of facts suggesting that Plaintiff  
21 seeks to hold Twitter liable in any capacity other than as a speaker or publisher of information  
22 about Plaintiff.

23 Plaintiff, in her opposition, claims that Twitter violated its own rules by allowing the  
24 Decedent to send offensive and harassing tweets. Twitter Opp. at 5–6. First, Plaintiff failed to  
25 include these allegations in the SAC; thus, the Court does not consider them. Twitter Reply at 3 &  
26 4 n.1; *Schneider v. California Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“In  
27 determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint  
28 to a plaintiff’s moving papers, such as a memorandum in opposition to a defendant’s motion to

1 dismiss.” (emphasis in original)). Likewise, Plaintiff asserts for the first time in her opposition  
2 that Twitter violated the Violence Against Women Reauthorization Act of 2013 and the Family  
3 Violence and Prevention Services Act. See *id.*; Twitter Opp. at 7; Twitter Reply at 4 n.1. The  
4 Court cannot consider this assertion for the same reason.

5 Even if the Court were to consider these arguments, however, they fail. Contrary to  
6 Plaintiff’s reading of *Barnes*, Twitter is not liable under a promissory estoppel theory. See Twitter  
7 Opp. at 6. Plaintiff fails to allege or argue that Twitter created a contract or quasi-contract with  
8 Plaintiff by specifically promising to remove or censor the Decedent’s account. Cf. *Barnes*, 570  
9 F.3d at 1107 (“In a promissory estoppel case, as in any other contract case, the duty the defendant  
10 allegedly violated springs from a contract—an enforceable promise—not from any non-  
11 contractual conduct or capacity of the defendant.”). The rules upon which Plaintiff relies, i.e.,  
12 Twitter’s “enforcement” options for removing content or accounts, are phrased in discretionary  
13 terms. See Twitter Opp. at 5–6 (citing Twitter’s rules, which state that Twitter “may ask someone  
14 to remove the offending Tweet before they can Tweet again,” and “may suspend an account”).  
15 Put simply, the rules that Plaintiff cites do not create liability based on an estoppel theory. Rather,  
16 the SAC’s statements pertain exclusively to Twitter’s decision to transmit the Decedent’s  
17 messages and maintain his account—activities that “necessarily involve[] treating the liable party  
18 as a publisher of the content it failed to remove.” See *Barnes*, 570 F.3d at 1103 (observing that  
19 “removing content is something publishers do”).

20 As to Plaintiff’s other new statutory claims, Plaintiff fails to explain how Twitter, by  
21 maintaining the Decedent’s account, violated the Violence Against Women Reauthorization Act of  
22 2013 or the Family Violence and Prevention Services Act. See Twitter Opp. at 7. Plaintiff does  
23 not cite any authority to support her assertion. In addition, Twitter’s CDA immunity precludes a  
24 finding of liability. The Court therefore **GRANTS** Twitter’s motion to dismiss.

25 For the reasons articulated, the Court also concludes that Plaintiff cannot reframe or  
26 modify her allegations so as to avoid invoking the CDA’s immunity provisions. Plaintiff’s suit is,  
27 at bottom, predicated entirely on her now deceased ex-husband’s tweeting activity. Because any  
28 allegations stemming from this theory arise from Twitter’s status as a publisher of information

1 generated by the Decedent, allowing Plaintiff to further amend her complaint would be futile. See  
2 *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (holding that “the  
3 district court did not err when it dismissed the SAC with prejudice, since it was clear that the  
4 plaintiffs had made their best case and had been found wanting.”). The Court therefore  
5 **DISMISSES WITHOUT LEAVE TO AMEND** Plaintiff’s claims against Twitter.

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7 **V. DEFENDANT CHRISTOPHER PERRY HUNTER’S MOTION**

8 Christopher Perry Hunter (“Christopher”) moves to dismiss Plaintiff’s complaint on  
9 grounds similar to those discussed in Section III—namely, Plaintiff’s failure fails to state any basis  
10 for Christopher’s individual liability. CPH Mot. at 2. Plaintiff again acknowledges this in her  
11 opposition, stating that she does not oppose dismissing Christopher “from Plaintiff’s SAC ‘as an  
12 individual.’” CPH Reply at 4. Nonetheless, Plaintiff asserts in her opposition that Christopher is  
13 still “vicariously liable to Plaintiff as a successor of Decedent; and/or a joint tortfeasor with  
14 Decedent as an ‘associate’ or ‘third party’ (depending on the content of Decedent’s Will).” CPH  
15 Opp. at 4–5.

