UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BROOKE C. DELENCH Plaintiff V. KIMBERLY ARCHIE Defendant	Civil action No. 1:18-CV-12549-LTS

I. INTRODUCTION

This defamation case arises from a four-year campaign by the defendant, Kimberly Archie ("Ms. Archie") to destroy the reputation of the plaintiff, Brooke de Lench ("Ms. de Lench") by falsely accusing her of using anonymous accounts on the social media platform, Twitter, to harass Ms. Archie.

In a desperate attempt to avoid being held to account for her defamatory conduct, Ms. Archie has filed a motion to dismiss plaintiff's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and a special motion to dismiss the complaint under the Massachusetts anti-SLAPP statute, M.G.L. c.231, §59H. As she has done consistently in the past, Ms. Archie attempts to portray herself as the victim of Ms. de Lench's harassment when it is Ms. de Lench who is the victim and Ms. Archie the perpetrator.

For the reasons stated below and in Ms. de Lench's affidavit, plaintiff respectfully requests that the defendant's motion to dismiss be denied.

II. ARGUMENT

A. Ms. Archie's Tweets and Facebook Posts Are Not Statements of Opinion

Contrary to defendant's assertions, Ms. Archie's tweets and Facebook posts are not protected by the First Amendment as expressions of pure opinion about Ms. de Lench's character

or conduct. Instead, they directly and definitively assert facts about her conduct on social media capable of being proven true or false. See Gray v. St. Martin's Press, Inc., 221 F.3d 243, 248 (1st Cir. 2000) (citation omitted).

A review of the tweets and Facebook posts by Ms. Archie at issue in this case[1] discloses that they are all variations on the same meme. All falsely accuse Ms. de Lench of setting up multiple "phony", "anonymous" or "fake" Twitter accounts[2] to use in "defaming", "harassing" or "trolling" Ms. Archie or CTE families or "mocking" her son's death.[3] A number claim that Ms. de Lench had been harassing Ms. Archie for a period of years; some go so far as to claim that she was harassing or defaming Ms. Archie "every day" or "day after day"; others claim that the harassment began just two days after her son died and only after plaintiff was alleged to have learned that defendant intended to have her son's brain autopsied for signs of CTE. Many assert

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1 Due to a clerical error, plaintiff attached the wrong tweet to the First Amended Complaint as Exhibit 58. The correct exhibit is attached as Exhibit A.

2 See Exhibits 47, 48 ("multiple accounts"), 49 ("phony accounts"), 50 (same), 51 (same); 53 ("phony anonymous twitter accounts", "posts today on one of her phony accounts", "fake" accounts; "opens new accounts", "almost a dozen twitter accounts"), 58 ("endless time using and creating new accounts"); 59 ("trolling CTE families from burner accounts"); 60 ("phony account"); 62 ("Brooke de Lench of MomsTEAM aka Luke Johnson burner account"); 63 ("fake account"); 65 (claiming unidentified Twitter account was Ms. de Lench); 66 ("so-called advocate team for 'moms' hiding behind anonymous twitter accounts"); 67 (de Lench was @DanConner76 and @kewlhandluke11); 69 ("Brooke you have more than one troll account"); 70 ("phony burner account" was Ms. de Lench); 71 (Ms. de Lench was a "troll posing as Pete Luke or whoever else she plays today"); 72 (asking Ms. de Lench if she wanted to be a CTE denier to use her real twitter account); 73 ("DanConnor76 [sic] and KewlLuke and Peter whatever are all Brooke de Lench"); 74 (Ms. Archie told @TDTommy33 that @kewlhandluke11 was a "fake account being investigated by twitter" and was associated with a "known twitter abuser").

3 Exhibits 47, 48 ("Brooke de Lench using multiple accounts to harass me"), 49 ("mocking" her son's death), 50 ("mocking" her son's death), 51 (using a phony account to "mock my son's death & defame me every day"); 53 ("online harassment", "troll a grieving mom about her dead son", "going after grieving moms for years"; "for over two years", "It isn't one incident, it is every day now and has been going on for more than two years", "going after grieving moms for years"); 58 (Ms. de Lench "spends endless time using and creating new [Twitter] accounts."). Ms. Archie's Facebook post (Ex. 53) not only claims that Ms. de Lench's relentless harassment campaign started with an "evil email only two days after" her son died – which could be viewed in isolation as the expression of an opinion protected under the First Amendment, [cite] – but asserted *as fact* that the email was sent "as soon as [Ms. de Lench] found out we donated his brain" to Concussion Legacy Foundation. Because the fact that Ms. Archie had donated Paul Bright, Jr.'s brain to be autopsied for CTE was not publicly known before Ms. de Lench sent her condolence email to Ms. Archie two days after his death (Ex. 17), and Ms. Archie did not disclose the contents of Ms. de Lench's email, her assertion was false and rendered her accusation capable of a defamatory meaning.

