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14 **TWITTER, INC.**

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**
17

18 TAMARA FIELDS, et al.,
19
20 Plaintiffs,
21 v.
22 TWITTER, INC.,
23 Defendant.
24

Case No. 3:16-cv-00213-WHO

**DEFENDANT TWITTER, INC.’S NOTICE
OF MOTION AND MOTION TO DISMISS
SECOND AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Judge: Hon. William H. Orrick

[Fed. R. Civ. Proc. 12(b)(6)]

Hearing Date: 2:00 PM, October 26, 2016

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on October 26, 2016, at 2:00 PM, in Courtroom 2, 17th
4 Floor, United States District Court for the Northern District of California, Phillip Burton Federal
5 Building & United States Courthouse, 450 Golden Gate Avenue, San Francisco, California,
6 Defendant Twitter, Inc. (“Twitter” or “Defendant”) shall and hereby does move for an order
7 dismissing with prejudice all claims presented in Plaintiffs’ Second Amended Complaint. This
8 motion is supported by the following Memorandum of Points and Authorities and such other
9 written or oral argument as may be presented at or before the time this motion is taken under
10 submission by the Court.

11 **STATEMENT OF REQUESTED RELIEF**

12 Pursuant to Fed. R. Civ. Proc. 12(b)(6), Defendant Twitter requests that the Court dismiss
13 with prejudice all claims presented in Plaintiffs’ Second Amended Complaint.

14 **STATEMENT OF ISSUES TO BE DECIDED**

- 15 1. Whether 47 U.S.C. § 230 (“Section 230”), which broadly immunizes online
16 intermediaries from liability for harms allegedly resulting from third-party content, bars
17 this action, which seeks to hold Twitter liable under 18 U.S.C. § 2333(a) based on
18 allegations that Twitter failed to block or remove accounts that ISIS affiliates allegedly
19 used to transmit terrorist content via Twitter’s online communications platform.
- 20 2. Whether the Second Amended Complaint fails to state a claim under the federal
21 Terrorism Civil Remedy Provision, 18 U.S.C. § 2333(a), because:
- 22 a. The Second Amended Complaint fails to allege facts that would establish that Twitter
23 proximately caused the deaths of Mr. Fields and Mr. Creach; and
- 24 b. The Second Amended Complaint fails to allege facts that would establish that Twitter
25 committed an “act of international terrorism” within the meaning of that provision.
- 26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Plaintiffs' Second Amended Complaint (SAC) suffers from the same flaws as Plaintiffs'
3 First Amended Complaint (FAC) and should be dismissed for the same reasons that this Court
4 dismissed the FAC. *See Fields v. Twitter, Inc.*, 2016 WL 4205687 (N.D. Cal. Aug. 10, 2016)
5 (Dkt. No. 47). The SAC relies entirely on one of the two theories that Plaintiffs advanced in
6 their opposition to Twitter's previous motion to dismiss and that this Court has already
7 rejected—the theory that Twitter should be held liable for Plaintiffs' injuries because Twitter
8 allegedly failed to block or remove accounts used by ISIS affiliates or supporters to allegedly
9 transmit terrorist content over Twitter's online platform. Attempting to support that theory, the
10 SAC largely repleads the same allegations as the FAC but in a different order and under different
11 headings, while occasionally sprinkling in allegations that “Twitter knowingly and recklessly
12 *provided ISIS with accounts* on its social network.” SAC ¶ 1, Dkt. No. 48 (emphasis added).¹

13 In dismissing the FAC, this Court held that Plaintiffs' “provision of accounts” theory is
14 barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c). *See Fields*,
15 2016 WL 4205687, at *6-*8. Nothing in the SAC suffices to disturb that conclusion. *First*, just
16 like the FAC, the SAC is “riddled with detailed descriptions of ISIS-related messages, images,
17 and videos disseminated through Twitter and the harms allegedly caused by the dissemination of
18 that content.” *Id.* at *6. Putting labels aside—as Section 230 requires—the SAC continues to
19 “describe a theory of liability based on Twitter's knowing failure to prevent ISIS from
20 disseminating content through the Twitter platform, not its mere provision of accounts to ISIS,”
21 and so runs afoul Section 230. *Id.* at *5. *Second*, as this Court explained, Twitter's decisions

