

United States District Court  
Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

X CORP.,

Plaintiff,

v.

CENTER FOR COUNTERING  
DIGITAL HATE, INC., et al.,

Defendants.

Case No. [23-cv-03836-CRB](#)

**ORDER GRANTING CCDH  
MOTION TO DISMISS AND  
STRIKE**

Sometimes it is unclear what is driving a litigation, and only by reading between the lines of a complaint can one attempt to surmise a plaintiff’s true purpose. Other times, a complaint is so unabashedly and vociferously about one thing that there can be no mistaking that purpose. This case represents the latter circumstance. This case is about punishing the Defendants for their speech.

Plaintiff X Corp., the social media company formerly known as Twitter, has brought suit against Defendants Center for Countering Digital Hate, Inc. (“CCDH U.S.”), Center for Countering Digital Hate Ltd. (“CCDH U.K.”) (together, “CCDH”), Stichting European Climate Foundation (“ECF”), and Does (collectively, “Defendants”), alleging that CCDH undertook “a series of unlawful acts,” one of which involved ECF’s help, “designed to improperly gain access to protected X Corp. data.” FAC (dkt. 10) ¶ 1. X Corp. alleges that CCDH then “cherry-pick[ed]” users’ posts from that data in order to “falsely claim” in reports and articles that “it had statistical support showing” that the X Corp. platform “is overwhelmed with harmful content.” *Id.* X Corp. insists that CCDH did so in order to push “a contrived narrative to call for companies to stop advertising on

1 X,” and that CCDH succeeded, causing X Corp. “at least tens of millions of dollars” in  
 2 “lost . . . advertising revenues and other costs.” *Id.* ¶¶ 2, 5. CCDH moves to dismiss  
 3 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and moves to strike  
 4 pursuant to California’s anti-SLAPP statute, California Civil Procedure Code § 425.16.  
 5 MTD&S (dkt. 47).<sup>1</sup> As explained below, the Court GRANTS the motion.

## 6 I. BACKGROUND

### 7 A. Factual Allegations<sup>2</sup>

#### 8 1. The Parties

9 X Corp. is a corporation organized under the laws of the State of Nevada, with a  
 10 principal place of business in San Francisco, California. FAC ¶ 7. X Corp. provides a  
 11 real-time social media platform (“the X platform”) to its users, who can share ideas  
 12 through public posts. *Id.* Elon Musk took over Twitter in late October of 2022. *See* Rob  
 13 Wile, “A timeline of Elon Musk’s takeover of Twitter,” NBC News (Nov. 17, 2022),  
 14 [nbcnews.com/business/business-news/twitter-elon-musk-timeline-what-happened-so-far-](https://www.nbcnews.com/business/business-news/twitter-elon-musk-timeline-what-happened-so-far-rca57532)  
 15 [rca57532](https://www.nbcnews.com/business/business-news/twitter-elon-musk-timeline-what-happened-so-far-rca57532) (hereinafter Wile Timeline). Twitter changed its name to “X” in July of 2023.  
 16 *See* Irina Ivanova, “Twitter is now X. Here’s what that means,” CBS News (July 31,  
 17 2023), [https://www.cbsnews.com/news/twitter-rebrand-x-name-change-elon-musk-what-it-](https://www.cbsnews.com/news/twitter-rebrand-x-name-change-elon-musk-what-it-means/)  
 18 [means/](https://www.cbsnews.com/news/twitter-rebrand-x-name-change-elon-musk-what-it-means/) (adding, “‘Twitter was acquired by X Corp both to ensure freedom of speech and  
 19 as an accelerant for X, the everything app,’ the company’s owner, billionaire Elon Musk,  
 20 recently said.”).

21 CCDH U.S. is a non-profit corporation organized under the laws of Washington,  
 22 D.C., with its principal place of business there as well. *Id.* ¶ 8. It created an account on  
 23 the X (then Twitter) platform in 2019. *Id.* CCDH U.K. is a non-profit organization  
 24 formed under English law and headquartered in London, England. *Id.* ¶ 9. CCDH U.S.  
 25 and CCDH U.K. are affiliated corporate entities. *Id.* CCDH prepares and publishes

26  
 27 <sup>1</sup> A second motion, filed by ECF, *see* ECF Mot. (dkt. 49), is addressed in a separate order.  
 28 <sup>2</sup> For the purposes of this motion, this order accepts as true the allegations from the  
 complaint, and construes them in the light most favorable to X Corp. *See* W. Reserve Oil  
 & Gas Co. v. New, 765 F.2d 1428, 1430 (9th Cir. 1985).

1 reports and articles about organizations and individuals who post on social media  
 2 platforms “on widely debated topics, included COVID-19 vaccinations, reproductive  
 3 healthcare, and climate change.” Id. ¶ 17. It then makes those reports “publicly available  
 4 and free.” Id. X Corp alleges that CCDH’s reports use “flawed methodologies to advance  
 5 incorrect, misleading narratives,” cherry-picking data and labeling as “hate speech”  
 6 content that does not conform to its views. Id. ¶ 18. X Corp. maintains that “CCDH’s  
 7 reports and articles, coupled with its demands to entirely remove certain users from  
 8 platforms, are transparent efforts to censor viewpoints that CCDH disagrees with, and  
 9 reveal CCDH’s goal of leaving on the platforms only viewpoints that CCDH supports.”  
 10 Id. ¶ 20. Indeed, X Corp. alleges that CCDH is an “activist organization[] masquerading  
 11 as [a] research agenc[y].” Id. ¶ 1.