that Ms. Archie blocked the accounts she claims Ms. de Lench was using to harass/defame/mock her or her son or troll CTE families.[4] Some assert that accounts she was using had been shut down by Twitter. Several claim that, after being blocked or having accounts shut down by Twitter, Ms. de Lench opened new phony accounts in order to continue her alleged online harassment.[5]

From her bald assertions that Ms. de Lench was tweeting from specific, anonymous accounts, including @okayestofmoms, @kewlhandluke, @DanConner76 and @PeterBrookfiel4, to the number of burner accounts from which she was allegedly tweeting, from the repeated factual assertion that she blocked every one of Ms. de Lench's anonymous accounts to the claim that Twitter had shut some of them down, all defendant's statements on social media make assertions of fact capable of verification as either true or false.

By way of example, Ms. Archie's tweet of November 22, 2016 states that "Brooke Delench [was] using multiple [Twitter] accounts to harass [her]" and that "Twitter shut one of them down but she keeps at it." On its face, the tweet asserts without qualification the following facts: (1) Ms. de Lench owned multiple Twitter accounts, (2) that she was using to harass Ms. Archie;[6] (3) Twitter had shut down an account belonging to Ms. de Lench; and (4) after Twitter shut down one of her accounts, Ms. de Lench kept harassing her. Whether plaintiff owned

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4 See Exhibit 47, 48 ("Twitter shut one of them down"); 49 ("blocked every 1 of Ms. de Lench's 'phony' accounts"); 50 ("I think I have blocked every 1 of her phony accounts"); 53 ("blocked her as many ways as I can"); 57 ("I blocked all of her accounts, but she tags me anyway."); 58 ("I have blocked her from all" of her "almost a dozen twitter accounts", "I block her or get an account suspended").

5 See Exhibit 47, 48 ("Twitter shut one of [the multiple accounts Ms. de Lench was using to harass her, "but she keeps at it"); 53 ("She still tags me or opens new accounts or gets around [the blocking by Ms. Archie] somehow", "Now has almost a dozen twitter accounts of which I have blocked her from all of them. Yet she posts this today on one of her phony accounts. Twitter did shut down one account but with new ones constantly popping up it's impossible to stop it"); 58 ("I block her or get an account suspended [but] she just makes another one").

6 Contrary to defendant's assertion (Def. Mem. at 7-8), the word "harassment" has a commonly understood meaning as behavior that "demeans, humiliates or embarrasses a person." https://en.wikipedia.org/wiki/Harassment

multiple accounts, whether she was using those accounts to harass Ms. Archie, whether Twitter had shut one of the accounts down, and whether Ms. de Lench continued to harass Ms. Archie after one of her accounts was shut down are assertions of fact – all of which Ms. de Lench has denied – capable of being proven true or false.

As with all of the statements by Ms. Archie on social media at issue in this case, the December 22, 2016 tweet does not characterize or offer an opinion on Ms. de Lench's conduct. Absent is any cautionary and qualifying language to alert the reader that the tweet was a statement of opinion. Instead, the statement on its face appears directly and definitively factual. Examining the tweet in its totality, nothing from the context in which it arose, or its format, tone or content, supports the conclusion that it was a subjective statement of opinion about Ms. de Lench's character or online behavior. Even given the limitations of Twitter, it clearly conveyed the impression that defendant was making unqualified statements of fact. The tweet thus "has an easily decipherable and verifiable meaning, presents the existence of specific facts that are capable of being proven false, and more than [a] mere rhetorical flight[ ] of fancy." Sindl v. El-Moslimany, 896 F.3d 1, 16 (1st Cir. 2018), citing Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127-128 (1st Cir. 1997).

The tweet does not employ the type of "loose, figurative language that no reasonable person would believe presented facts." Levinsky's, 127 F.3d at 128; compare Phantom Touring , 953 F.2d at 729. It was not an "off-the-cuff statement" which Ms. Archie's Twitter followers were unlikely to interpret as factual. See Fairbanks v. Roller, 314 F.Supp.3rd 85, 91 (D. D.C. 2018). It was not made, as defendant argues, in the heat of the moment or in anger. Rather, it directly accused Ms. de Lench of conduct which the average reader would view as unethical, dishonest, cowardly, cruel, morally reprehensible, and/or lacking the empathy one would expect

from a woman who had built her reputation over nearly two decades on being a trusted advocate for youth sports parents and sports safety.