22
23 ¹ Plaintiffs seem to abandon the second theory that they pressed in their opposition to Twitter's
24 motion to dismiss—that by making a direct messaging tool widely available, Twitter had
25 provided material support to terrorists or to a designated terrorist organization. The SAC still
26 relies on direct messaging to support its assertion that Twitter proximately caused Plaintiffs'
27 injuries. SAC ¶¶ 43-45 (alleging ISIS recruited new members by sending direct messages to
28 potential recruits). But it no longer alleges that Twitter's provision of a direct messaging service
constituted a form of material support. In any event, for the reasons this Court has already given,
Section 230 precludes any direct messaging theory. *Fields*, 2016 WL 4205687, at *9-*10; *see*
also Reply, Dkt. No. 32 at 7-9.

1 about *who* may open or keep an account—and so *who* may post content to its platform—are
2 themselves publisher choices about *what* content may be posted. *See id.* at *6-*8. Because the
3 “provision of accounts” theory on which the SAC relies turns on “Twitter’s alleged violation of a
4 ‘duty ... derive[d] from [its] status or conduct as a publisher,’” it is barred by Section 230. *Id.* at
5 *6 (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)). *Third*, the SAC
6 *confirms* that content created by third parties is essential to Plaintiffs’ attempts to plead and
7 prove that Twitter proximately caused Plaintiffs’ injuries: The SAC now expressly groups many
8 of its allegations about content created by third parties under the new heading “Twitter
9 Proximately Caused Plaintiffs’ Injuries.” SAC at 6; *id.* ¶¶ 41-71. The SAC’s new structure thus
10 further reinforces the conclusion that Plaintiffs seek to hold Twitter responsible for harms arising
11 from third-party content, and not “Twitter’s mere provision of Twitter accounts to ISIS.” *Fields*,
12 2016 WL 4205687, at *9. For each of these reasons, Section 230 once again requires that
13 Plaintiffs’ claims be dismissed.

14 This Court also held that under any proximate cause standard “the allegations in the FAC
15 do not support a plausible inference of proximate causation between Twitter’s provision of
16 accounts to ISIS and the deaths of Fields and Creach.” *Fields*, 2016 WL 4205687, at *9. The
17 SAC attempts to escape that holding by replacing the allegation that Abu Zaid was a “lone wolf”
18 who had been inspired by ISIS’s brutal execution of Jordanian pilot al-Kassasbeh, FAC ¶¶ 80,
19 84, with an allegation that he had once belonged to an ISIS sleeper cell, SAC ¶ 81. But this
20 Court was aware of Plaintiffs’ sleeper cell allegation before issuing its decision, *see* Mot. to
21 Dismiss Hearing Tr., Dkt. No. 40, at 14:9-11, and did not rely on the FAC’s “lone wolf”
22 allegation in the Order dismissing the FAC, *Fields*, 2016 WL 4205687, at *8-*9. Whatever the
23 connection between Abu Zaid and ISIS, the SAC adds nothing to support the only connection
24 that could matter—i.e., one between Abu Zaid and *Twitter*. For this reason as well, the SAC
25 should be dismissed for failure to state a claim under the Terrorism Civil Remedy Provision.

26 During the motion to dismiss hearing, the Court granted Plaintiffs leave to amend in large
27 part so that Plaintiffs could get the “complaint in the shape that [they would] like it for more
28 receptive ears, if mine don’t work out the way that you want them.” Mot. to Dismiss Hearing Tr.

1 at 27:5-8. By merely reshuffling the same allegations and doubling down on theories that this
2 Court has already rejected, Plaintiffs have made clear that they have already turned their
3 attention to what they hope will be “more receptive ears.” Twitter respectfully urges the Court to
4 speed Plaintiffs on their way by dismissing the Second Amended Complaint with prejudice.