12 ECF is a non-profit foundation formed under Dutch law and headquartered in The  
 13 Hague, Netherlands. Id. ¶ 10.

14 Doe defendants are “presently unknown supporters and funders [of CCDH] who  
 15 have, among other things, directed, instructed, acted as agents of or in concert with,  
 16 conspired with, and/or who have participated in meaningful ways in CCDH’s and ECF’s  
 17 unlawful conduct.” Id. ¶ 6. X Corp. alleges that “a United States Senator” referred to  
 18 CCDH as a “[f]oreign dark money group,” and further alleges that X Corp. will further  
 19 amend the complaint once it ascertains the Doe defendants’ true names. Id.

## 20 2. The Dispute Between the Parties

21 X Corp. alleges that CCDH has created “faulty narratives regarding X Corp. and the  
 22 X service, with the express goal of seeking to harm X Corp.’s business by driving  
 23 advertisers away from the platform.” Id. ¶ 25. It continues: “To enable and facilitate those  
 24 efforts, CCDH has engaged in a series of unlawful acts to secure data regarding X that  
 25 CCDH could then mischaracterize in its reports and articles alongside calls for companies  
 26 not to advertise on X.” Id. The dispute between the parties involves two separate means  
 27 by which CCDH acquired X Corp. data, and three publications in which CCDH made use  
 28 of that data.

**a. CCDH “Scraping” Data from X Corp. Itself**

The first means by which CCDH took X Corp. data involves “scraping” data from X Corp. directly.

As a user of the X platform, CCDH necessarily agreed to X Corp.’s Terms of Service (“ToS”) when it created a new account in 2019. Id. ¶¶ 8, 53. The ToS provided that “scraping the Services without the prior consent of Twitter is expressly prohibited.” Id. ¶ 53.<sup>3</sup> The ToS did not define “scraping.” See ToS. However, scraping generally means “extracting data from a website and copying it into a structured format, allowing for data manipulation or analysis.” See hiQ Labs, Inc. v. LinkedIn Corp., 31 F.4th 1180, 1186 n.4 (9th Cir. 2022) (hereinafter “hiQ 2022 Circuit opinion”); see also hiQ Labs, Inc. v. LinkedIn Corp., 639 F. Supp. 3d 944, 954 (N.D. Cal. 2022) (hereinafter “hiQ 2022 district opinion”) (defining “scraping” as “a process of extracting information from a website using automated means”).

In its February 9, 2023 report, discussed below, CCDH states: “[t]o gather tweets from each of the ten reinstated accounts, [CCDH’s] researchers used the social media web-scraping tool SNScrape, which utilizes Twitter’s search function to enable data collection.” FAC ¶ 77. X Corp. alleges that CCDH scraped the X platform “on numerous occasions, including before preparing its February 9, 2023 report,” and that X Corp. never gave CCDH permission to do so. Id.

**b. CCDH Accessing Data from Brandwatch**

The second means by which CCDH took X Corp. data involves a company called Brandwatch. Brandwatch, “a trusted partner of X,” and notably not a defendant in this case, “provides SaaS products<sup>4</sup> that enable its customers to conduct brand monitoring on

<sup>3</sup> This provision specified that users “may not . . . access or search or attempt to access or search the Services by any means (automated or otherwise) other than through our currently available, published interfaces that are provided by Twitter (and only pursuant to the applicable terms and conditions), unless you have been specifically allowed to do so in a separate agreement with Twitter (NOTE: crawling the Services is permissible if done in accordance with the provisions of the robots.txt file, however, scraping the Services without the prior consent of Twitter is expressly prohibited).” Kaplan Decl. Ex. A (dkt. 48-1) (“ToS”) at 6–7.

<sup>4</sup> SaaS means “software as a service.” See What is SaaS Business Intelligence?,

1 social media, customer research on opinions and trends, campaign planning and campaign  
 2 effectiveness measurement, competitive analysis and risk management, influencer  
 3 identification and market research, and audience segmentation and analysis.” FAC ¶ 28.  
 4 Brandwatch had contracts with X Corp. and with ECF, both of which are relevant here. Id.  
 5 ¶¶ 29, 35.

6 **i. Relevant Brandwatch Agreements**

7 X Corp. entered into a contract with Brandwatch on May 1, 2020, called the  
 8 “Master License Agreement” (“the MLA”). Id. ¶ 29. Pursuant to the MLA, Brandwatch  
 9 could access certain data regarding X Corp., referred to as “Licensed Materials,” which  
 10 included posts on the X platform, in order “to enable Brandwatch’s customers to use its  
 11 SaaS products to analyze posts and X/Twitter users.” Id. X Corp. would stream its  
 12 Licensed Materials from its servers, “including in California,” to “servers used by  
 13 Brandwatch [] located in the United States, which Brandwatch’s applications accessed to  
 14 enable [its] users with login credentials to analyze the data.” Id. In the MLA, Brandwatch  
 15 agreed that it would “not attempt to (and will not allow others to): . . . copy, sell, lease,  
 16 sublicense, distribute, redistribute, syndicate, create derivative works or assign or  
 17 otherwise transfer or provide access to, in whole or in part, the Licensed Material to any  
 18 third party.” Id. ¶ 31. Brandwatch further agreed to keep “Twitter Content” secure. Id.

