

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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TARA READE,

Plaintiff,

v.

THE NEW YORK TIMES COMPANY,

Defendant.

No. 2:22-cv-00543 WBS KJN

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS AND SPECIAL
MOTION TO STRIKE

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Plaintiff Tara Reade brought this action against defendant The New York Times Company challenging the alleged publication of a photograph containing her Social Security number in defendant's newspaper, The New York Times (the "Times"). (See Compl. (Docket No. 1-1 at 5-9).) Plaintiff's complaint includes three claims under California law: (1) violation of California Civil Code § 1798.85, (2) public disclosure of private fact, and (3) negligence. Defendant now moves both to dismiss plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6) and to strike them via special motion under California's anti-SLAPP

statute, Cal. Code Civ. P. § 425.16. (See Mot. to Dismiss (Docket No. 10); Mot. to Strike (Docket No. 11).)¹

I. Factual and Procedural Background²

During the 2020 United States presidential campaign, plaintiff publicly accused then-candidate Joe Biden of having sexually assaulted her in the 1990s, while plaintiff was working at the United States Senate. (See Compl. at ¶¶ 7-12.) The Times investigated plaintiff's allegations and, to corroborate them, plaintiff provided the Times with a photograph of her federal identification card from her time with the Senate. (See id. at ¶¶ 9-11.) That ID card included what turned out to be the upper portion of plaintiff's Social Security number. (Id. at ¶ 12.)³

The Times published an article about plaintiff's allegations in April of 2020, in which it included the photo of her ID card, though plaintiff had not expressly given the Times consent to publish the photo. (Id. at ¶¶ 11-13.) The Times

¹ Defendant's motions appear to be identical, except for portions addressing the respective legal standards for a motion to dismiss under Rule 12(b)(6) and for a special motion to strike under the anti-SLAPP statute. (See Mot. to Dismiss; Mot. to Strike.) Accordingly, except where relevant to the special motion to strike, which as explained below has additional requirements beyond those of a motion to dismiss, the court cites to the motion to dismiss and not to the special motion to strike.

² All facts described in this section are as alleged in plaintiff's complaint, except as otherwise noted.

³ Although the Complaint suggests the whole number was visible, counsel for plaintiff acknowledged at oral argument that this was not the case. This is confirmed by the unredacted copy of the image as it was provided to the Times, which has been filed under seal, as well as a partially redacted version with only the final four digits of the number visible, attached to this Order as Exhibit A, pursuant to Local Rule 140(a)(iii) and Federal Rule of Civil Procedure 5.2(a)(1).

1 removed the photo after roughly nine hours, after plaintiff
2 demanded its removal. (Id. at ¶¶ 14-15.) Plaintiff alleges that
3 the photo was viewed thousands or millions of times before it was
4 removed and that there have since been hundreds of attempts to
5 steal her identity using her Social Security number. (Id. at
6 ¶¶ 15-16.)

7 Plaintiff alleges that defendant employs an extensive
8 editing process prior to publishing articles on the Times website
9 and that its publication of the photo in spite of this process
10 shows the publication of the photo was either intentional or
11 reckless. (Id. at ¶¶ 18-19.) She alleges that as a result of
12 the photo's publication, she has suffered financial and emotional
13 harm. (Id. at ¶ 17.) Plaintiff filed this action in the
14 Superior Court of the State of California, in and for the County
15 of Nevada, on February 22, 2022. (Compl. (Docket No. 1-1 at 5).)
16 Defendant removed to this court on May 24, 2022. (Notice of
17 Removal at 1 (Docket No. 1).)

18 II. Discussion

19 A. Motion to Dismiss

20 Federal Rule of Civil Procedure 12(b)(6) allows for
21 dismissal when the plaintiff's complaint fails to state a claim
22 upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).
23 "A Rule 12(b)(6) motion tests the legal sufficiency of a claim."
24 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). The inquiry
25 before the court is whether, accepting the allegations in the
26 complaint as true and drawing all reasonable inferences in the
27 plaintiff's favor, the complaint has alleged "sufficient facts
28 . . . to support a cognizable legal theory," id., and thereby

1 stated "a claim to relief that is plausible on its face," Bell
2 Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). In deciding
3 such a motion, all material allegations of the complaint are
4 accepted as true, as well as all reasonable inferences to be
5 drawn from them. Id.