5 **FACTUAL BACKGROUND**

6 The allegations in the SAC are laid out differently than the allegations in the FAC, but
7 are otherwise nearly identical. Like the FAC, the SAC alleges that a terrorist named Abu Zaid
8 shot and killed Lloyd “Carl” Fields, Jr. and James Damon Creach in a terrorist attack on
9 November 9, 2015 in Amman, Jordan, and that ISIS subsequently claimed responsibility for the
10 attack. SAC ¶¶ 1, 78, 80. The SAC again fails to allege that Twitter had anything to do with the
11 attack itself or that its platform was ever used by Abu Zaid. It also continues to contain no
12 allegations that ISIS recruited Abu Zaid through Twitter’s online platform, or that he or ISIS
13 used the Twitter platform to plan, carry out, or raise money for the attack. Instead, once again,
14 the sole alleged connection between Twitter and the attack in Jordan is that some of the hundreds
15 of millions of individuals who maintained Twitter accounts before the attack were allegedly
16 affiliated with or sympathetic to ISIS and allegedly used Twitter’s platform to recruit new
17 members, *id.* ¶¶ 42-52, fundraise, *id.* ¶¶ 53-57, and spread propaganda, *id.* ¶¶ 58-71. And, once
18 again, the SAC does not allege that Twitter created any of this content. According to Plaintiffs,
19 however, Twitter should have “take[n] a more proactive approach to countering terrorist
20 messages and recruitment online.” SAC ¶ 32. Based on these allegations, Plaintiffs seek treble
21 money damages from Twitter under the Terrorism Civil Remedy Provision, 18 U.S.C. § 2333(a).
22 *Id.* ¶¶ 84-87 (based on alleged violation of 18 U.S.C. § 2339A); ¶¶ 88-91 (based on alleged
23 violation of 18 U.S.C. § 2339B).

24 The principle difference between the SAC and the FAC is cosmetic: Plaintiffs have
25 attempted to segregate their allegations about Twitter providing ISIS with accounts from their
26 allegations about the information ISIS or its supporters posted or sent through those accounts.
27 Allegations about accounts that previously were scattered throughout the FAC are now grouped
28 at the top of the SAC under new, account-focused headers such as “Twitter Provided Accounts

1 To ISIS,” and “Twitter Provided Accounts To ISIS Knowingly And Recklessly.” SAC at 2; *id.*
2 ¶¶ 9-40. And many of the FAC’s prior allegations about how ISIS used those accounts to
3 transmit content promoting ISIS’s purposes have been consolidated under the new heading
4 “Twitter Proximately Caused Plaintiffs’ Injuries.” *Id.* at 6; *id.* ¶¶ 41-71. Some content-focused
5 allegations continue to appear in other parts of the SAC, however, most notably in allegations
6 faulting Twitter for inadequately policing its platform. *Id.* ¶¶ 30, 32, 36, 37, 40. Plaintiffs have
7 also replaced their allegation that Abu Zaid was a “lone wolf” who had been inspired by ISIS’s
8 horrific execution of Jordanian pilot Maaz al-Kassasbeh, FAC ¶¶ 80, 84, with an allegation that,
9 according to Israeli military intelligence, Abu Zaid had been part of a clandestine ISIS terror cell
10 at al-Mutah University in al-Karak, Jordan, SAC ¶¶ 80-81. None of these changes are
11 unexpected: Plaintiffs’ opposition to Twitter’s motion to dismiss the FAC relied heavily on a
12 “provision of accounts” theory, Dkt. No. 31, and Plaintiffs advised the Court of the allegation
13 that Abu Zaid had been part of an “ISIS sleeper cell” at the motion to dismiss hearing, *see* Mot.
14 to Dismiss Hearing Tr., Dkt. 40, 14:9-11. In addition, the SAC acknowledges Twitter’s recent
15 announcement “that it has suspended 235,000 accounts since February [2016] for promoting
16 terrorism.” SAC ¶ 40.

