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19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA

21 NADIA NAFFE, an individual,
22
23 Plaintiff,

24 v.

25 JOHN PATRICK FREY, an individual,
26 and the COUNTY OF LOS ANGELES,
27 a municipal entity,
28 Defendants.

Case No.: CV12-08443-GW (MRWx)
Judge: Hon. George H. Wu

**DEFENDANT JOHN PATRICK
FREY'S REPLY MEMORANDUM
OF LAW IN SUPPORT OF HIS
MOTION TO DISMISS FIRST
THROUGH SIXTH CAUSES OF
ACTION IN THE FIRST
AMENDED COMPLAINT
PURSUANT TO RULE 12(b)(6) OF
THE FEDERAL RULES OF CIVIL
PROCEDURE**

Hearing Date: April 18, 2013
Time: _____ 8:30 a.m.
Courtroom: 10

Complaint Filed: October 2, 2012



MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In his Renewed Motion to Dismiss (“the Motion”), Mr. Frey established that the First Amended Complaint (“FAC”) fails utterly, as did its predecessor, to meet the standards required to sustain a lawsuit under Fed. R. Civ. P. 12(b)(6). Mr. Frey demonstrated that the FAC does not allege facts, plausible or otherwise consistent with the record Plaintiff has placed before the Court, to sustain that burden, and that the purpose of Plaintiff’s lawsuit – as set out in Mr. Frey’s previous submissions – is to settle political scores and abuse the litigation process, not to state a claim for which relief can be granted.

Plaintiff’s Opposition (“the Opposition”) does nothing to bridge the chasm between what Mr. Frey described in his moving papers – a patchwork of inconsistencies, vague generalities and arbitrary bursts of anger – and a legal claim justifying continuing litigation in this court. To the contrary, the opposition, which focuses on Mr. Frey’s motion under Rule 12(b)(6) seeking dismissal of Plaintiff’s claims under Section 1983, demonstrates the FAC’s complete lack of merit:

- Plaintiff presents neither new factual allegations nor legal authority to support her position that Mr. Frey’s private actions as a blogger who is known to be a Deputy District Attorney amount to actions taken “under color of state law”;
- Plaintiff fails to enunciate any plausible deprivation of her constitutional rights as a result of some action taken by Mr. Frey; and
- To overcome the obvious objection to her claim of “chilled speech” – the fact that the record indicates that she was not intimidated from expressing herself at all – Plaintiff relies on utterly inapposite case law arising out of serious, actual abuses of state power bearing no relation at all to the “indignities” of which she complains.



1 For these reasons, set out below in detail, the Court should grant the Motion in
2 full.

3 **II. PLAINTIFF FAILS TO EXPLAIN HER MISREPRESENTATIONS TO**
4 **THE COURT**

5 In his Motion, Mr. Frey demonstrated that this Court may take notice of online
6 posts Plaintiff incorporates in her FAC (Motion at 6-7), and that when the Court does
7 so, it will see that Plaintiff has deliberately misrepresented the content of those posts
8 to the Court. Plaintiff has no answer whatsoever for this point – no response to the fact
9 that, in claiming that Mr. Frey was blogging in his official capacity, she referred to
10 posts in which he explicitly said he was blogging in his private capacity. For instance:

- 11 • Plaintiff falsely asserts that “FREY, acting as a Deputy District
12 Attorney, criticized journalist Tommy Christopher for failing to vet
13 PLAINTIFF before publishing an article about the Barn Incident and
14 subsequent lawsuit . . .” (§ 45). When she made that claim to the
15 Court, she knew that the actual post said the opposite: “By the way:
16 given Naffe’s admission that she accessed O’Keefe’s emails,
17 evidently without his permission, has she committed a crime? I offer
18 no opinion on that, as *this post (like all my posts!) is written in my*
19 *private capacity*, as an exercise of my rights as a private citizen under
20 the First Amendment.” (Exhibit R to Frey Decl. at 93 [emphasis
21 added].)
- 22 • Plaintiff listed a May 27, 2010 post as establishing that Mr. Frey was
23 blogging in his official capacity. (§ 28.) When she made that claim,
24 she knew that the post itself said the opposite: “I think it is actually
25 known as the Invasion of Privacy Act, but don’t take my word for it;
26 contrary to Friedman’s suggestions, I am not a wiretap violations
27 prosecutor but a gang murder prosecutor, *speaking in my private*
28



1 *capacity* as I always do on this blog.” (Exhibit P to Frey Decl. at 88-
2 89 [emphasis added].)