19 ECF was a subscriber to Brandwatch’s applications, and therefore also had a series  
 20 of contracts with Brandwatch. Id. ¶ 35. X Corp. alleges that Brandwatch’s terms of  
 21 service, to which ECF must have agreed, must be similar to the ones publicly available at  
 22 <https://www.brandwatch.com/legal/terms-and-conditions/>. Id. Brandwatch provided ECF  
 23 with login credentials, which enabled ECF to log into Brandwatch’s applications to access  
 24 the Licensed Materials. Id. ¶ 36. X alleges that ECF’s agreement with Brandwatch  
 25 prevented ECF from selling, reselling, licensing, sublicensing, or otherwise making the  
 26 Brandwatch service “available to anybody other than its Users” and from distributing  
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28 <sup>1</sup>WiseGeek, <http://wisegeek.net/what-is-saas-business-intelligence.htm> (last visited 2/3/2024).

1 “Supplier Data to any non-User for any reason other than Customer’s (or User’s) business  
2 purpose.” Id. ¶ 37. ECF further agreed “that it would ensure that its user ID and password  
3 to use the Brandwatch applications were kept confidential” and that it would “not share  
4 Customer Data with any other customer or third parties.” Id.<sup>5</sup>

5 **ii. CCDH Access to Brandwatch Using ECF Login**

6 CCDH has never been a customer of Brandwatch. Id. ¶ 39. X Corp. alleges that  
7 ECF knew that CCDH was not authorized to access the Licensed Materials or Brandwatch,  
8 and knew that CCDH wanted to access the Licensed Materials “to prepare its purported  
9 ‘research’ reports and call for censorship and attacks on X Corp.” Id. ¶ 38. X Corp.  
10 alleges that “on several occasions since at least early 2021,” ECF agreed to share its  
11 Brandwatch login credentials with CCDH “to enable CCDH’s illegal access to the X Corp.  
12 data.” Id. CCDH U.K. allegedly instructed CCDH U.S. to secure ECF’s login credentials  
13 and helped CCDH U.S. determine how to use Brandwatch applications to search X Corp.  
14 data and “how to mischaracterize that data in the CCDH reports.” Id. CCDH then  
15 allegedly “accessed the Licensed Materials improperly and without authorization.” Id. ¶  
16 41.

17 X Corp. further alleges that CCDH knew as of March 2021 that X Corp. and  
18 Brandwatch are parties to agreements that “prohibit Brandwatch from allowing third  
19 parties to, among other things, access, distribute, create derivative works from, or  
20 otherwise transfer the Licensed Materials.” Id. ¶ 42.<sup>6</sup> X Corp. also alleges that “CCDH  
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22 <sup>5</sup> CCDH has submitted Brandwatch Service Terms dated October 15, 2022, see Kaplan  
23 Decl. Ex. C (dkt. 48-3), Brandwatch Service Terms dated August 8 or 9, 2021, see Kaplan  
24 Decl. Ex. D (dkt. 48-4), Brandwatch Service Terms dated April 15, 2019, see Kaplan Decl.  
25 Ex. E (dkt. 48-5), and Brandwatch Service Terms dated April 21, 2023, see Kaplan Decl.  
26 Ex. F (dkt. 48-6), all of which, it asserts, are incorporated by reference in the Complaint,  
27 see Kaplan Decl. ¶¶ 4–7. X Corp. does not seem to dispute that the complaint incorporates  
28 these documents.

<sup>6</sup> See also id. ¶ 91 (“Defendants knew, based on their experience in CCDH purporting to  
analyze data associated with social media platforms . . . that for Brandwatch to have access  
to X Corp. data for its SaaS products to analyze, X Corp. must have contracts with  
Brandwatch, and that Brandwatch would be prohibited under the terms of the Brandwatch  
Agreements from providing access to unauthorized parties, or allowing any unauthorized  
parties to access that data.”).

1 knew that . . . ECF’s agreement with Brandwatch prohibited ECF from, among other  
 2 things, sharing its login credentials [or] any of the Licensed Materials with CCDH.” Id.  
 3 Despite that alleged knowledge, X Corp. alleges, CCDH “induced and conspired with ECF  
 4 to provide CCDH U.S. with its login credentials in violation of [X Corp.’s agreements with  
 5 Brandwatch] and in violation of ECF’s agreement with Brandwatch.” Id. ¶ 43. “CCDH  
 6 then impermissibly and without authorization accessed the Licensed Materials on several  
 7 occasions.” Id.

8 **c. CCDH’s Use of the Data**

9 Notwithstanding X Corp.’s claim at the motion hearing that “data security . . . is  
 10 what this case is about,” see Tr. of 2/29/24 Hearing (dkt. 74) at 12:11, the complaint does  
 11 not stop at allegations of CCDH’s allegedly unauthorized access of X Corp. data. It goes  
 12 on to allege that CCDH “used limited, selective, and incomplete data . . . that CCDH then  
 13 presented out of context in a false and misleading manner in purported ‘research’ reports  
 14 and articles.” FAC ¶ 43 (emphasis added). The complaint includes extensive allegations  
 15 about these publications, which X Corp. contends are based on “flawed ‘research’  
 16 methodologies,” and which “present an extremely distorted picture of what is actually  
 17 being discussed and debated” on the X platform, in order to “silence” speech with which  
 18 CCDH disagrees. See id. ¶¶ 17–20. Specifically, X Corp. highlights three publications.