17 LEGAL STANDARDS ON A MOTION TO DISMISS

18 To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must “contain
19 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”
20 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A claim is
21 plausible on its face only if the “plaintiff pleads factual content that allows the court to draw the
22 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The Court is
23 not “required to accept as true allegations that are merely conclusory, unwarranted deductions of
24 fact, or unreasonable inferences.” *Rieckborn v. Jefferies LLC*, 81 F. Supp. 3d 902, 913 (N.D.
25 Cal. 2015) (quoting *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)). Nor is
26 the Court “bound to accept as true a legal conclusion couched as a factual allegation.”
27 *Chinatown Neighborhood Ass’n v. Harris*, 33 F. Supp. 3d 1085, 1093 (N.D. Cal. 2014) (quoting
28

1 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Threadbare recitals of the elements of a cause of
2 action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

3 Given “the extreme nature of the charge of terrorism,” it is especially important in an
4 action brought under the Terrorism Civil Remedy Provision that the Court take special care to
5 ensure that the plaintiff has satisfied these basic pleading requirements. *In re Terrorist Attacks*
6 *on Sept. 11, 2001 (Burnett)*, 349 F. Supp. 2d 765, 831 (S.D.N.Y. 2005), *aff’d*, 714 F.3d 118 (2d
7 Cir. 2013). In such an action, “‘fairness requires extra-careful scrutiny of Plaintiff[’s]
8 allegations.’” *Id.*

9 Section 230 requires dismissal at the threshold pleading stage where, as here, the
10 defendant’s entitlement to immunity “is evident from the face of the complaint.” *Klayman v.*
11 *Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *see also Fair Housing Council of San*
12 *Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc)
13 (Section 230 “protect[s] websites not merely from ultimate liability, but [also] from having to
14 fight costly and protracted legal battles.”).

15 ARGUMENT

16 The Second Amended Complaint should be dismissed for the same two independent
17 reasons that this Court dismissed the First Amended Complaint. *First*, Section 230 bars
18 Plaintiffs’ claims because they continue to seek to hold Twitter liable for harms allegedly arising
19 from content created by third parties and for Twitter’s publishing conduct with respect to that
20 content. *Second*, the Second Amended Complaint again fails to plead facts sufficient to establish
21 an essential element of the Terrorism Civil Remedy Provision: that Twitter’s own conduct
22 proximately caused the deaths of Mr. Fields and Mr. Creach.²

23
24 _____
25 ² Twitter also incorporates and thereby preserves all of the arguments made in its motion to
26 dismiss the FAC, including the argument that Plaintiffs have failed to allege facts that would
27 establish that Twitter committed an act of “international terrorism” within the meaning of 18
28 U.S.C. § 2331(1), as the Terrorism Civil Remedy Provision requires. *See Mot. to Dismiss*, Dkt.
No. 27, at 23-25; *Reply*, Dkt. No. 32, at 13-15. Nothing in the SAC cures that additional and
independently dispositive defect.

1 **I. Section 230 Requires Dismissal Of Plaintiffs' Claims**

2 Section 230 “immunizes providers of interactive computer services against liability
3 arising from content created by third parties.” *Roommates.com*, 521 F.3d at 1162. As this
4 Court’s prior dismissal ruling recognized, this immunity provision mandates dismissal when
5 (1) the defendant is a “provider ... of an interactive computer service”; (2) the allegedly harmful
6 content at issue was “provided by another information content provider,” and not the defendant;
7 and (3) the plaintiff is seeking to hold the defendant liable as a “publisher or speaker” of that
8 content. 47 U.S.C. § 230(c)(1); *Fields*, 2016 WL 4205687, at *5; *see also Barnes*, 570 F.3d at
9 1100-1101. There is no dispute in this case that “Twitter is an interactive computer service
10 provider, or that the offending content highlighted in the FAC [and now the SAC] was provided
11 by another information content provider.” *Fields*, 2016 WL 4205687, at *4; *see also Mot. to*
12 *Dismiss*, Dkt. No. 27 at 12-13. The only element of immunity Plaintiffs have ever disputed is
13 “whether [their claims] seek to treat Twitter as a publisher or speaker.” *Fields*, 2016 WL
14 4205687, at *4.