- 3 • Plaintiff has no explanation for why she edited a tweet and
4 misrepresented it to the Court to make it appear that Mr. Frey was
5 tweeting in his official capacity. She quotes Mr. Frey’s tweet as “You
6 owe [O’KEEFE] @gamesokeefeiii a retraction. A big one. You’d
7 better issue it promptly. [A threat made as a Deputy District
8 Attorney.]” (¶ 39.) The placement of the quotation marks suggests
9 dishonestly that the tweet included the “A threat made as a Deputy
10 District Attorney” language. In fact, the tweet – which Plaintiff
11 incorporated into the FAC – did *not* include that language. (Exhibit
12 KK to Frey Decl. at 249.)
- 13 • Plaintiff offers no explanation for why she misrepresented a post by
14 Mr. Frey’s attorney, Mr. White, suggesting that it said the exact
15 opposite of what it truly said. (Motion at 10.)

16 Plaintiff didn’t respond to these points because she cannot. There is no excuse
17 for her misrepresentations to the Court. Those misrepresentations, like her conclusory
18 legal assertions, undermine all of her arguments.

19 **III. LEGAL ARGUMENT**

20 The Opposition neither demonstrates that the FAC sets forth facts that could
21 plausibly amount to an allegation that Mr. Frey acted under state law, or that his
22 conduct amounted to a deprivation of any cognizable right that causes Plaintiff harm.
23 For this reason, as set out in more detail, the FAC should be dismissed pursuant to
24 Rule 12(b)(6).

25 **A. Plaintiff Fails to Demonstrate That She Has Alleged Action Taken by**
26 **Mr. Frey Under Color of State Law.**

27 As set out in Mr. Frey’s moving papers on this Motion, the Court, in its
28 Tentative Ruling, explained the application of the “state action” test under Section

1 1983 to the facts alleged in the original Complaint as follows:

2
3 Apart from her assertion that Mr. Frey used his blog and Twitter account
4 as a vehicle for his thoughts and opinions during the time he was
5 supposed to be working as a district attorney and using resources made
6 available to him as a district attorney, there is nothing *Mr. Frey did*
7 which in any way suggested he was “pontificating” in his role as a
8 district attorney.

9 (Tentative Ruling at 6-7; emphasis added.) Plaintiff’s response has been to ignore the
10 Court’s statement of fundamental law and to repeatedly refer to the irrelevant fact that
11 Mr. Frey accurately, and within the scope of his First Amendment right to free
12 expression, acknowledged the fact that he was employed as a Deputy District
13 Attorney while involved in his private activities as a commentator on an issue of
14 public interest. In fact, not a single argument in Plaintiff’s brief advances her
15 argument beyond that already rejected by this Court in its Tentative Ruling.

16 Indeed, the Tentative Ruling is, to Plaintiff, of no significance whatsoever. In
17 that ruling, the Court, for example, wrote, “what *someone else* says about Mr. Frey
18 does not turn Mr. Frey’s behavior into action under the color of state law, or state
19 action” (Tentative Ruling at 10). The guidance Plaintiff has taken from that holding is
20 to argue that “based on Frey’s repeated reference to his position as a prosecutor, this is
21 precisely how other media outlets viewed ‘Patterico’s Pontifications.’” (Opposition at
22 8.) And where the Court wrote, as quoted above, “there is nothing *Mr. Frey did* which
23 in any way suggested he was ‘pontificating, in his role as a district attorney,” Plaintiff
24 responds that his supposed “threats to investigate Ms. Naffe for criminal misconduct
25 had weight and substance precisely because of his position as a Deputy District
26 Attorney.” In other words, Plaintiff argues, not that Mr. Frey *did* anything at all, but
27 that because of his job, he didn’t have to. By this argument, Plaintiff apparently
28 creates a new legal test, the authority for which is not cited by Plaintiff, called the
“weight and substance” standard.

1 The “weight and substance” test is not the only novel rule of law offered up by
2 the Plaintiff on this issue. She also asserts that Mr. Frey – a county prosecutor in
3 California who suggested that Plaintiff should be investigated for violation of the
4 federal wiretapping statute in one or more states a continent away – should be deemed
5 as acting under color of state law when he did so, based on “his inherent authority as a
6 prosecutor to target Ms. Naffe for a criminal investigation.” This concept of “inherent
7 authority,” i.e., the suggestion that a prosecutor in one jurisdiction should be deemed
8 as wielding official power in any (and every) other jurisdiction, is certainly
9 melodramatic, but it is legally and factually baseless.