6 Courts are not, however, "required to accept as true
7 allegations that are merely conclusory, unwarranted deductions of
8 fact, or unreasonable inferences." Spewell v. Golden State
9 Warriors, 266 F.3d 979, 988 (9th Cir. 2001); see Bell Atl., 550
10 U.S. at 555. Accordingly, "for a complaint to survive a motion
11 to dismiss, the non-conclusory 'factual content,' and reasonable
12 inferences from that content, must be plausibly suggestive of a
13 claim entitling the plaintiff to relief." Moss v. U.S. Secret
14 Serv., 572 F.3d 962, 969 (9th Cir. 2009) (quoting Ashcroft v.
15 Iqbal, 556 U.S. 662, 678 (2009)).

16 1. California Civil Code § 1798.85

17 Plaintiff first alleges violation of § 1798.85 of the
18 California Civil Code, which in pertinent part provides that,
19 except under specified circumstances, "a person or entity may not
20 . . . [p]ublicly post or publicly display in any manner an
21 individual's social security number." Cal. Civ. Code
22 § 1798.85(a)(1). The statute defines "[p]ublicly post" and
23 "publicly display" to mean "to intentionally communicate or
24 otherwise make available to the general public." Id.

25 Defendant seeks dismissal of plaintiff's § 1798.85
26 claim on the grounds that (1) the statute creates no private
27 right of action and, (2) even assuming it does, plaintiff
28 nonetheless fails to allege that defendant "intentionally"

1 communicated or displayed her Social Security number when
2 publishing the photo. (Mot. to Dismiss at 11-16.)⁴

3 a. Existence of Private Right of Action

4 "A violation of a state statute does not necessarily
5 give rise to a private cause of action." Lu v. Hawaiian Gardens
6 Casino, Inc., 50 Cal. 4th 592, 596 (2010) (citation omitted).

7 "Whether a party has a right to sue depends on 'whether the
8 Legislature has manifested an intent to create such a private
9 cause of action under the statute.'" Fresno Motors, LLC v.
10 Mercedes Benz USA, LLC, 771 F.3d 1119, 1132 (9th Cir. 2014)
11 (quoting Lu, 50 Cal. 4th at 596). To find such a legislative
12 intent, courts must first look to the language of the statute and
13 then to its legislative history. Id. (citing Lu, 50 Cal. 4th at
14 596); see San Diegans for Open Gov't v. Pub. Facilities Fin.
15 Auth. of City of San Diego, 8 Cal. 5th 733, 739 (2019).

16 In examining the language of a statute, the court must
17 look for signals such as an "express[] state[ment] 'that a
18 person has or is liable for a cause of action for a particular
19 violation,'" "a remedy or means of enforcing its substantive
20 provisions," or other "obvious," "'clear, understandable, [and]
21 unmistakable terms which strongly and directly indicate' an
22

23 ⁴ In its motions, defendant also argues that the Social
24 Security number depicted in the ID photo is not plaintiff's
25 current Social Security number, and that \$ 1798.85 only applies
26 to current Social Security numbers. (Mot. to Dismiss at 14.)
27 However, in its reply defendant indicates that it no longer seeks
28 to pursue this argument in light of an affidavit from plaintiff
stating that the Social Security number is in fact current.
(Reply at 2 n.1 (Docket No. 16); see Reade Aff. (Docket No. 15-
3).) Accordingly, the court will not address this asserted basis
for dismissal.

1 intent to create a private cause of action.” Fresno Motors, 771
2 F.3d 1132-33 (quoting Lu, 50 Cal. 4th at 597). Section 1798.85
3 does clearly state that a person or entity “may not” publicly
4 post or display an individual’s Social Security number, but it
5 does not contain either any language establishing that
6 individuals whose Social Security numbers are publicly posted or
7 displayed have a cause of action against the offending party or
8 warning that persons who violate the statute are liable for a
9 cause of action based on the statute itself. Nor does it contain
10 any language explaining what remedies would be available to a
11 plaintiff bringing suit for violation of the statute. See Lu, 50
12 Cal. 4th at 597 (listing examples of statutory language courts
13 have found expressly create causes of action, none of which are
14 present in § 1798.85).

15 Because § 1798.85 contains no “obvious language”
16 indicating that cause of action exists, the court turns to
17 legislative history. To demonstrate the existence of a cause of
18 action, the legislative history must offer a “clear indication
19 that the Legislature intended to create a private cause of action
20 under the statute.” Id. at 600.