19 **i. March 24, 2021 Report**

20 The first publication, from March 24, 2021, is a report called “The Disinformation  
 21 Dozen,” which focused on twelve high-profile individuals who opposed COVID  
 22 vaccinations. Id. ¶ 21. It is publicly available on CCDH’s website. Id. (citing  
 23 <https://counterhate.com/research/the-disinformation-dozen/>). And it asserts that “[j]ust  
 24 twelve anti-vaxxers are responsible for almost two-thirds of anti-vaccine content  
 25 circulating on social media platforms.” Id. X Corp. alleges that an unnamed social media  
 26 platform criticized the report as “creating a ‘faulty narrative’ without ‘any evidence.’” Id.  
 27 ¶ 22. CCDH states in the March 24, 2021 report that it “collected this sample using  
 28 Brandwatch, an enterprise social listening tool, to extract anti-vaccine tweets posted

1 between 1 February and 16 March 2021 based on text analysis.” Id. ¶ 45.

2 **ii. November 10, 2022 Article<sup>7</sup>**

3 The second publication, from November 10, 2022, is an article called “Fact check:  
4 Musk’s claim about a fall in hate speech doesn’t stand [up] to scrutiny.” Id. ¶ 46. It is  
5 publicly available on CCDH’s website. Id. (citing [https://counterhate.com/blog/fact-  
6 check-musks-claim-about-a-fall-in-hate-speech-doesnt-stand-up-to-scrutiny/](https://counterhate.com/blog/fact-check-musks-claim-about-a-fall-in-hate-speech-doesnt-stand-up-to-scrutiny/)). And it  
7 purports to contradict Elon Musk’s claim that hate speech on the X platform had declined,  
8 stating that based on its “analysis of data from the social media analytics tool  
9 Brandwatch,” “the week in question saw an uptick in the amount of hateful language being  
10 tweeted.” See CCDH, “Fact check” (Nov. 22, 2022) [https://counterhate.com/blog/fact-  
11 check-musks-claim-about-a-fall-in-hate-speech-doesnt-stand-up-to-scrutiny/](https://counterhate.com/blog/fact-check-musks-claim-about-a-fall-in-hate-speech-doesnt-stand-up-to-scrutiny/)). The article  
12 specifies that “[d]ata was collected using Brandwatch, which includes original tweets,  
13 retweets and quote retweets.” Id.

14 **iii. February 9, 2023 Report**

15 The third publication, from February 9, 2023, is a report called “Toxic Twitter,”  
16 which concludes that Twitter was generating millions of dollars in advertising revenue  
17 from previously banned accounts. See FAC ¶ 49 (citing  
18 <https://counterhate.com/research/toxic-twitter/>); Kaplan Decl. Ex. B (dkt. 48-2) (“Toxic  
19 Twitter” report). The report is publicly available on CCDH’s website. Id. It states that  
20 Musk “has reinstated tens of thousands of accounts, including neo-Nazis, white  
21 supremacists, misogynists and spreaders of dangerous conspiracy theories,” and that “just  
22 ten reinstated accounts renowned for publishing hateful content and dangerous  
23 conspiracies will generate up to \$19 million a year in advertising revenue for Twitter.”  
24 Toxic Twitter at 3. X Corp. alleges that the report “expressly calls for companies to stop

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27 <sup>7</sup> The complaint also discusses a November 2, 2021 report called “The Toxic Ten,” about  
28 ten climate-change-denying posters, which it contends is flawed, see id. ¶¶ 23–24;  
however, the complaint does not discuss that report as one involving improperly accessed  
data, see id. ¶¶ 39–55 (only discussing the March 24, 2021 report, November 10, 2022  
article, and February 9, 2023 reports for this point).

1 advertising on X based on its incorrect implications . . . that hate speech viewed on X is on  
2 the rise.” FAC ¶ 50.

3 The Toxic Twitter report involves both types of data collection at issue in the  
4 complaint. X Corp. alleges that “to obtain data that it needed for and mischaracterized in  
5 its February 9, 2023 report, CCDH again improperly accessed data that X Corp. provided  
6 to Brandwatch,” citing “several data points for which non-public Brandwatch sources are  
7 quoted.” FAC ¶ 51; but see Toxic Twitter at 17 (citing Brandwatch, 22 February 2022,  
8 [https://www.brandwatch.com/blog/how-much-do-social-media-ads-cost-on-facebook-  
9 instagram-twitter-and-linkedin/](https://www.brandwatch.com/blog/how-much-do-social-media-ads-cost-on-facebook-instagram-twitter-and-linkedin/)).<sup>8</sup> X Corp. further alleges that CCDH admits in the  
10 February 9, 2023 report that it ““used the social media web-scraping tool SNScrape, which  
11 utilizes Twitter’s search function to enable data collection.”” FAC ¶ 54.

12 **d. Harm to X Corp.**

13 X Corp. alleges that CCDH “widely disseminates its articles and ‘research’ reports  
14 for free,” id. ¶ 65, and that CCDH’s publications “have attracted attention in the press,  
15 with media outlets repeating CCDH’s incorrect assertions that hate speech is increasing on  
16 X,” id. ¶ 56. X Corp. alleges that CCDH’s publications have “caused significant financial  
17 harm to X Corp., including via lost advertising revenues.” Id. ¶ 66. Specifically, at least  
18 eight “companies who advertised on X on an ongoing basis immediately paused spending”  
19 after viewing CCDH’s publications, and at least five companies “planning on running  
20 future campaigns” paused those plans after viewing CCDH’s publications. Id. ¶¶ 67–68.  
21 Other companies have allegedly identified the CCDH publications as a barrier “to  
22 reactivating their paid advertising campaigns on X.” Id. ¶ 69. X Corp. “estimates that it  
23 has lost at least tens of millions of dollars in lost revenues” as of the date of the amended  
24 complaint, “with those amounts subject to increasing as time goes on.” Id. ¶ 70. It accuses  
25 CCDH of being the but-for and proximate cause of its lost revenues, because “CCDH’s  
26 conduct to obtain that data (which it then distorted) was necessary for CCDH to make its  
27

28 <sup>8</sup> This is the only citation to Brandwatch that the Court observes in the February 9, 2023 report.