10 Similarly, Plaintiff’s argument that Mr. Frey’s “online persona, found through
11 ‘Patterico’s Pontifications’ and on Twitter with @patterico, was a digital extension of
12 his real life role as Deputy District Attorney” merely shunts aside every point made
13 by the Court negating just that suggestion in the Tentative Opinion and the well-
14 established law to the contrary.

15 Plaintiff’s “digital extension of his real life role as Deputy District Attorney”
16 argument is also an insult to common sense. It would be one thing to argue that Mr.
17 Frey’s online activities were an extension of some analogous, or comparable, or even
18 remotely similar activities in which he were alleged to engage in as part of his role as
19 a criminal prosecutor. But no such activities are alleged and, of course, they could not
20 be: District Attorneys such as Mr. Frey are not alleged to, and do not, perform their
21 “real life roles” – in any sense whatsoever – by writing blog posts or tweeting
22 opinions. Plaintiff offers neither facts nor law supporting her conclusory statements
23 that Mr. Frey’s responsibilities somehow involve blogging and tweeting about
24 politics.

25 Thus it would be one thing to argue, however implausibly, that Mr. Frey’s
26 social media utterances could be placed on a continuum between those he publishes as
27 a prosecutor and those he claims to be solely private matters, and that where they fall
28 on that continuum perhaps constituted a factual question. But Deputy District



1 Attorneys do not perform their jobs on the Internet. Plaintiff’s so-called “digital
2 extension” is more accurately described as a digital invention – implausible legally
3 and logically.

4 **B. Plaintiff Fails to Demonstrate that her Allegations Make out a**
5 **Deprivation of Constitutional Rights.**

6 Plaintiff argues that her constitutional rights were deprived by Mr. Frey because
7 he expressed his opinion about her credibility and about the legality of her actions and
8 – she states falsely – because he stated that he “intended to investigate Ms. Naffe for
9 possible criminal conduct” (Opposition at 11). This last is a completely fallacious
10 claim already resolved by the Court, and quoted in Mr. Frey’s Motion, as something
11 far less onerous and quite lawful:

12 Plaintiff directs the Court to paragraph 27 of her declaration filed in connection
13 with her opposition to the pending anti-SLAPP motion. In that paragraph she
14 alleges that Mr. Frey contacted her on Twitter on March 23, 2012, stating “My
15 first task is learning what criminal statutes, if any, you have admitted
16 violating.” Docket No. 20-1, ¶ 27. This “tweet” comes closest to invoking Mr.
17 Frey’s public status, but the parties give the Court no context illuminating what
18 was at issue at the time Mr. Frey issued this comment. From the Court’s
19 perusal of the exhibits to Plaintiffs declaration, it would appear that Mr. Frey
20 was referring to Plaintiffs conduct in connection with her possession of a
21 laptop belonging to her former employer, the Florida Republican Party. See
22 Docket No. 20-1, Exh. A, at 1; id., Exh. B, at 3-6. **If that is the case, it is
23 unclear how the Court could infer an “under color of state law” act by a
24 Los Angeles County District Attorney, when there is no apparent
25 connection between that issue and any jurisdiction over which Mr. Frey
26 would have any authority.** Indeed, subsequent to the comment quoted above,
27 Mr. Frey “tweeted” a request for a citation to a federal statute.
28

Tentative Ruling at 10 (emphasis added). Plaintiff’s insistence on repeating the canard
that the tweet referred to constituted an action taken under color of state has nothing to
do with any new allegation in the FAC. It is merely contumacious disregard of this
Court’s explicit ruling, as is her pointless recapitulation of the same supposed
“threats” that the Court found unavailing the first time around. This includes her
preposterous claim that she “intended” to ask the Los Angeles County District

1 Attorney to investigate the alleged wiretapping of Rep. Maxine Waters’s office –
2 wiretapping which she acknowledges she herself was “involved in” and regarding
3 which she bragged on her own blog. (Opposition at 2-3.)