Even assuming for purposes of argument that the December 22, 2016 tweet could be viewed as a statement of opinion, it is nevertheless actionable because it implies that Ms. Archie was in possession of other facts – the existence of which she failed to disclose – which supported her assertions and which themselves are capable of being proven true or false. Sindl, 896 F.3d at 14, citing Levinsky's, 127 F.3d at 127.[7]

Defendant's social media posts imply the existence of undisclosed defamatory facts but fail to provide readers with evidence of her assertions regarding plaintiff's conduct, as she easily could have done.[8] Piccone v. Bartels, 785 F.3d 766, 771 (1st Cir. 2015), citing Restatement (Second) of Torts § 566 (1977) ("A defamatory communication ... in the form of an opinion ... is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."); Yohe v. Nugent, 321 F.3d 35, 41–42 (2003); Howell v. Enter. Publ'g Co., 455 Mass. 641, 671–72 (2010). Absent such explanation, even if the tweet is viewed as expressing Ms. Archie's opinion that Ms. de Lench was harassing her from anonymous accounts, it is still actionable.

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[7] Many of the tweets at issue in this case are couched in language which is intended to buttress defendant's primary factual assertions that Ms. de Lench was tweeting – and harassing – from anonymous accounts by hinting at the process Ms. Archie appears to have used to connect them to plaintiff. See Exhibit 39 ("*The internet isn't invisible* we *know* this was posted by you"); 40 ("This account *has been identified* as controlled by you."); 44 ("Great meeting today with private investigators for my case against the person who keeps harassing me online."); 55 ("And *we all know who it is*. Same person who has been obsessed with grieving moms & their dead kids stories for more than a decade"); 59 ("Brooke de Lench when are you going to stop trolling CTE from burner accounts? *You realize this is traceable right*?"); 70 ("Hilarious for a Sybil to use [sic] who own [sic] own article and tweet it out from a phony burner account. Brooke thinks she sneaky [sic], *but we all know* it's just her from another alias") (all emphasis supplied). Such statements further emphasize the factual nature of Ms. Archie's statements on social media about Ms. de Lench.

[8] If Defendant believed a tweet from an anonymous account constituted harassment, she could simply have retweeted it with a comment so that her followers could determine for themselves whether it constituted harassment. That she did not raises the inference that no harassment was actually occurring.

B. The First Amended Complaint Alleges Facts Sufficient to Support A Finding of Actual Malice.

Defendant's suggestion that plaintiff's claims should be dismissed because the First Amended Complaint fails to sufficiently allege actual malice is without merit.

Because the actual malice standard is a subjective one which must necessarily be based on an evaluation of the defendant's state of mind at the time an allegedly defamatory statement about the plaintiff is published, Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989), and because direct evidence of actual malice is rare, it is ordinarily proved through inference and circumstantial evidence. Levesque v. Doocy, 560 F.3d 82, 90 (1st Cir. 2009), citing Bose Corp., 692 F.2d at 196; Harte-Hanks, 491 U.S. at 688.

Plaintiff's allegations that each of the tweets and Facebook posts about which she complains were false, that they were made either with Ms. Archie's actual knowledge of their falsity, a high degree of awareness of their probable falsity, or with reckless disregard of their truth or falsity, and that they were published in furtherance of a concerted campaign by the defendant to defame or otherwise injure plaintiff's reputation as a youth sports expert and cause her emotional distress (see First Amended Complaint, ¶¶ 123, 136, 149, 162, 175, 188, 201, 214, 227, 240, 248, 264) adequately plead the element of actual malice sufficient to withstand a motion to dismiss her defamation claims.

Any doubt as to whether the First Amended Complaint is sufficient to raise an inference that Ms. Archie's tweets and Facebook posts were made with actual malice is eliminated from inferences raised by other paragraphs of the Complaint. To begin with, actual malice can be inferred, as here, from allegations that defendant harbored a deep animosity towards plaintiff. See ¶¶ 20, 49; Exhibits 20 (calling plaintiff an "ass"), 24 (calling plaintiff a "monster"); Ex. 53 (calling email plaintiff sent after the death of her son "evil." See Lino Celle & Radio Mindandao

v. Fillipino Reporter, 209 F.3d 163, 183 (2nd Cir. 1998) ("Evidence of ill will combined with other circumstantial evidence indicating that the defendant acted with reckless disregard of the truth or falsity of a defamatory statement may also support a finding of actual malice.")