1 allegations against X Corp . . . regarding hate speech and other types of content on X.” Id.  
 2 X Corp. also alleges additional losses of over \$5,000 caused by internal investigations to  
 3 look into CCDH’s unauthorized data access, as well as attorneys’ fees. Id. ¶ 71.

4 **B. Procedural History**

5 X Corp. brought suit on July 31, 2023. See Compl. (dkt. 1). X Corp. amended its  
 6 complaint on August 7, 2023. See FAC. The complaint now includes causes of action for  
 7 (1) breach of contract, in connection with the ToS, against CCDH U.S.; (2) breach of the  
 8 Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030, in connection with the  
 9 Brandwatch data, against all Defendants; (3) intentional interference with contractual  
 10 relations, as to Brandwatch’s agreement with X Corp., against all Defendants; and (4)  
 11 inducing breach of contract, as to Brandwatch’s agreement with X Corp., against all  
 12 Defendants. See id.

13 CCDH moves to dismiss pursuant to Rule 12(b)(6) and moves to strike pursuant to  
 14 California’s anti-SLAPP statute. MTD&S. The motion is fully briefed, see MTD&S,  
 15 Opp’n (dkt. 62), Reply (dkt. 65), and the Court has received amicus briefs from (1) Public  
 16 Participation Project, in support of CCDH, see PPP Br. (dkt. 55-1), and (2) the American  
 17 Civil Liberties Union Foundation of Northern California, Electronic Frontier Foundation,  
 18 and Knight First Amendment Institute at Columbia University, also in support of CCDH,  
 19 see ACLU Br. (dkt. 52-1). The Court held a motion hearing on Thursday, February 29,  
 20 2024. See Tr. of 2/29/24 Hearing.

21 **II. LEGAL STANDARD**

22 **A. Anti-SLAPP**

23 California’s anti-SLAPP statute provides that “[a] cause of action against a person  
 24 arising from any act of that person in furtherance of the person’s right of petition or free  
 25 speech under the United States Constitution or the California Constitution in connection  
 26 with a public issue” is “subject to a special motion to strike, unless the court determines  
 27 that the plaintiff has established that there is a probability that the plaintiff will prevail on  
 28 the claim.” Cal. Code Civ. Proc. § 425.16(b)(1). The statute facilitates “the early

1 dismissal of unmeritorious claims filed to interfere with the valid exercise of the  
2 constitutional rights of freedom of speech and petition for the redress of grievances.” Club  
3 Members for an Honest Election v. Sierra Club, 45 Cal. 4th 309, 315 (2008). “[W]hen an  
4 anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district  
5 court should apply the [Rule 12(b)(6)] standard.” Planned Parenthood Fed’n of Am., Inc.  
6 v. Ctr. for Med. Progress, 890 F.3d 828, 834 (9th Cir. 2018).

7 **B. Rule 12(b)(6)**

8 Under Rule 12(b)(6), the Court may dismiss a complaint for failure to state a claim  
9 upon which relief may be granted. The Court may base dismissal on either “the lack of a  
10 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
11 theory.” Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th Cir. 2019) (cleaned  
12 up). A complaint must plead “sufficient factual matter, accepted as true, to state a claim to  
13 relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (cleaned  
14 up). A claim is plausible “when the plaintiff pleads factual content that allows the court to  
15 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id.  
16 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
17 statements, do not suffice” to survive a 12(b)(6) motion. Id. (citing Bell Atlantic v.  
18 Twombly, 550 U.S. 544, 555 (2007)). When evaluating a motion to dismiss, the Court  
19 “must presume all factual allegations of the complaint to be true and draw all reasonable  
20 inferences in favor of the nonmoving party.” Usher v. City of Los Angeles, 828 F.2d 556,  
21 561 (9th Cir. 1987). “[C]ourts must consider the complaint in its entirety, as well as other  
22 sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in  
23 particular, documents incorporated into the complaint by reference, and matters of which a  
24 court may take judicial notice.” Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S.  
25 308, 322 (2007).

26 If a court dismisses a complaint for failure to state a claim, it should “freely give  
27 leave” to amend “when justice so requires.” Fed. R. Civ. Proc. 15(a)(2). A court may  
28 deny leave to amend due to “undue delay, bad faith or dilatory motive on the part of the

1 movant, repeated failure to cure deficiencies by amendment previously allowed, undue  
2 prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of  
3 amendment.” Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522, 532 (9th Cir. 2008).

### 4 **III. DISCUSSION**

5 CCDH argues that California’s anti-SLAPP statute applies to the three California  
6 causes of action.<sup>9</sup> MTD&S at 8–9. It then argues that X Corp. fails to state a claim as to  
7 each cause of action, and so the Court should either strike (in the case of the three  
8 California causes of action) or dismiss (in the case of the CFAA cause of action) them. Id.  
9 at 9–26. Finally, CCDH argues that the Complaint fails to state a claim as to the Doe  
10 defendants. Id. at 26–27. This order addresses each argument in turn.