21 In support of her argument that the statute creates a
22 private right of action, plaintiff points to two portions of a
23 report on the law by the Assembly Committee on Banking and
24 Finance (Docket No. 15-1).⁵ She first points to the report’s

25 ⁵ Plaintiff has attached the report to her opposition.
26 Although not framed as such, the court construes this as a
27 request for judicial notice of the statements contained in the
28 report. So construed, plaintiff’s request for judicial notice is
granted. Defendant does not contest that the statements are
authentic, see Fed. R. Evid. 201(b)(2); indeed, defendant seeks

1 statement that the law represents "a modest effort to allow the
2 victim to assertively deal with the consequences of identity
3 theft." (Id. at 3.) Although this statement suggests the
4 Committee's view that the law could assist victims of identity
5 theft in addressing the effects of such theft, its meaning is
6 clarified when read in context with the second portion plaintiff
7 identifies. There, the Committee recommends that the bill's
8 "author . . . consider specific causes of action and monetary
9 sanctions for violations" and that such sanctions include "costs
10 and attorney fees to the prevailing plaintiff." (Id.) This
11 language makes plain the Committee's understanding that the
12 statute, as written, did not provide a cause of action for
13 violations, hence the Committee's recommendation that one or more
14 causes of action be added. That recommendation was never
15 adopted.

16 In light of those statements, this court cannot
17 conclude that the report's vague reference to victims
18 "assertively deal[ing] with the consequences of identity theft"
19 constitutes a "clear indication that the Legislature intended to
20 create a private cause of action under the statute." Lu, 50 Cal.
21 4th at 600. Likewise, that the report lists the statute's
22 projected "fiscal effect" as "None," (Docket No. 15-1 at 2),
23 provides too weak an inference of intent to create a cause of
24 action for the court to recognize one here. Although plaintiff

25 judicial notice of the contents of the same document, (Docket No.
26 12-13). Defendant's request, insofar as it seeks such notice, is
27 granted. Defendant's request is denied in all other respects,
28 however, as consideration of the other documents for which
defendant seeks notice is unnecessary to the resolution of the
instant motions.

1 argues the lack of a projected fiscal impact indicates that the
2 legislature did not intend for the state Attorney General to
3 enforce the law, and that individuals whose Social Security
4 numbers are published therefore must be able to enforce the law
5 themselves, (Opp. at 11 (Docket No. 15)), this rationale is far
6 too speculative to represent a "clear indication" of legislative
7 intent. Moreover, it appears that the Attorney General has
8 indeed sought to enforce this statute on at least one occasion,
9 via an action brought under California's Unfair Competition Law,
10 Cal. Bus. & Prof. Code § 17200, indicating that a means of
11 enforcing the law does in fact exist. (See Docket No. 12-12.)⁶

12 Plaintiff also cites an unpublished California Superior
13 Court decision, Skylight Advisors, LLC v. Does 1-25, 20-SMC-cv-
14 01175, at 13 (Cal. Super. Ct. May 24, 2021) (Docket No. 15-2),
15 attached to her opposition, in arguing that a cause of action
16 exists.⁷ There, the court stated that, "[a]s a remedial statute,
17 the Court believes that there is a manifest intent to allow a
18 private right of action" in § 1798.85. (Docket No. 15-2 at 13.)
19 However, that conclusion is expressly qualified by the court's
20 statement that "[n]o party provide[d] the Court with the full
21 legislative history, including what the Legislative Analyst or
22

23 ⁶ Although not part of the Complaint, the court takes
24 judicial notice of the fact that the state brought this claim, in
25 a case in the Superior Court of the State of California, in and
for the County of Alameda, in January of 2014. (See id.)

26 ⁷ As with the legislative analysis of § 1798.85, the
27 court construes this as a request for judicial notice of the
28 document's contents. (See supra n.5.) So construed, plaintiff's
request for judicial notice is granted, as defendant does not
contest the document's authenticity.

1 Counsel stated about [the existence of a] claim (if anything),"

2 and that "the Court [was] open to persuasion on this point at a

3 later stage of the proceedings, perhaps with a better recitation

4 of Legislative history." (Id. at 13-14.) This discussion makes

5 clear that that court did not consider the legislative materials

6 that this court has reviewed. Skylight Advisors is therefore

7 unpersuasive.

8 Accordingly, the court concludes that, based on the

9 statutory text and the legislative history identified by

10 plaintiff, § 1798.85 does not create a cause of action. Accord

11 Fine v. Cambridge Int'l Sys., 12-cv-165 WQH (BGS), 2012 WL

12 2871656, at *5 (S.D. Cal. July 11, 2012) (citation omitted),

13 rev'd in part on other grounds, 584 F. App'x 695 (9th Cir. 2014);

14 see San Diegans for Open Gov't, 8 Cal. 5th at 739 ("The burden of

15 persuasion is with the party claiming a statutory right to sue.")

16 (citation omitted). Plaintiff's § 1798.85 claim therefore cannot

17 succeed.