The Complaint demonstrates the lengths to which Ms. Archie was willing to go in order damage Ms. de Lench's reputation and harm her business relationships, including contacting Sony Pictures in an attempt to persuade it to break off its social media partnership with Ms. de Lench around the launch of its *Concussion* movie (Ex. 25) and tweeting attacks on Ms. de Lench from a friend's Twitter account without his permission. Exhibits 28 to 34. The First Amended Complaint thus supports an inference that Ms. Archie's tweets and Facebook posts were intended as in-kind retribution on Ms. de Lench for allegedly accusing her of lying about whether her son had CTE. Exhibit 35; see Lino Celle, 209 F.3d at 186.

An examination of the defendant's tweets and Facebook posts shows, that, far from the plaintiff being the one who harassed Ms. Archie over a period of years, it was actually the defendant who bullied, harassed and trolled Ms. de Lench relentlessly and ruthlessly for years, even when threatened with litigation; that she encouraged others to join in her baseless attacks (Exhibit 24)("I rarely ever go to friends for favors but today I am pulling any favor I ever had to take on a monster who has tormented [sic] since my son died"); and that she carried on a personal vendetta against Ms. de Lench (which has continued to this day), without regard for the truth of her allegations. Bentley v. Burton 94 S.W.3d 561, 602 (Tex. 2002) (evidence that defendant carried on a personal vendetta against plaintiff without regard for the truth of his allegations also indicates actual malice).

That defendant continued to attack Ms. de Lench despite her repeated denials that she was behind the anonymous Twitter accounts (Exhibit 41, 43) and in the face of demands that she

stop also can be considered evidence of actual malice. Levesque, 560 F.3d at 91; Harte-Hanks, 491 U.S. at 691. The cavalier attitude Ms. Archie displayed in dismissing out of hand Ms. de Lench's denials that she had any connection to the Twitter accounts which defendant claimed were being used to harass her (see Exhibit 27 ("I can't even take this [cease and desist letter] serious (sic)"); 75 (characterizing as "hilarious" that Ms. de Lench allegedly tweeted out one of her own articles from one of her phony burner accounts), coupled with the fact that she was remarkably quick to jump to the conclusion that plaintiff was tweeting from accounts which she could not possibly know were hers without subpoenaing Twitter,[9] give rise to a reasonable inference that Ms. Archie acted with a total lack of care suggesting reckless disregard for whether her claims were true. See Bentley, 94 S.W.3d at 59 (lack of care or injurious motive in making a statement is not alone proof of actual malice, but are factors to be considered); Harte-Hanks, 491 U.S. at 668 ("it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.")

Considered as a whole, the First Amended Complaint thus clearly supports the inference that Ms. Archie was more than willing to assert without any factual basis that certain Twitter accounts were Ms. de Lench's because painting her in a negative light while portraying herself as the victim of plaintiff's harassment advanced her own interests by evoking sympathy for her as a so-called grieving mother of a CTE victim, which helped her gain attention for her business as an expert witness (Exhibit 36) ("I am on the legal team of 11 lawsuits including the NFL case, Pop

[9] https://forums.whatismyipaddress.com/viewtopic.php?t=22523. In contrast to the braggadocio defendant often displayed in her emails to Ms. de Lench and in many of her tweets claiming that she knew Ms. de Lench was behind the @kewlhandluke, @okayestofmoms, @peterbrookfiel and @DanConner76 accounts, she hinted in an August 2, 2017 tweet at the difficulty, if not impossibility of actually connecting Ms. de Lench to anonymous Twitter accounts without filing a lawsuit against Ms. de Lench and then directing a subpoena to Twitter in order to "unmask" her. See Exhibit 66 (referring to a "so called advocate team for 'moms' hiding behind anonymous twitter accounts and including in her tweet the hashtags #subpoena #coming soon.")

Warner and Riddell. So really she is a personal aggravation that upsets me as a mother protecting my child's memory, not really worth taking my time away from helping lawsuits that will bring victims justice) and advocate for CTE families.")

Plaintiff intends to demonstrate in discovery that defendant's attacks against her were complete fabrications, and that she "simply plucked the accusation[s] out of thin air" in order to damage Ms. de Lench's reputation. Sindl, 896 F.3d at 17. Such "[c]alculated falsehood[s] fall[ ] into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Hence, the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." Bentley, 94 S.W.3d at 591.