15 This Court held that the claims in the FAC did seek to treat Twitter as a publisher and
16 were therefore barred by Section 230 for three reasons: (1) as actually pled, the claims in the
17 FAC sought to hold Twitter liable for third-party content, *Fields*, 2016 WL 4205687, at *5-*6;
18 (2) holding Twitter liable for its decisions about whether particular third parties may open or
19 maintain Twitter accounts inherently would be based on a duty derived from Twitter’s “status or
20 conduct as a publisher,” and thereby necessarily (and impermissibly) treat it as a publisher of
21 third-party content, *id.* at *6-*8; and (3) Plaintiffs had not and could not establish proximate
22 cause without relying on third-party content. *Id.* at *8-*9. The claims alleged in the SAC are
23 barred for these same reasons.

24 **A. The Allegations Actually Pled In The Second Amended Complaint Continue**
25 **To Premise Liability On Third-Party Content**

26 The SAC, like the FAC, continues to “describe a theory of liability based on Twitter’s
27 knowing failure to prevent ISIS from disseminating content through the Twitter platform.”
28 *Fields*, 2016 WL 4205687, at *5. The SAC’s new structure does not remedy that fundamental

1 defect. “To be sure,” the SAC, like the FAC, includes “some allegations ... concerning Twitter’s
 2 provision of accounts to ISIS.” *Id.* Indeed, every allegation in the SAC about provision of
 3 accounts is identical to or derived from a corresponding allegation in the FAC. *Compare* SAC
 4 ¶¶ 9-13, 20, 24, 29, 30, 32, 38, 39, 40, 43, 48, 56, 61, 66, 68, 69 with FAC ¶¶ 3-6, 20, 25, 33, 38,
 5 43, 45, 49, 53, 59, 60, 62, 68, 69, 70, 84. But the SAC also contains, and necessarily relies on,
 6 “detailed descriptions of ISIS-related messages, images, and videos disseminated through
 7 Twitter and the harms allegedly caused by the dissemination of that content.” *Fields*, 2016 WL
 8 4205687, at *6; *see also* SAC ¶¶ 41-71. And notably, the SAC continues to “specifically fault[]
 9 Twitter for failing to detect and prevent the dissemination of ISIS-related content through the
 10 Twitter platform.” *Fields*, 2016 WL 4205687, at *6 (citing FAC ¶ 60 (Twitter “failed to respond
 11 to pleas to shut down clear incitements to violence”) and ¶ 66 (Twitter “does not actively
 12 monitor and will not censor user content”)); *see also* SAC ¶¶ 30, 36 (reproducing *verbatim* FAC
 13 ¶¶ 60, 66); *id.* ¶¶ 32, 37 (further criticizing Twitter for inadequately policing *content*). The SAC
 14 in fact *adds* an allegation concerning Twitter’s alleged failure to prevent the dissemination of
 15 ISIS-related content on its platform. SAC ¶ 40 (“[J]ust this month, Twitter announced that it has
 16 suspended 235,000 accounts since February *for promoting terrorism*, something that it
 17 previously refused to do.” (emphasis added)).³

18
 19
 20 ³ While its falsity does not affect the legal analysis of this motion, the SAC’s allegation that
 21 Twitter had “previously refused” to suspend accounts for promoting terrorism is simply untrue.
 22 Both the FAC and the SAC elsewhere acknowledge earlier efforts by Twitter to “shut down”
 23 ISIS-related accounts. SAC ¶ 39; FAC ¶ 69. And as explained in the Twitter blog post from
 24 which the SAC plucked the 235,000 number, Twitter had, during the half-year *before* February
 25 2016, suspended 125,000 accounts for violating rules banning terrorist content on the Twitter
 26 platform. *See* Twitter, *An update on our efforts to combat violent extremism*, available at
 27 <https://blog.twitter.com/2016/an-update-on-our-efforts-to-combat-violent-extremism> (last visited
 28 Sept. 13, 2016). The Twitter Rules have always banned content that encourages terrorism under
 rules prohibiting “threats,” as well as use of the platform “for any unlawful purposes or in
 furtherance of illegal activities,” and have since April 2015 made that ban even more explicit by
 expressly prohibiting “threats of violence ... including threatening or promoting terrorism.” *See*
 Mot. to Dismiss, Dkt. No. 27 at 6-7 & n.3.