#### 11 **A. Anti-SLAPP**

12 CCDH moves to strike the California causes of action pursuant to the anti-SLAPP  
13 statute. MTD&S at 8–9. A moving defendant must, at the first step, make a prima facie  
14 showing that the state law claims “arise from any act in furtherance of the person’s right of  
15 petition or free speech” “in connection with a public issue.” Cal. Code Civ. Proc. §  
16 425.16(b)(1); Makaeff v. Trump Univ., LLC, 715 F.3d 254, 261 (9th Cir. 2013). If the  
17 defendant makes that showing, the court then considers whether the plaintiff has, at the  
18 second step, demonstrated “a reasonable probability” of prevailing on the merits of its  
19 claims. In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268,  
20 1273 (9th Cir. 2013) (quoting Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003)). This  
21 order will now address the first step: whether CCDH has made the required prima facie  
22 showing. This order will go on to address the second step on a claim-by-claim basis,  
23 applying a 12(b)(6) standard. See Planned Parenthood Fed’n of Am., Inc., 890 F.3d at  
24 834.

#### 25 **1. “In Furtherance of”**

26 CCDH’s writing of reports and articles about X Corp.—writing the complaint

27  
28 <sup>9</sup> “[T]he anti-SLAPP statute does not apply to federal law causes of action.” Hilton v. Hallmark Cards, 599 F.3d 894, 901 (9th Cir. 2010).

1 references over and over, see, e.g., FAC ¶¶ 1, 3–4, 12, 17–24, 38, 41, 43–52, 54–60, 62,  
 2 65–70, 77–78, 84–85, 92, 96, 98—unquestionably constitutes an act “in furtherance of”  
 3 CCDH’s free speech rights. See Hilton, 599 F.3d at 904 (producing a birthday card is  
 4 conduct in furtherance of free speech rights). CCDH also makes a compelling case that  
 5 gathering the data used in its publications is also an act in furtherance of its free speech  
 6 rights. See MTD&S at 8–9. “Because newsgathering is part and parcel of [reporting the  
 7 news], newsgathering likewise constitutes protected activity.” Iloh v. Regents of Univ. of  
 8 Cal., 94 Cal. App. 5th 947, 956–57 (2023). “Reporting the news usually requires the  
 9 assistance of newsgathering, which therefore can be construed as undertaken in furtherance  
 10 of the news media’s right to free speech.” Lieberman v. KCOP Television, Inc., 110 Cal.  
 11 App. 4th 156, 166 (2003); see also Taus v. Loftus, 40 Cal. 4th 683, 713 (2007)  
 12 (“conducting an investigation” was “unquestionably . . . conduct in furtherance of [the]  
 13 right of free speech”). CCDH obtained X Corp. data in order to use that data in its reports  
 14 and articles. See FAC ¶ 70 (“CCDH’s conduct to obtain that data (which it then distorted)  
 15 was necessary for CCDH to make its allegations against X Corp. and X regarding hate  
 16 speech and other types of content on X.”), id. ¶¶ 44–55 (describing the two reports and one  
 17 article at issue in this case). Accordingly, the acquisition of X Corp. data was  
 18 newsgathering in furtherance of CCDH’s protected rights.

19 Moreover, it is irrelevant for the purposes of satisfying CCDH’s burden at the first  
 20 step if CCDH did its newsgathering improperly. In Navellier v. Sletten, 52 P.3d 703, 712  
 21 (Cal. 2002), the plaintiffs noted that the anti-SLAPP statute took aim at lawsuits that  
 22 chilled the “valid exercise” of free speech rights, and argued that the statute did not apply  
 23 where the petitioning activity at issue “was not ‘valid.’” The court disagreed, explaining  
 24 that “any claimed illegitimacy of the defendant’s act is an issue which the plaintiff must  
 25 raise and support in the context of the discharge of the plaintiff’s [secondary] burden to  
 26 provide a prima facie showing of the merits of the plaintiff’s case.” Id. (internal quotation  
 27 marks omitted). Likewise, in Smith v. Payne, No. C 12-01732 DMR, 2012 WL 6712041,  
 28 at \*4 (N.D. Cal. Dec. 26, 2012), the court rejected the plaintiffs’ argument that they needed

1 discovery of “the precise nature of pre-publication acts constituting [the defendant’s]  
2 conduct toward [p]laintiffs’ to show that his motives in allegedly trespassing on private  
3 property and assaulting them ‘had nothing to do with furtherance of the exercise of  
4 constitutional right of petition or free speech.’” Judge Ryu explained: “To the extent that  
5 [the plaintiffs] seek such discovery to show that [the defendant’s] actions . . . were not  
6 performed in connection with newsgathering, but for some other, sinister motive, such an  
7 argument ‘confuses the threshold question of whether the SLAPP statute [potentially]  
8 applies with the question whether [the plaintiffs have] established a probability of success  
9 on the merits.’” *Id.* (quoting *Birkner v. Lam*, 156 Cal. App. 4th 275, 284 (2007)). X  
10 Corp.’s argument that “parties to a contract cannot disregard the terms of their agreements,  
11 or governing statutory law, simply by invoking the mere pursuit of contemplated, alleged  
12 protected speech,” *see* Opp’n at 11, therefore misses the mark. If CCDH’s conduct  
13 breached a contract or violated a law, that is an issue for the second step of the anti-SLAPP  
14 analysis, where X Corp. bears the burden.