To dismiss plaintiff's case now, before she has had the opportunity to conduct discovery and develop a full record on which to assess defendant's credibility and whether she acted with actual malice, would be to apply a standard that few if any public figures claiming defamation could meet at the pleading stage absent an admission by the defendant that she knew her statements were false or blithely ignored evidence that they were not true. See Bentley, 94 S.W.3d at 597 (If the First Amendment precluded consideration of credibility, the defendant would almost always be a sure winner. Her assertions as to her own state of mind, if they could not be disbelieved, would surely prevent proof of actual malice by clear and convincing evidence absent a "smoking gun" — something like a defendant's confession on the verge of making a statement that she did not believe it to be true.)

C. Defendant's Tweets and Facebook Posts Are Not Protected Under the Common Law Self-Defense Privilege

Defendant's suggestion that the fourteen counts of plaintiff's complaint are subject to dismissal because her social media posts were all somehow justified as responses in self-defense to an alleged insult by Ms. de Lench in a private conversation with one of Ms. Archie's friends that she was brain damaged (a fact that she has repeatedly acknowledged on social media), her suggestion in an email to a *Newsweek* reporter that he verify Ms. Archie's claim that her son had been diagnosed as having CTE by speaking with the pathologist who performed his autopsy, and that he speak to Sony about whether she had actually been invited to the Los Angeles premiere of the movie, *Concussion*, or rather, as plaintiff was told by Sony, was not originally invited and only received an invitation after essentially begging for one, and her comment on Twitter suggesting that physicians, in determining the cause of an athlete's CTE, consider all possible causes, not just the repetitive head impacts they sustained playing tackle football (which defendant is somehow twisted into an allegation that plaintiff was accusing her of child abuse) is not only grossly premature but without merit.

While "'one attacked by a slander or libel has a right to defend h[er]self, … [s]he has no right to turn h[er] defense into a slanderous or libelous attack, unless it clearly appears that such attack was necessary.'" Conroy v. Fall River Herald News Co., 306 Mass. 488 (1940), quoting Borley v. Allison, 181 Mass. 246, 247 (1902). Where the publication plainly overruns the limits of self-defense, it is not privileged.

Such is the case here. Nothing that Ms. de Lench said in a private conversation with a then-mutual friend in 2014 can possibly justify immunizing, especially at the pleading stage, all of Ms. Archie's defamatory tweets and Facebook posts between January 2016 to January 2019. Even if Ms. de Lench's insults could be viewed as defamatory, which they were not, Ms.

Archie's statements on social media bore no relationship to that alleged insult; instead, all concerned alleged harassment by Ms. de Lench from phony Twitter accounts or accused her, falsely, of trolling CTE families from phony accounts.

Likewise, Ms. de Lench's email exchanges with the *Newsweek* reporter in late December 2015 and January 2016 cannot possibly give her carte blanche to make defamatory tweets *over the course of the next two years* on the basis of the self-defense privilege. Given that the version of that email exchange advanced by Ms. Archie is fundamentally at odds with the version documented in Ms. de Lench's emails with the reporter, as subsequently confirmed by the reporter (First Amended Complaint, ¶65; Exhibit 38), dismissal of plaintiff's lawsuit on the basis of common law self-defense privilege is not warranted.

D. Ms. Archie's Tweets and Facebook Posts Are Not Protected Under the Massachusetts Anti-SLAPP Statute

Defendant's special motion to dismiss under the Massachusetts anti-SLAPP statute, G.L. c.231, §59H, is completely baseless. Not only has the defendant failed to make the threshold showing that her tweets and Facebook posts constituted petitioning activity within the meaning of the anti-SLAPP statute, but her motion should be denied because the preponderance of the evidence shows that defendant's statements about plaintiff were without a reasonable basis in fact or law, and that plaintiff's claims were not brought primarily to chill the defendant's legitimate exercise of her right to petition but to seek damages for the personal harm Ms. Archie's tweets have caused.

1. Defendant's tweets and Facebook posts did not constitute petitioning activity.

Defendant has completely failed to make the required threshold showing that her tweets and Facebook posts constituted petitioning activity, as defined by the anti-SLAPP statute and as

construed by Massachusetts courts.[10] See, e.g., Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 148 (2017).