18 b. Requisite Allegations of Intent

19 Even if a cause of action existed, plaintiff's claim

20 fails for another, independent reason. Section 1798.85 includes

21 an intent component, prohibiting "person[s] or entit[ies]" from

22 "intentionally communicat[ing] or otherwise mak[ing] available to

23 the general public" another person's Social Security number.

24 Cal. Civ. Code § 1798.85(a)(1) (emphasis added).

25 As a threshold matter, the parties dispute whether the

26 provision requires general or specific intent -- in other words,

27 whether a person or entity violates the statute any time it

28 intentionally communicates material that happens to contain

1 another person's Social Security number, or whether the person or
2 entity must specifically intend to communicate the Social
3 Security number itself. A plain reading of the statute
4 demonstrates that the latter interpretation is correct. As
5 noted, the statute provides that "a person or entity may not
6 . . . [p]ublicly post or publicly display in any manner an
7 individual's social security number" and defines "[p]ublicly
8 post" and "publicly display" to mean "to intentionally
9 communicate or otherwise make available to the general public."
10 Cal. Civ. Code § 1798.85(a)(1). Reading these provisions of the
11 statute together, it prohibits persons or entities from
12 "intentionally communicat[ing] or otherwise mak[ing] available to
13 the general public," "in any manner[,] an individual's social
14 security number." Id. The terms "communicate" and "make
15 available" apply directly to "an individual's social security
16 number," making clear that the intent requirement, which modifies
17 "communicate" and "make available," applies to disclosure of the
18 number itself.

19 The allegations in plaintiff's complaint relevant to
20 intent are that defendant (1) "has an extensive editing process
21 before publication on its website," making it "very unlikely that
22 the disclosure was inadvertent, as several people must have seen
23 the photo before it was published"; (2) "acted recklessly or
24 intentionally in disclosing Plaintiff's Social Security Number";
25 and, similarly, (3) "intentionally or recklessly violated
26 California law in publicly posting or displaying Plaintiff's
27 Social Security Number." (Compl. at ¶¶ 18-19, 24.)

28 These allegations are insufficient to plausibly suggest

1 that defendant intentionally displayed plaintiff's Social
2 Security number when it chose to publish the photo of her ID.
3 The court has reviewed an unredacted image of the photo, which
4 the court has separately ordered to be sealed, and it is not at
5 all obvious that the number is in fact a Social Security number.⁸
6 Only the top half of the digits are visible at the bottom of the
7 image, and it is not even clear what numbers they are. The two
8 dashes typically separating the digits are also absent from the
9 photo. The mere fact that defendant has a practice of reviewing
10 photos before publishing them online does not plausibly suggest
11 that its inclusion of a portion of plaintiff's Social Security
12 number was intentional. See Sprewell, 266 F.3d at 988 (courts
13 not "required to accept as true allegations that are merely . . .
14 unwarranted deductions of fact[] or unreasonable inferences").

15 Plaintiff's other allegations on this point are mere
16 conclusory statements that defendant acted either recklessly or
17 intentionally. These allegations are unsupported by any factual
18 allegations -- other than the above-noted allegation regarding
19 defendant's editing process -- supporting an inference that the
20 inclusion of plaintiff's Social Security number was intentional.
21 See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("[T]he tenet
22 that a court must accept as true all of the allegations contained
23 in a complaint is inapplicable to legal conclusions. Threadbare
24 recitals of the elements of a cause of action, supported by mere
25 conclusory statements, do not suffice.").

26 There is no suggestion as to how defendant would have

27 ⁸ As noted, see supra n.3, a partially redacted copy of
28 the image is attached at Exhibit A.

1 known that portions of what appear to be numbers on what was
2 represented to be plaintiff's identification badge as an employee
3 of the United States Senate were in fact her Social Security
4 number. Moreover, the Complaint does not even definitively state
5 that defendant's publication of the Social Security number was,
6 in fact, intentional, but rather alleges that the publication may
7 instead have been reckless. Because the statute specifies that
8 intentional display or dissemination is required, recklessness is
9 insufficient.

10 Because section 1798.85 does not create a cause of
11 action and, in any event, plaintiff fails to plausibly allege
12 that defendant's publication of her Social Security number was
13 intentional, plaintiff's first claim will be dismissed.