1 The sole difference between the FAC and the SAC with respect to third-party content is
2 that instead of scattering allegations about third-party content throughout the complaint, the SAC
3 deploys nearly all of those allegations in only two places: to support Plaintiffs' assertion that
4 Twitter proximately caused Mr. Creach and Mr. Fields' deaths, *see* SAC ¶¶ 41-71, and to
5 describe the steps that Twitter allegedly failed to take to drive ISIS content from its platform, *id.*
6 ¶¶ 30, 32, 36, 37, 40. Section 230 immunity, however, does not turn on and off based on how a
7 plaintiff arranges her complaint; "'creative' pleading" cannot "circumvent [Section 230's]
8 protections." *Kimzey v. Yelp! Inc.*, ___F.3d___, 2016 WL 4729492 (9th Cir. Sept. 12, 2016) (Nos.
9 14-35487, 14-35494) (slip op. 1) (rejecting attempt "to plead around [Section 230] to advance
10 the same basic argument that the statute plainly bars"); *see, e.g., Barnes*, 570 F.2d at 1102-1103;
11 *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19-20 (1st Cir. 2016); *Doe v. MySpace*, 528
12 F.3d 413, 419-420 (5th Cir. 2008); *see also* Mot. to Dismiss, Dkt. No. 27 at 14-16; Reply, Dkt.
13 No. 32 at 2-3. Rather, "what matters is whether the cause of action inherently requires the court
14 to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes*, 570
15 F.3d at 1101-1102; *see also Fields*, 2016 WL 4205687, at *4. As in the FAC, the entire premise
16 of the SAC is that ISIS or its supporters used Twitter's platform to spread their hateful messages,
17 and that Twitter should have taken more aggressive steps to keep such harmful content off its
18 platform. Such claims by definition treat Twitter as the "publisher" of the content at issue—
19 exactly what Section 230 forbids. *Barnes*, 570 F.3d at 1103 (immunity extends to "'any activity
20 that can be boiled down to deciding whether to exclude material that third parties seek to post
21 online'"); *see also* Mot. to Dismiss, Dkt. No. 27 at 9, 14-15.

22 **B. Plaintiffs' Accounts-Provision Theory Still Impermissibly Treats Twitter As**
23 **A Publisher Of Third-Party Content**

24 Plaintiffs' efforts to further highlight their provision of accounts theory also do not cure
25 the second problem identified by this Court: on its own terms, the provision of accounts theory
26 of liability is barred by Section 230. As this Court held, "decisions about whether particular
27 third parties may have Twitter accounts" are no different, for purposes of Section 230 immunity,
28 from decisions about "what particular third-party content may be posted." *Fields*, 2016 WL

1 4205687, at *6. Both decisions fundamentally are decisions to permit third parties to post
2 content, “it is just that under plaintiffs’ provision of accounts theory, Twitter would be liable for
3 granting permission to post (through the provision of Twitter accounts) instead of for allowing
4 postings that have already occurred.” *Id.* Imposing liability on Twitter for failing to block
5 accounts allegedly associated with ISIS would “significantly affect Twitter’s monitoring and
6 publication of third-party content by effectively requiring Twitter to police and restrict its
7 provision of Twitter accounts.” *Id.* at *8. The provision of accounts theory is thus “based on
8 Twitter’s alleged violation of a ‘duty ... derive[d] from [its] status or conduct as a publisher.’”
9 *Id.* at *6 (quoting *Barnes*, 570 F.3d at 1102); *see also* Reply, Dkt. No. 32 at 5-6.

10 Indeed, Plaintiffs’ reorganization of the SAC only confirms that their claims
11 fundamentally rely on, and seek to hold Twitter liable for, content created by third parties.
12 Plaintiffs ultimately seek to hold Twitter liable for failing to block accounts created by ISIS
13 affiliates or supporters *because these accounts were used to post content* that ISIS has used to
14 recruit new members, SAC ¶¶ 42-52, fundraise, *id.* ¶¶ 53-57, and spread propaganda, *id.* ¶¶ 58-
15 71. That is, Plaintiffs seek to hold Twitter liable not merely because ISIS obtained and
16 maintained Twitter accounts, but because ISIS transmitted content from those accounts. Because
17 the SAC attempts to resurrect the provision of accounts theory that this Court has already
18 rejected, it should be dismissed.