To fall under the "in connection with" definition of petitioning under the anti-SLAPP statute, a communication must be "'made to influence, inform, or at the very least, reach governmental bodies, either directly or indirectly.'" Id., 477 Mass. at 149, quoting North Am. Expositions Co., Ltd. Partnership v. Corcoran, 452 Mass. 852, 862 (2009). "The key requirement of this definition of petitioning is the establishment of a plausible nexus between the statement and the governmental proceeding." Blanchard, 477 Mass. at 149.

No such plausible nexus exists here. There are no objective indicia that Ms. Archie intended by her tweets and Facebook posts to influence a governmental proceeding. Id., 477 Mass. at 149, citing North Am. Expositions Co. Ltd. Partnership, 452 Mass. 852, 862-863 (2009). The mere fact that Ms. Archie may be "actively engaged in the public debate over how to address the problem of CTE" (Def. Mem. at 15) is insufficient to establish that her tweets were closely and rationally related to any governmental proceeding, nor that they were somehow in furtherance of the objective served by governmental consideration of any issue, such as, for example, whether tackle football should be banned for kids under age 14. While defendant's memorandum lists a variety of activities by Ms. Archie that would qualify as petitioning, none of the social media statements which are the subject of this action refer, even obliquely, to such activities. See Global NAPs, Inc. v. Verizon New England, Inc., 63 Mass. App. Ct. 600, 607 (2005); Burley v. Comets Community Youth Ctr., Inc., 75 Mass. App. Ct. 818, 823

[10] None of defendant's statements constituted statements made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding. Compare Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 161-162 (1998), citing Pring, SLAPPS: Strategic Lawsuits Against Public Participation, 7 Pace Envtl. L. Rev. 3, 5 (1989). Thus, this section of plaintiff's memorandum will focus on the other four kinds of petitioning covered by the anti-SLAPP statute.

(2009)(defendant failed to demonstrate "statements were made in conjunction with its protected petitioning activity … as opposed to being incidental observations that were not tied to the petitioning activity in a direct way).

Ms. Archie's tweets and Facebook posts were not made solely to "facilitate further consideration" of any legislation relating to CTE or head injuries in sports. Burley, 75 Mass. App. Ct. at 823. None tag any state legislator or member of Congress. Contrary to defendant's assertion, none discuss or relate to "policy responses" to CTE. Rather, all are, at bottom, ad hominem attacks on Ms. de Lench. Defendant cannot magically create such a connection simply by attaching a *New York Times* article about efforts in Massachusetts to ban tackle football for youth players, especially where, as here, none of her tweets even mention that legislation.

There is nothing in the tweets' content to suggest that they were intended for a legislative audience. See Blanchard, 477 Mass. at 151-52, citing Plante, 63 Mass. App. Ct. at 159 ("statement to a select group of people does not, without more, establish a plausible nexus to a governmental proceeding. It stands to reason that statements cannot be 'in furtherance of petitioning the government if they are not reasonably geared to reaching it."). There is nothing in defendant's tweets or Facebook posts to suggest that someone viewing her tweets or Facebook posts "reasonably would be expected to or did communicate" her tweets – all of which concerned Ms. de Lench personally – to any legislator or legislative body. Id. Ms. Archie has utterly failed to establish that any legislator would have encountered her messages, let alone that what Ms. Archie's tweets or Facebook posts attacking Ms. de Lench were in any way designed to influence how a legislature acted on a pending or proposed bill. In other words, as in Blanchard, "[t]here was nothing in [the messages] to suggest that [they] were intended to influence, inform, or reach anyone other" than Ms. Archie's Twitter followers.

Ms. Archie's suggestion that her tweets and Facebook posts were petitioning activity covered by the anti-SLAPP statute simply because they were allegedly in response to plaintiff's "provocative comments on a topic of substantial public controversy" or were made "as part of a vigorous, sometimes sharply worded, public debate" over CTE (Def. Mem. at 14) avails her of nothing. Massachusetts courts have rejected the view that any statement about an issue under some form of government consideration, whether defamatory or not, is protected by the statute, and have read the phrase "in connection with" more narrowly. Global NAPS, Inc., 63 Mass. App. Ct. at 607 ("That a statement concerns a topic that has attracted governmental attention, in itself, does not give that statement the character contemplated by the statute.") Thus, even if Ms. Archie's tweets and Facebook posts could be viewed as concerning a topic that has attracted governmental attention – as opposed to being about Ms. de Lench's alleged trolling or harassment – they cannot be viewed as having the character of petitioning activity contemplated by the statute. Id. (oblique reference to special movant's petitioning activity did not constitute a protected instance of "full participation ... and robust discussion of issues before [a governmental body].").