## 15 2. “Arising from”

16 In addition, X Corp.’s claims arise from protected conduct.

17 To determine whether a claim or claims arise from protected activity, courts are to  
18 look to “the conduct that constitutes the specific act of wrongdoing challenged by the  
19 plaintiff.” *Jordan-Benel v. Universal City Studios, Inc.*, 859 F.3d 1184, 1190 (9th Cir.  
20 2017). “A defendant in an ordinary private dispute cannot take advantage of the anti-  
21 SLAPP statute simply because the complaint contains some references to speech or  
22 petitioning activity by the defendant.” *Sansoe v. Ford Motor Co.*, 668 Fed. Appx. 718, 719  
23 (9th Cir. 2016) (quoting *People ex rel. Fire Ins. Exch. v. Anapol*, 211 Cal. App. 4th 809  
24 (2012)). In addition, “the mere fact an action was filed after protected activity took place  
25 does not mean it arose from that activity.” *City of Cotati v. Cashman*, 29 Cal. 4th 69, 76–  
26 77 (2002).

27 In *Jordan-Benel*, the plaintiff was a screenwriter who alleged that defendant  
28 production companies’ failure to compensate and credit him for a script constituted a

1 breach of contract. Id. at 1187, 1189. The defendants brought an anti-SLAPP motion,  
2 arguing that the contract claim arose from their free-speech activity of producing a film.  
3 Id. at 1190. The Ninth Circuit agreed with the plaintiff, concluding that the specific  
4 wrongful act that gave rise to the claim was the failure to pay. Id. The court explained  
5 that even if the cause of action was triggered by protected activity—the release of the  
6 film—that does not mean that the action arose from it: “even if a defendant engages in free  
7 speech activity that is relevant to a claim, that does not necessarily mean such activity is  
8 the basis for the claim.” Id.; see also Martinez v. Metabolife Internat., Inc., 113 Cal. App.  
9 4th 181, 187 (2003) (“[W]hen the allegations referring to arguably protected activity are  
10 only incidental to a cause of action based essentially on nonprotected activity, collateral  
11 allusions to protected activity should not subject the cause of action to the anti-SLAPP  
12 statute.”).

13 X Corp. argues that just as the production of the film was not the specific act that  
14 gave rise to the claim in Jordan-Benel, CCDH’s publication of its articles and reports is not  
15 the specific act of wrongdoing at issue here. See Opp’n at 10–11 (“CCDH’s alleged  
16 ‘speech’ is not the wrong complained of—its wanton breach of contract and illegal access  
17 of data are.”). But even accepting that the conduct that forms the specific wrongdoing in  
18 the state law claims is CCDH’s illegal access of X Corp. data, that conduct (scraping the X  
19 platform and accessing the Brandwatch data using ECF’s login credentials) is  
20 newsgathering—and claims based on newsgathering arise from protected activity. See  
21 Iloh, 94 Cal. App. 5th at 956–57.

22 It is also just not true that the complaint is only about data collection. See Reply at  
23 3 (arguing that X Corp.’s contention that its “claims arise from ‘illegal access of data,’ as  
24 opposed to speech,” is the “artifice” at “the foundation of [this] whole case.”) (quoting  
25 Opp’n at 10). It is impossible to read the complaint and not conclude that X Corp. is far  
26 more concerned about CCDH’s speech than it is its data collection methods. In its first  
27 breath, the complaint alleges that CCDH cherry-picks data in order to produce reports and  
28 articles as part of a “scare campaign” in which it falsely claims statistical support for the

1 position that the X platform “is overwhelmed with harmful content” in order “to drive  
2 advertisers from the X platform.” See FAC ¶ 1. Of course, there can be no false claim  
3 without communication. Indeed, the complaint is littered with allegations emphasizing  
4 CCDH’s communicative use of the acquired data. See, e.g., id. ¶¶ 17–20 (reports/articles  
5 are based on “flawed ‘research’ methodologies,” which “present an extremely distorted  
6 picture of what is actually being discussed and debated” on the X platform, in order to  
7 “silence” speech with which CCDH disagrees); id. ¶ 43 (CCDH “used limited, selective,  
8 and incomplete data from that source . . . that CCDH then presented out of context in a  
9 false and misleading manner in purported ‘research’ reports and articles.”), id. ¶ 56  
10 (“CCDH’s reports and articles . . . have attracted attention in the press, with media outlets  
11 repeating CCDH’s incorrect assertions that hate speech is increasing on X.”).

12 X Corp. is correct that it has not brought a claim for defamation. See Opp’n at 10;  
13 FAC. It insists that that choice demonstrates that it is not really complaining about  
14 CCDH’s speech. Opp’n at 10. CCDH argues that X Corp.’s decision not to include a  
15 defamation claim is evidence that X Corp. “cannot allege that the CCDH Defendants said  
16 anything knowingly false, nor does it wish to invite discovery on the truth about the  
17 content on its platform.” MTD&S at 2; see also ACLU Br. at 1 (“X Corp. attempts to  
18 disguise a nonviable defamation claim as a breach of contract claim to retaliate against a  
19 nonprofit that provided the public with information critical of X Corp.”). Whatever X  
20 Corp. could or could not allege, it plainly chose not to bring a defamation claim.<sup>10</sup> As the  
21 Court commented at the motion hearing, that choice was significant. Tr. of 2/29/24  
22 Hearing at 62:6–10. It is apparent to the Court that X Corp. wishes to have it both ways—

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<sup>10</sup> At the motion hearing, X Corp. asserted that it was “not trying to avoid defamation” and claimed to have “pleaded falsity” in paragraph 50 of the complaint. Tr. of 2/29/24 Hearing at 59:20–23. In fact, paragraph 50 did not allege falsity, or actual malice, though it used the word “incorrect.” See FAC ¶ 50 (“incorrect implications . . . that hate speech viewed on X is on the rise” and “incorrect assertions that X Corp. ‘doesn’t care about hate speech’”). When the Court asked X Corp. why it had not brought a defamation claim, it responded rather weakly that “to us, this is a contract and intentional tort case,” and “we simply did not bring it.” Tr. of 2/29/24 Hearing at 60:1–12; see also id. at 60:21–22 (“That’s not necessarily to say we would want to amend to bring a defamation claim.”).