14 2. Public Disclosure of Private Fact

15 To state a claim for public disclosure of private facts
16 under California law, a plaintiff must allege: "(1) public
17 disclosure (2) of a private fact (3) which would be offensive and
18 objectionable to the reasonable person and (4) which is not of
19 legitimate public concern." Shulman v. Grp. W Prods., Inc., 18
20 Cal. 4th 200, 214 (1998). This type of claim arises from
21 California's common law right to privacy. See Diaz v. Oakland
22 Trib., Inc., 139 Cal. App. 3d 118, 125-26 (1st Dist. 1983); see
23 also id. at 125 n.10 (noting claim may also arise under
24 California Constitution's right to privacy) (citing Cal. Const.
25 Art. I, § 1).⁹ As the Ninth Circuit has noted regarding common

26 ⁹ The other tort claims arising under the common law
27 right to privacy in California are "(1) intrusion upon
28 plaintiff's solitude or into his or her private affairs;
(2) 'false light' publicity; and (3) appropriation of plaintiff's

1 law privacy claims, although California courts “ha[ve] not
2 explicitly required a finding of intentional conduct as a
3 prerequisite for the cause of action to be asserted,” they “have
4 yet to extend the cause of action to include accidental or
5 negligent conduct.” Ruiz v. Gap, Inc., 380 F. App’x 689, 692-93
6 (9th Cir. 2010).

7 Defendant argues that plaintiff fails to state a claim
8 because public disclosure of another’s Social Security number is,
9 as a matter of law, not “offensive and objectionable to the
10 reasonable person,” citing a series of cases from other district
11 courts in California. (See Mot. to Dismiss at 17.) These
12 decisions state that “[e]ven disclosure of personal information,
13 including social security numbers, does not constitute an
14 ‘egregious breach of the social norms’ to establish an invasion
15 of privacy claim.” E.g., Low v. LinkedIn Corp., 900 F. Supp. 2d
16 1010, 1025 (N.D. Cal. 2012). All appear to cite Ruiz v. Gap,
17 Inc., 540 F. Supp. 2d 1121 (N.D. Cal. 2008), aff’d, 380 F. App’x
18 689, for this proposition, or other decisions that did so. See
19 Schmitt v. SN Servicing Corp., 21-cv-3355 WHO, 2021 WL 3493754,
20 at *7 (N.D. Cal. Aug. 9, 2021) (citing In re iPhone Application
21 Litig., 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012), which relied
22 upon Ruiz); Low, 900 F. Supp. 2d at 1025 (citing Ruiz); White v.
23 Soc. Sec. Admin., 111 F. Supp. 3d 1041, 1053 (N.D. Cal. 2015)
24 (citing Low and Ruiz); Del Llano v. Vivint Solar Inc., 17-cv-1429
25 AJB MDD, 2018 WL 656094, at *5 (S.D. Cal. Feb. 1, 2018) (citing
26 White); Barry v. Wells Fargo Home Mortg., 15-cv-4606 BLF, 2016 WL
27
28 name or likeness to the defendant’s advantage.” Diaz, 139 Cal.
App. 3d at 126 (citations omitted).

1 4242237, at *4 (N.D. Cal. Aug. 11, 2016) (citing Low);
2 Bongiovanni v. State Farm Fin. Servs., F.S.B., 15-cv-556 MWF
3 (SSx), 2015 WL 13916261, at *9 (C.D. Cal. July 22, 2015) (citing
4 Low); Mitchell v. Reg'l Serv. Corp., 13-cv-4212 JSW, 2014 WL
5 12607809, at *5 (N.D. Cal. Apr. 23, 2014) (citing Low);
6 Belluomini v. Citigroup, Inc., 13-cv-1743 CRB, 2013 WL 3855589,
7 at *6 (N.D. Cal. July 24, 2013) (citing Ruiz).

8 The decision in Ruiz was based upon the peculiar facts
9 in that case, and the court there did not purport to hold that
10 disclosure of Social Security numbers may never form the basis
11 for public disclosure claims. Although the cases following Ruiz
12 do not fully articulate the rationale for their conclusion that a
13 public disclosure claim may not be predicated simply upon
14 disclosure of a Social Security number, there is a sound
15 underlying reason to reach such a conclusion. California courts
16 have frequently described the scope of the right of action for
17 public disclosure of private facts as protecting against
18 disclosure of "intimate details of [a] plaintiff's private life."
19 Fellows v. Nat'l Enquirer, Inc., 42 Cal. 3d 234, 251 n.13 (1986)
20 (en banc); Kapellas v. Kofman, 1 Cal. 3d 20, 35 (1969) (en banc);
21 Coverstone, 38 Cal. 2d at 322-23; see also, e.g., Taus v. Loftus,
22 40 Cal. 4th 683, 717-18 (2007) (right covers disclosure of
23 "sufficiently sensitive or intimate private fact[s]").