It appears that Ms. Archie is operating on the false assumption that, as a California resident, she enjoys the protection of that state's much broader anti-SLAPP statute, which allows parties to move to dismiss a defamation case whenever they are sued for an "act in furtherance of a person's right to petition *or free speech* under the United States or California Constitution in connection with a public issue" or "an issue of public interest." Ayyadurai v. Floor64, Inc., 270 F. Supp.3d 343, 353 (D. Mass. 2017) (emphasis in original), quoting Cal. Civ. Proc. Code §425.16(e). Fatal to her special motion to dismiss under the Massachusetts anti-SLAPP statute is the fact that, because Massachusetts' anti-SLAPP statute applies only to claims involving a

person's exercise of his or her *right to petition*, and *not* to claims to involving a person's exercise of free-speech rights more generally, a claim sought to be dismissed pursuant to a special motion must be "based on said party's exercise of its right to petition under the constitution of the United States or of the Commonwealth." Global NAPs, Inc., 63 Mass. App. Ct. at 607. "As the Supreme Judicial Court stated in Kobrin v. Gastfriend, 443 Mass. 327, 330 (2005), "'The right of petition contemplated by the Legislature is thus one in which a party seeks some redress *from the government*.'" Quoting Global NAPs, Inc., 63 Mass. App. Ct. at 607 (emphasis supplied). None of the tweets or Facebook posts at issue in this case relate in even a tangential way to efforts, by Ms. Archie or others, to petition any state legislature or Congress for redress.

2. The defendant's statements lacked any reasonable factual support and caused actual injury to plaintiff.

The First Amended Complaint, coupled with plaintiff's affidavit, support a finding that no reasonable person would have made defendant's tweets and Facebook posts, and that they caused actual injury to plaintiff. See, e.g., North American Expositions Co. v. Corcoran, 452 Mass. 852, 865 (2009).

Conspicuously absent from defendant's memorandum is any argument that dismissal of plaintiff's First Amended Complaint under the Massachusetts anti-SLAPP statute is appropriate based on a failure by plaintiff to meet her burden – once defendant has made a threshold showing of petitioning activity – to show that defendant's petitioning activity completely lacked reasonable factual or legal merit. Wenger v. Aceto, 451 Mass. 1, 7 (2008). The reason is simple: defendant has no reasonable factual support for her tweets because all are deliberate falsehoods. None of the tweets or Facebook posts at issue in this case refer to facts to support Ms. Archie's claims of harassment by Ms. de Lench or the use of anonymous accounts to troll her. Indeed, the record thus far shows that Ms. Archie was using anonymous accounts to troll Ms. de Lench, not

the other way around.[11] None of Ms. Archie's tweets or Facebook posts suggest that Twitter ever investigated Ms. de Lench for violating its rules, nor does Ms. Archie point to any actual proof that Twitter shut down any account with which Ms. de Lench was associated.

Plaintiff's affidavit, in which she details the emotional, reputational, and fiscal harms Ms. Archie's tweets and Facebook posts caused her to suffer (Affidavit of Brooke de Lench, ¶¶ 3, 4, 6, 12, 27), coupled with comments made on Twitter and Facebook in response to Ms. Archie's statements[12] also make clear that she suffered "actual injury" for purposes of the anti-SLAPP statute. See 477 Harrison Ave. LLC v. Jace Bos, 477 Mass. 162, 174-75 (2017), citing Millennium Equity Holdings, LLC v. Mahlowitz, 456

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[11] For example, a review of the full conversation thread in which the tweets highlighted in Exhibits 60, 61 and 63 appeared (a complete version of which is attached to this memorandum as Exhibit A) shows that Ms. Archie's attacks on Ms. de Lench for being @kewlhandluke11 began after a tweet by Luke Johnson replying to a tweet by @FrontiersInTBI, which did not "tag" Ms. Archie. Rather than accepting Frontiers of TBI's invitation to participate in a debate over whether CTE was a major public health concern, Ms. Archie, tweeting as @tackleCTE, elected instead to use the opportunity to interject an ad hominem attack on Ms. de Lench for allegedly tweeting as Luke Johnson to troll CTE. Fairly read, Ms. Archie's tweets, not those of Mr. Johnson, were the ones that constituted trolling. See https://en.wikipedia.org/wiki/Internet_troll (In Internet slang, a troll is a person who starts quarrels or upsets people on the Internet to distract and sow discord by posting inflammatory and digressive, extraneous, or off-topic messages in an online community [such as Twitter] with the intent of provoking readers into displaying emotional responses and normalizing tangential discussion, whether for the troll's amusement or a specific gain. … Both the noun and the verb form of "troll" is associated with Internet discourse. However, the word has also been used more widely. Media attention in recent years has equated trolling with online harassment.). For another example of Ms. Archie calling the kettle black in accusing Ms. de Lench of trolling as @kewlhandluke11 and @PeterBrookfiel4 when it was she who was the one trolling, see Exhibit 72.