16 Though the SAC names Christopher in his capacity as “Executor, Trustee, Fiduciary,  
17 and/or Beneficiary” of the Decedent’s estate, see SAC at 3, the SAC lacks allegations that support  
18 finding Christopher liable in these capacities. To the extent that any allegations regarding  
19 derivative liability appear, they do so for the first time in Plaintiff’s opposition. See *id.* The Court  
20 does not consider these statements for the reasons already discussed. See *Schneider*, 151 F.3d at  
21 1197 n.1.

22 Even if the Court were to entertain these allegations, they fail. Plaintiff does not explain  
23 how Christopher joined in or sanctioned the Decedent’s tweeting, or exercised any control over  
24 the Decedent’s Twitter account. Cal. Prob. Code § 18002 (“A trustee is personally liable for torts  
25 committed in the course of administration of the trust only if the trustee is personally at fault.”).  
26 Though Plaintiff alludes to *Savage v. Pac. Gas & Elec. Co.*, that case does not support Plaintiff’s  
27 proposition. See 21 Cal. App. 4th 434, 445 (1993). In *Savage*, the court found a triable question  
28 as to whether certain corporate defendants were liable for communicating allegedly slanderous

1 statements about the plaintiff. See *id.* at 446–47. Here, in contrast, Plaintiff fails to allege that  
2 Christopher somehow communicated or conveyed statements about Plaintiff on behalf of the  
3 Decedent.

4 Because Plaintiff fails to state a claim for relief that is plausible on its face, the Court  
5 **GRANTS** Defendant Christopher Perry Hunter’s dismissal motion.<sup>2</sup> Nonetheless, the Court  
6 cannot determine at this stage that Plaintiff “could not possibly” cure the above discussed  
7 deficiencies by alleging other facts. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)  
8 (quotation and citation omitted).<sup>3</sup> Plaintiff’s claims against Christopher are therefore  
9 **DISMISSED WITH LEAVE TO AMEND**.<sup>4</sup> Any third amended complaint must clearly,  
10 concisely and comprehensively state the precise basis for Christopher’s liability. Plaintiff cannot  
11 advise the Court, for instance, to review the Twitter archive for evidence of Christopher’s tweeting  
12 activity. Nor can her claims survive based on their current premise: Christopher’s familial  
13 relationship with the Decedent. Rather, Plaintiff must plead facts that plausibly show Christopher  
14 joined or otherwise authorized the Decedent’s allegedly defamatory and harassing tweets (but only  
15 if she can do so truthfully on some plausible basis). If Plaintiff cannot correct the multiple  
16 obvious flaws in her now twice-amended complaint, the Court will dismiss Plaintiff’s claims  
17 without further notice or leave to amend.

18  
19 **VI. CONCLUSION**

20 For these reasons, the Court **GRANTS** Defendants’ motions, **DISMISSES WITHOUT**  
21 **LEAVE TO AMEND** Plaintiff’s claims against Amy Dufur Hunter, Jody Hunter, and Twitter,  
22 and **DISMISSES** Plaintiff’s claims against Defendant Christopher Perry Hunter **WITH LEAVE**  
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24  
25 <sup>2</sup> Because the Court grants Defendants’ motions to dismiss the SAC in its entirety, the Court  
**DENIES AS MOOT** Christopher’s motions to strike portions of the SAC under Rule 12(f) and  
for a more definite statement under Rule 12(e). See CPH Mot. at 10–15.

26 <sup>3</sup> But for Christopher’s concession that he believed that Plaintiff could cure the deficiencies in the  
SAC, see CPH Mot. at 14–15, the Court likely would not have allowed Plaintiff any further  
27 opportunity to amend given the purported basis for the allegations.

28 <sup>4</sup> Plaintiff concedes that her claims against Christopher in his “individual capacity” should be  
dismissed. CPH Opp. at 10. To the extent based on that theory, Plaintiff’s claims are accordingly  
**DISMISSED WITHOUT LEAVE TO AMEND**.

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**TO AMEND** in part and **WITHOUT LEAVE TO AMEND** in part, as set out above. Any third amended complaint must be filed within 21 days of the date of this Order.

**IT IS SO ORDERED.**

Dated: 4/26/2018

  
HAYWOOD S. GILLIAM, JR.  
United States District Judge