24 The history of this tort sheds light on its reach. The
25 California Supreme Court has noted that California courts'
26 initial recognition of the tort stemmed from the Restatement of
27 Torts and from a seminal article on privacy law by Dean William
28 Prosser. Shulman, 18 Cal. 4th at 214 (citing Restatement

(Second) of Torts § 652A-E (Am. Law Inst. 1977); William Prosser, Privacy, 48 Cal. L. Rev. 381 (1960)); see Miller v. Nat'l Broadcasting Co., 187 Cal. App. 3d 1463, 1482 (2d Dist. 1986) ("The Prosser analysis has been widely adopted Recent California decisions have also employed it.") (citing Prosser, supra at 389). Although the Restatement in relevant part refers only to disclosure of "matter[s] concerning the private life of another," Restatement (Second) § 652D, Prosser's article identified the tort as "Public disclosure of embarrassing private facts about the plaintiff." Prosser, supra at 389, 392 (emphasis added). It went on to discuss the tort in depth, citing, as the tort's basis, a variety of decisions involving dissemination of scandalous stories or lurid details about individuals' private lives that were likely to cause embarrassment. Id. at 392-98 (collecting cases).¹⁰

One such early case addressed a challenge to a magazine's publication of a photograph in which plaintiffs alleged they were depicted in an "uncomplimentary pose" and that their "right of privacy was thereby invaded and plaintiffs were subjected to humiliation and annoyance." Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 227 (1953) (en banc) (internal quotation marks omitted). The California Supreme Court, in reviewing a dismissal of the plaintiffs' claim, concluded in pertinent part that the image contained nothing "uncomplimentary or

¹⁰ See also id. at 397 ("The law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about . . . publicity. It is quite a different matter when the details of sexual relations are spread before the public gaze, or there is highly personal portrayal of his intimate private characteristics or conduct.").

1 discreditable," distinguishing the case from others "where the
2 right of privacy has been enforced with regard to the publication
3 of a picture which was shocking, revolting or indecent in its
4 portrayal of the human body." Id. at 230-31. Because the
5 disclosure in Gill did not rise to that level, it was
6 insufficient "to shock the ordinary sense of decency or
7 propriety" as was necessary to give rise to "an actionable
8 invasion of the right of privacy." Id. at 231.

9 California courts continue to speak of the tort in
10 terms of whether the private facts disclosed were embarrassing,
11 uncomplimentary, discreditable, indecent, derogatory, or
12 reprehensible. See Forsher v. Bugliosi, 26 Cal. 3d 792, 808
13 (1980) (addressing invasion of privacy claim in which plaintiff
14 alleged "that private embarrassing facts about him were revealed
15 and that his personal character was thereby injured"); Diaz, 139
16 Cal. App. 3d at 125 (referring to privacy right at issue as "the
17 right to be free from public disclosure of private embarrassing
18 facts").

19 Courts in other jurisdictions have described the common
20 law public disclosure tort in a similar fashion. See Cottrell v.
21 Smith, 299 Ga. 517, 532 (2016) (referring to tort as "public
22 disclosure of embarrassing private facts" and explaining, "[t]he
23 interest protected [by the tort] is that of reputation, with the
24 same overtones of mental distress that are present in libel and
25 slander") (citing Cabaniss v. Hipsley, 114 Ga. App. 367, 372-73
26 (1966), which likewise relied on Prosser's article); Busse v.
27 Motorola, Inc., 351 Ill. App. 3d 67, 72 (1st Dist. 2004) (public
28 disclosure tort applies to disclosure of individuals' private

1 conduct, such as "family problems, romantic interests, sex lives,
2 [and] health problems," but not of personal identifying
3 information) (citation omitted); see also Dept. of Labor v.
4 McConnell, 305 Ga. 812, 819 n.7 (2019) ("[T]he subject matter of
5 other cases involving this tort includes the disclosure of
6 extramarital affairs and the publication of a partially nude
7 photograph.") (citations omitted).

8 In sum, this court concludes that, under existing
9 California law, to state a claim for public disclosure of private
10 facts a plaintiff must allege disclosure not merely of facts she
11 would prefer to keep private, but rather of private facts that
12 rise to such a level as could be characterized as embarrassing in
13 nature, such as would adversely affect her personal or
14 professional reputation if disclosed. Personal identifying
15 information such as a Social Security number, standing alone,
16 clearly does not qualify because it discloses nothing about the
17 individual's conduct or personal life that would adversely affect
18 her reputation if made known to others.¹¹

19 Accordingly, because plaintiff's public disclosure
20 claim is predicated solely upon the alleged disclosure of her
21 Social Security number, that claim must fail.¹²

22 ¹¹ In Re iPhone Application Litigation supports this
23 conclusion. There the court held that disclosure of identifying
24 information contained in cell phones, including users' "unique
25 device identifier number, personal data, and geolocation
26 information," is not an "egregious breach of social norms." 844
27 F. Supp. 2d at 1063 (citing Folgelstrom v. Lamps Plus, Inc., 195
Cal. App. 4th 986, 992 (2d Dist. 2011)). A Social Security
number is similar in its ability to identify and reveal basic
information about individuals.