4 Plaintiff places much stock in language from *Lacey v. Maricopa County*, 693
5 F.3d 896, 916 (9th Cir. 2012) suggesting that Ms. Naffe “need not show that her
6 speech was ‘actually inhibited or suppressed.’” She also acknowledges, however, that
7 while the test is not “actual chilling,” courts nevertheless “consider “whether an
8 official's acts would chill or silence a person of ordinary firmness from future First
9 Amendment activities.” This point does not mean what Plaintiff thinks it means, for
10 despite a throwaway reference to “statements reasonably perceived as threats and
11 retaliation” (Opposition at 13), her argument has never been based on how “a person
12 of ordinary firmness” would react when offended by the comments of a blogger who
13 happens to work in the prosecutor’s office in a distant state. Rather, it has always been
14 premised on her self-anointed special status as one who, unlike those she slanders,
15 defames and attacks, should be held immune from criticism, contradiction or hurt
16 feelings – the entire premise of this lawsuit.

17 The “person of ordinary firmness” standard was first adopted by this Circuit in
18 *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283 (9th Cir. 1999), in which
19 the plaintiffs sued police officers and FBI agents alleging unlawful arrest, knowingly
20 or recklessly included false information in search warrant affidavits, entering into a
21 conspiracy to violate the plaintiffs' constitutional rights, and – by these coercive,
22 official uses of state-sanctioned force – hindering plaintiffs' First Amendment
23 activities. Courts applying this formulation test have used it to hold, for example, that
24 “a person of ordinary firmness would be chilled from future exercise of his First
25 Amendment rights if he were booked and taken to jail in retaliation for his speech.”
26 *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013). Similarly, in *Skoog v. County*
27 *of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006), the Ninth Circuit noted that
28 “searching someone's office and seizing materials can satisfy this first requirement.”

1 Indeed, in *Lacey*, the claim was that the defendant violated the plaintiff’s First
2 Amendment rights “by investigating and arresting him in retaliation for articles
3 published by the New Times [publication] and with the purpose of suppressing the
4 exercise of those rights.” 693 F.3d at 916. As the court explained:

5 [Defendant’s] motions for arrest warrants, contempt findings, and fines show
6 that he meant the New Times to fear them as valid. He did not wait for the
7 warrants or other official approval before authorizing Arpaio’s “Selective
8 Enforcement Unit” to arrest Lacey and Larkin at their homes. In the
9 circumstances of this case, to state that “[a]rresting someone in retaliation for
their exercise of free speech rights” is sufficient to chill speech is an
understatement.

10 *Id.* at 917.

11 Nothing in the FAC comes close to such allegations. Obviously no one is
12 complaining here of having been searched, detained, arrested – or even “investigated.”
13 Indeed Plaintiff makes no effort to prove that “threatening to investigate” someone –
14 separate and apart from the plausibility of that perceived threat under the
15 circumstances – would be an inappropriate exercise of state action. Admittedly, she
16 would have a hard time doing so here. Not only has she filed to allege facts from
17 which the Court could conclude that such the “investigation” alleged would be
18 improper on any ground recognized by the law. Beyond this, Plaintiff has, as set out in
19 Mr. Frey’s previous submissions in this matter, consistently refused to even **attempt**
20 rebuttal of the factual submissions of record and admissions by Plaintiff on which Mr.
21 Frey’s “investigation” comments were based: Plaintiff’s unforced public admission
22 concerning her involvement in unlawful conduct.

23 Ultimately, Plaintiff’s comparison of the events that led her to file this lawsuit
24 to the serious deprivations of constitutional rights suffered in such cases underlines
25 the absurdity of her legal claims. It also demonstrates the extent to which the FAC,
26 and the papers submitted to support it, go beyond trivializing the very concept of civil
27 rights violation – which would be bad enough – to turning them on their head, seeking
28

1 to utilize this Court in a meritless attempt to deprive Patrick Frey of his right to
2 comment on a matter of obvious public concern.

3 **IV. CONCLUSION**

4 Based on the foregoing, this Court should dismiss the First Cause of Action
5 without leave to amend. If the Court does not grant Defendant’s concurrently filed
6 Anti-SLAPP Motion, the Court should also dismiss the Second through Sixth Causes
7 of Action without leave to amend for the reasons set forth in Mr. Frey’s Motion and in
8 his Anti-SLAPP Motion.

9
10 DATED: April 3, 2013

Respectfully submitted,
GOETZ FITZPATRICK LLP

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12
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14 RONALD D. COLEMAN
15 Attorneys for Defendant
JOHN PATRICK FREY

16 DATED: April 3, 2013

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