19 **C. Plaintiffs’ Allegations About Proximate Causation Continue To Be Based On**
20 **Third-Party Content**

21 Finally, the SAC emphatically underscores that Plaintiffs cannot avoid relying on third-
22 party content because any hope they have of satisfying the causation element of the Terrorism
23 Civil Remedy Provision, 18 U.S.C. § 2333, depends on such content. This Court expressed
24 skepticism that “a theory based on Twitter’s mere provision of Twitter accounts to ISIS” could
25 “plausibly allege[] the causal connection necessary to support” liability under the Terrorism Civil
26 Remedy Provision. *See Fields*, 2016 WL 4205687, at *9 & n.4. The Court noted that Plaintiffs
27 had heavily relied on content-based arguments in attempting to establish proximate causation.
28 *Fields*, 2016 WL 4205687, at *8 (“The rest of plaintiffs’ arguments and allegations with respect

1 to proximate causation are similarly content-based.”). And the Court asked how “Twitter’s mere
2 provision of Twitter accounts to ISIS—conduct that allegedly created liability before ‘the
3 publication of any content’ and would support liability ‘[e]ven if ISIS had never issued a single
4 tweet,’—[could have] proximately caused the November 2015 shooting”? *Id.* (quoting Opp’n,
5 Dkt. No. 31 at 7-8). Plaintiffs have now answered that question by doubling-down on their use
6 of third-party content to attempt to satisfy the Terrorism Civil Remedy Provision’s proximate
7 cause requirement. *See* SAC ¶¶ 41-71. This overt and overwhelming reliance on third-party
8 content confirms that Plaintiff’s claims “inherently require[] the court to treat [Defendants] as the
9 ‘publisher or speaker’ of content provided by another.” *Barnes*, 570 F.3d at 1101-1102; *see also*
10 Reply, Dkt. No. 32 at 3-4. For this and the other reasons discussed above and in Twitter’s
11 previous briefs, Section 230 bars Plaintiffs’ claims.

12 **II. The Second Amended Complaint Still Fails To Allege Facts Plausibly Establishing**
13 **That Twitter Proximately Caused The Deaths Of Mr. Fields And Mr. Creach**

14 The Second Amended Complaint also must be dismissed for a second reason identified in
15 this Court’s Order dismissing the FAC: The SAC fails to state a claim for relief under the
16 Terrorism Civil Remedy Provision because it fails to plead facts sufficient to plausibly establish
17 that Plaintiffs were injured “by reason of” Twitter’s conduct. *See Fields*, 2016 WL 4205687, at
18 *8-*9.

19 The Terrorism Civil Remedy Provision’s “‘by reason of’ language ... restricts the
20 imposition of ... liability [under the statute] to situations where plaintiffs plausibly allege that
21 defendants actions proximately caused their injuries.” *In re Terrorist Attacks on Sept. 11, 2001,*
22 *(Al Rajhi Bank)*, 714 F.3d 118, 123-125 (2d Cir. 2013). As this Court noted, the parties “dispute
23 the exact formulation of the appropriate causal test for civil liability under the ATA, [but] agree
24 that the statute requires a showing of proximate causation.” *Fields*, 2016 WL 4205687, at *8.
25 But “[e]ven under plaintiffs’ proposed ‘substantial factor’ test,” and “regardless of the particular
26 theory of liability [asserted by] plaintiffs,” the allegations “do not support a plausible inference
27 of proximate causation between Twitter’s provision of accounts to ISIS and the deaths of Fields
28 and Creach.” *Id.*