28 ¹² Additionally, because the court has concluded that

3. Negligence

In her claim for negligence, plaintiff alleges that defendant's disclosure caused her "significant damages," and the Complaint elsewhere clarifies that these consist of "financial and emotional damages." (Compl. at ¶¶ 24, 36.) It is well established, however, that plaintiffs may not recover damages solely for economic losses in negligence claims. See E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 874-76 (1986); Union Oil Co. v. Oppen, 501 F.2d 558, 563-64 (9th Cir. 1974); Sheen v. Wells Fargo Bank, N.A., 12 Cal. 5th 905, 915 (2022).

An exception to this rule may apply in rare cases where there exists a "special relationship" between the parties. S. Cal. Gas Leak Cases, 7 Cal. 5th 391, 400 (2019). However, plaintiff has not alleged that a special relationship existed between her and defendant, nor does precedent suggest that their relationship would qualify. See, e.g., J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 804-05 (1979) (restaurant operator's contract to renovate restaurant created special relationship with contractor, thus allowing recovery for purely economic loss caused by contractor's negligent failure to complete construction on time); Biakanja v. Irving, 49 Cal. 2d 647, 650-51 (1958) (notary's preparation of will created special relationship with plaintiff, an intended beneficiary, such that plaintiff could recover for notary's negligent omission from will of assets that would

plaintiff has failed to allege that defendant intentionally disclosed her Social Security number, plaintiff's public disclosure claim fails for this independent reason as well. See Ruiz, 380 F. App'x at 692-93.

1 otherwise have passed to plaintiff).

2 Precedent also establishes that allegations of
3 "increased risk of identity theft," standing alone, are
4 insufficient to show actual damages. See Holly v. Alta Newport
5 Hosp., Inc., 2:19-cv-07496 ODW (MRWx), 2020 WL 6161457, at *4
6 (C.D. Cal. Oct. 21, 2020). Although plaintiff alleges that there
7 have been attempts to steal her Social Security number since the
8 photo was published, she does not allege that her Social Security
9 number was actually stolen or that she suffered harm as a result.

10 To the extent that plaintiff seeks damages for
11 emotional harm based on negligence, the California Supreme Court
12 has stated that there generally "is no duty to avoid negligently
13 causing emotional distress to another." See Potter v. Firestone
14 Tire & Rubber Co., 6 Cal. 4th 965, 984 (1993). Plaintiff,
15 however, points to the statement of a California Court of Appeal:

16 California courts have limited emotional suffering
17 damages to cases involving either physical impact and
18 injury to plaintiff or intentional wrongdoing by
19 defendant. Damages for emotional suffering are
allowed when the tortfeasor's conduct, although
negligent as a matter of law, contains elements of
intentional malfeasance or bad faith.

20 Quezada v. Hart, 67 Cal. App. 3d 754, 761 (2d Dist. 1977).

21 Relying on this "intentional wrongdoing" exception,
22 plaintiff argues that because defendant intentionally published
23 her Social Security number, she may recover in negligence for
24 emotional harm. As explained above, however, the Complaint fails
25 to adequately allege that defendant's publication of plaintiff's
26 Social Security number was intentional. Accordingly, the
27 exception identified in Quezada does not apply. Moreover, the
28 court in Quezada cited no precedent in support of the existence

1 of this exception, and it is not clear that the exception remains
2 viable today.

3 Because plaintiff therefore cannot recover in
4 negligence for either type of alleged harm, her negligence claim
5 will be dismissed.

6 B. Special Motion to Strike

7 Under California's Strategic Lawsuit Against Public
8 Participation ("anti-SLAPP") statute, a defendant in a civil
9 action may file a special motion to strike claims "arising from
10 any act of [the defendant] in furtherance of [the defendant's]
11 right of petition or free speech" under the United States or
12 California constitutions. Cal. Code Civ. P. § 425.16(b)(1); see
13 Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress,
14 890 F.3d 828, 832-33 (9th Cir. 2018). The motion is available to
15 litigants proceeding in federal court. Thomas v. Fry's Elecs.,
16 Inc., 400 F.3d 1206, 1206-07 (9th Cir. 2005).