[12] One need look no further than the comments responding to Ms. Archie's Facebook post of December 22, 2016 and subsequent comments (Amended Complaint, ¶¶79-80; Ex. 53) for proof that the defamatory meaning of her tweets and posts damaged reputation. "She should hang her head down for being a cruel, mean-spirited person," wrote one. Accepting as true Ms. Archie's false accusations, another said she couldn't imagine how "someone [could] be so cruel [as] to mock a grieving mother," and stated that Ms. de Lench should be "ashamed of herself for ever mocking anyone w a loss." Id., ¶81. Indeed, Ms. Archie's tweets were so inflammatory, and so enraged some of her Facebook followers, that they then threatened Ms. de Lench with physical violence. Id., ¶¶ 82, 85. Any possible doubt that Ms. Archie's tweets had the negative effect on Ms. de Lench's reputation that she intended is removed by comments on Twitter the same day from two of Ms. Archie's followers directed at @OkayestOfMoms, the first asking the user to "'exercise [their] heart and [their] humanity and refrain from targeting [Ms. Archie] for abuse," and the second, stating, point-blank, that Ms. de Lench had "built a horrible reputation for being a harasser/troll who preys on grieving families" and demanding that she stop. Id., ¶86; Exhibit 54.

Mass. 627, 645 (2010) (emotional, reputational and fiscal harms of malicious prosecution constituted categories of harm to plaintiff).

3. Plaintiff's lawsuit was not brought primarily to chill defendant's legitimate exercise of her right to petition.

Even if Ms. Archie were able to establish that all of her tweets and Facebook posts were based solely on her own petitioning activities – which Ms. de Lench argues she has failed to come even close to doing – defendant's special motion to dismiss still fails because a review of the entire record establishes by a preponderance of the evidence that plaintiff has not challenged defendant's statements on social media primarily to chill the special movant's legitimate petitioning activities, but to seek damages for the personal harm Ms. Archie's defamation has caused her to suffer. de Lench Aff., ¶5, 11. See Blanchard, 477 Mass. at 160, quoting Sandholm v. Kuecker, 2012 IL 111443, ¶57,356 Ill Dec. 733, 962 N.E.2d 418.

To begin with, Ms. de Lench's defamation claims are colorable and, even before discovery has begun, are supported by substantial evidence. See Blanchard, 477 Mass. at 160, quoting L.B. v. Chief Justice of Probate & Family Court Dept., 474 Mass. 231 (2016) ("A necessary but not sufficient factor in this analysis will be whether the nonmoving party's claim at issue is 'colorable or … worthy of being presented to and considered by the court, … i.e. whether it 'offers some reasonable possibility' of a decision in the party's favor.") The facts as alleged in her First Amended Complaint were of and concerning Ms. de Lench and were of the type that reasonably exposed her to public hatred, ridicule, or contempt, as they falsely accused her of engaging in abuse and harassment of Ms. Archie, trolling other so-called "CTE families", and of lying. See Blanchard v. Steward Carney Hosp., Inc. (Mass Superior Court 2017), citing Draghetti v. Chmielewski, 416 Mass. 808, 811 (1994).

Considering the entire record, including plaintiff's affidavit, it is clear that Ms. de Lench's primary purpose in asserting claims for defamation is to recover for the harm caused by Ms. Archie and in pursuit of the plaintiffs' well-established right to sue for reputational damage and emotional distress related to the false published comments. Plaintiffs' claim for damages as a result of defendant's alleged defamation is legitimate and should be allowed to proceed.

III. CONCLUSION

For the reasons stated above, plaintiff respectfully requests that the defendant's motion to dismiss the First Amended Complaint be denied.

BROOKE DE LENCH

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Dated: April 30, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2019, I caused the foregoing document to be filed electronically on CM/ECF, thereby causing electronic notice to be provided to all counsel of record and paper copies will be sent to those indicated as nonregistered participants.

/Lindsey M. Straus

Lindsey M. Straus