1 Plaintiffs' attempt to cure this additional dispositive defect is to no avail. Even as
2 between Abu Zaid and ISIS, the sole connection proffered by the SAC is that Abu Zaid,
3 according to Israeli military intelligence, once belonged to a clandestine ISIS terrorist cell. SAC
4 ¶ 81. This allegation replaces the allegation in the FAC that Abu Zaid was a "lone wolf," FAC
5 ¶ 80, who, according to his brother, had been moved by "ISIS's brutal execution of Jordanian
6 pilot Maaz al-Kassasbeh in February 2015," *id.* ¶ 84. Whatever this new alleged connection
7 means for the link between Abu Zaid and ISIS, it still leaves any connection between Abu Zaid
8 and *Twitter* "tenuous at best." *Fields*, 2016 WL 4205687, at *8. As before, "Plaintiffs do not
9 allege that ISIS recruited or communicated with Abu Zaid over Twitter, that ISIS or Abu Zaid
10 used Twitter to plan, carry out, or raise funds for the attack, or that Abu Zaid ever viewed ISIS-
11 related content on Twitter or even had a Twitter account." *Id.* at *1. There is, in sum, no
12 allegation linking Twitter to Abu Zaid at all. The "causal connection" on which the SAC relies
13 is thus "too speculative [and] attenuated to raise a plausible inference of proximate causation."
14 *Fields*, 2016 WL 4205687, at *8 n.4.

15 It is hardly surprising that this "new" factual allegation should fail to change the outcome
16 reached by the Court in its dismissal order. The Court's analysis did not rely on the assumption
17 that Abu Zaid was a "lone wolf" without connection to ISIS, *see Fields*, 2016 WL 4205687, at
18 *8-*9, and the Court was aware when issuing its decision of the purported Israeli intelligence on
19 which Plaintiffs rely. *See Mot. to Dismiss Hearing Tr.*, Dkt. 40, 14:9-11 ("[W]e've now come
20 across evidence from Israeli military intelligence that the shooter in this case ... was part of an
21 ISIS sleeper cell."). Because the SAC still fails to "plausibly allege[] the causal connection"
22 necessary to support a claim under the Terrorism Civil Remedy Provision, it should be dismissed
23 for this reason as well.⁴

24 _____
25 ⁴ Twitter incorporates and thereby preserves the additional argument, not reached by the Court's
26 dismissal order, that only a "direct relation between the injury asserted and the injurious conduct
27 alleged" is sufficient to satisfy the Terrorism Civil Remedy's "by reason of" requirement.
28 *Holmes v. Secur. Inv. Protection Corp.*, 503 U.S. 258, 268 (1992); *see also Mot. to Dismiss*, Dkt.
No. 27, at 21; *Reply*, Dkt. No. 32, at 11.

1 **III. No Further Amendment Should Be Permitted**

2 When a district court has already granted leave to amend, its discretion to deny further
3 amendment is “particularly broad.” *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d
4 351, 355 (9th Cir. 1996). Leave to amend should be denied when amendment would be
5 futile, *see id.* at 355-356, especially where, as here, a plaintiff has failed to cure defects
6 previously identified by the Court, *In re Splash Tech. Holdings, Inc. Sec. Litig.*, 160 F. Supp. 2d
7 1059, 1071-1072 (N.D. Cal. 2001), or has continued to advance a theory that the Court has
8 already rejected, *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1155 (N.D. Cal.
9 2010); *Scognamillo v. Credit Suisse First Boston, LLC*, 587 F. Supp. 2d 1149, 1159 (N.D. Cal.
10 2008).

11 Plaintiffs have now tried and failed three times to construct viable claims: once in the
12 original Complaint, Dkt. No. 1; again in the First Amended Complaint filed in response to
13 Twitter’s first motion to dismiss, Dkt. No. 21; and once again in the Second Amended Complaint
14 filed in response to this Court’s dismissal order, Dkt. No. 48. Each iteration has introduced only
15 minor changes. Nothing would be gained and much time and expense would be lost were this
16 Court to give Plaintiffs a fourth bite at the apple. Leave for any further amendment should
17 therefore be denied.

18 **CONCLUSION**

19 For the foregoing reasons, the SAC should be dismissed. And because any further
20 amendments would be just as futile as Plaintiffs’ now *three* attempts to state a claim, dismissal
21 should be with prejudice.
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1 Dated: September 13, 2016

Respectfully submitted,

3 /s/ Seth P. Waxman

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16 CERTIFICATE OF SERVICE

17 I hereby certify that on September 13, 2016, I electronically filed the above document
18 with the Clerk of the Court using CM/ECF which will send electronic notification of such filing
19 to all registered counsel.

20 By: /s/ Seth P. Waxman
Seth P. Waxman