17 "A court considering a motion to strike under the anti-
18 SLAPP statute must engage in a two-part inquiry." Vess v. Ciba-
19 Geigy Corp. USA, 317 F.3d 1097, 1110 (9th Cir. 2003). The
20 defendant must first show "that the plaintiff's suit arises from
21 an act by the defendant made in connection with a public issue in
22 furtherance of the defendant's right to free speech under the
23 United States or California Constitution." Batzel v. Smith, 333
24 F.3d 1018, 1024 (9th Cir. 2003), superseded in part by statute on
25 other grounds as stated in Breazeale v. Victim Servs., Inc., 878
26 F.3d 759, 766-67 (9th Cir. 2017). "The burden then shifts to the
27 plaintiff," id., who "must show a reasonable probability of
28 prevailing in [her] claims for those claims to survive

1 dismissal.” Planned Parenthood, 890 F.3d at 833 (quoting
2 Metabolife Intern., Inc. v. Wornick, 264 F.3d 832, 840 (9th Cir.
3 2001)) (internal quotation marks omitted).

4 Where an anti-SLAPP motion is made at the pleading
5 stage, challenging the legal sufficiency of a claim, the second
6 part of the analysis is identical to the analysis performed in
7 evaluating a motion to dismiss under Rule 12(b)(6). Id. at 834.
8 Accordingly, where a court concludes that a plaintiff’s complaint
9 fails to satisfy the 12(b)(6) standard, the only remaining
10 question is whether the suit arises from “an act by the defendant
11 made in connection with a public issue in furtherance of the
12 defendant’s right to free speech.”

13 Such an “act” includes, as relevant here, “any written
14 or oral statement or writing made in a place open to the public
15 or a public forum in connection with an issue of public interest”
16 and “any other conduct in furtherance of the exercise of the
17 constitutional right of petition or the constitutional right of
18 free speech in connection with a public issue or an issue of
19 public interest.” Cal. Code Civ. P. § 425.16(e)(3)-(4).

20 “[P]ublic issues,” in turn, include “statements concerning a
21 person or entity in the public eye” and “topic[s] of widespread,
22 public interest.” Sarver v. Chartier, 813 F.3d 891, 901 (9th
23 Cir. 2016) (citation and internal quotation marks omitted,
24 alteration adopted). To be of “public interest,” a topic must be
25 “of concern to a substantial number of people.” Id. (quoting
26 Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1132 (3d Dist.
27 2003)). The terms “public issue” and “public interest” must be
28 “construed . . . broadly in light of the statute’s stated purpose

1 to encourage participation in matters of public importance or
2 consequence.” Id. (citations omitted, alteration adopted).

3 The publication of the photo, which plaintiff
4 voluntarily provided to the newspaper that she knew intended to
5 write a story about her, was clearly done in connection with a
6 public issue in furtherance of the newspaper’s constitutional
7 right to free speech. California courts have on multiple
8 occasions held that similar conduct was in furtherance of
9 defendants’ free speech rights. See Taus, 40 Cal. 4th at 713
10 (journalistic investigation, writing, and publishing are conduct
11 in furtherance of free speech rights); Lieberman v. KCOP
12 Television, Inc., 110 Cal. App. 4th 156, 165-66 (2d Dist. 2003)
13 (newsgathering is conduct in furtherance of free speech rights).
14 Moreover, in the article in which the photo was published, the
15 Times was reporting on plaintiff’s accusation that a leading
16 candidate for President of the United States had sexually
17 assaulted her. Such an accusation would certainly have been of
18 interest to a substantial number of people.

19 Plaintiff argues that the article could have told the
20 story just as effectively without the photo or if the editors had
21 omitted the number segments from the bottom of it. First, since
22 it was plaintiff who submitted the photo with the partial number
23 visible on the bottom to the Times, presumably she agreed that
24 both the photo and the numbers had some relevance to the article
25 in that they corroborated her claim that she had worked for the
26 Senate. More importantly, the test is not whether the article
27 could have been written or presented differently, but rather only
28 whether the defendant has shown that its actions were “in


1 furtherance of" its constitutional right of free speech in
2 connection with a public issue. Cal. Code Civ. P.
3 § 425.16(e)(4). Defendant has met that burden.

4 IT IS THEREFORE ORDERED that defendant's Motion to
5 Dismiss (Docket No. 10) be, and the same hereby is, GRANTED.

6 AND IT IS FURTHER ORDERED that defendant's Special
7 Motion to Strike (Docket No. 11) be, and the same hereby is,
8 GRANTED.

9 Plaintiff has twenty days from the date of this Order
10 to file an amended complaint, if she can do so consistent with
11 this Order.

12 Dated: June 30, 2022



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

EXHIBIT A