1 to be spared the burdens of pleading a defamation claim, while bemoaning the harm to its  
2 reputation, and seeking punishing damages<sup>11</sup> based on reputational harm.

3 For the purposes of the anti-SLAPP motion, what X Corp. calls its claims is not  
4 actually important. The California Supreme Court has held “that the anti-SLAPP statute  
5 should be broadly construed.” Martinez, 113 Cal. App. 4th at 187 (citing Equilon Enters.  
6 v. Consumer Cause, Inc., 29 Cal. 4th 53, 60 n.3 (2002)). Critically, “a plaintiff cannot  
7 avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to  
8 characterize an action as a ‘garden variety breach of contract [or] fraud claim’ when in fact  
9 the liability claim is based on protected speech or conduct.” Id. at 188 (quoting Navellier,  
10 29 Cal. 4th at 90–92); see also Baral v. Schnitt, 1 Cal. 5th 376, 393 (2016) (“courts may  
11 rule on plaintiffs’ specific claims of protected activity, rather than reward artful pleading”);  
12 Navellier, 29 Cal. 4th at 92 (“conduct alleged to constitute breach of contract may also  
13 come within constitutionally protected speech or petitioning. The anti-SLAPP statute’s  
14 definitional focus is not the form of the plaintiff’s cause of action[.]”).

15 Collondrez v. City of Rio Vista, 61 Cal. App. 5th 1039 (2021), is a recent example  
16 of a court disregarding the name of a claim to assess its content. In that case, a former  
17 police officer brought suit for breach of contract and intentional interference with  
18 prospective economic advantage because his former employer disclosed information from  
19 his personnel file without giving him notice as required by contract. Id. at 1044–46. The  
20 court held that the claims nonetheless arose from protected speech, explaining that “we  
21 disregard [a claim’s] label and instead examine its gravamen.” Id. at 1051, 1048 (cleaned  
22 up). It then concluded that “the harmful act at the heart of the complaint, the act that  
23

24 <sup>11</sup> If there is any question about the “punishing” part, X Corp. filed a similar suit, not  
25 before this Court, in November of 2023 against Media Matters, another non-profit media  
26 watchdog, for “reporting on ads from major brands appearing next to neo-Nazi content.”  
27 PPP Br. at 10. Prior to doing so, Musk threatened a “thermonuclear lawsuit” against  
28 Media Matters. Id. (quoting Elon Musk (@elonmusk), X (Nov. 18, 2023, 2:01 AM),  
<https://twitter.com/elonmusk/status/1725771191644758037> [<https://perma.cc/K8SZ-M33S>]). Musk’s post also claimed, remarkably, that the lawsuit was furthering X Corp.’s  
efforts “to protect[] free speech.” See Elon Musk (@elonmusk), X (Nov. 18, 2023, 2:01  
AM), <https://twitter.com/elonmusk/status/1725771191644758037> [<https://perma.cc/K8SZ-M33S>].

1 allegedly cost [the plaintiff] his [new job] and resulted in other economic and emotional  
2 harm, is the publication of his personnel information.” Id. at 1049. Here, even though X  
3 Corp. did not include a cause of action explicitly premised on CCDH’s speech, as in  
4 Collondrez, speech is a harmful act at the heart of the complaint.

5 X Corp. insists that that is not so, arguing that “CCDH’s actions caused harm  
6 independent of any alleged protected activities.” Opp’n at 11. It asserts that “[i]f CCDH  
7 carried out all the same illegal activities, but stopped just short of publishing the February  
8 9, 2023 report, X Corp. would maintain the very same valid claims against it.” Opp’n at  
9 11; see also id. at 11–12 (citing Kovalenko v. Kirkland & Ellis LLP, No. 22-cv-5990-HSG,  
10 2023 WL 5444728, at \*3 (N.D. Cal. Aug. 23, 2023) (“The question is whether the  
11 challenged allegations ‘supply a necessary element’ of a claim.”)). The Court disagrees—  
12 and not because it is impossible to imagine that X Corp. would have been motivated to  
13 bring suit had CCDH not spoken.

14 Each of the state law causes of action—breach of contract, intentional interference  
15 with contractual relations, and inducing breach of contract—require as an element a  
16 showing of damages. See Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115, 1121 (Cal.  
17 2011) (“the elements of a cause of action for breach of contract are (1) the existence of the  
18 contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach,  
19 and (4) the resulting damages to the plaintiff.”) (citing Reichert v. General Ins. Co., 68 Cal.  
20 2d 822, 830 (1968)); United Nat’l Maint., Inc. v. San Diego Convention Ctr., Inc., 766  
21 F.3d 1002, 1006 (9th Cir. 2014) (“the elements for the tort of intentional interference with  
22 contractual relations are ‘(1) a valid contract between plaintiff and a third party; (2)  
23 defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce  
24 a breach or disruption of the contractual relationship; (4) actual breach or disruption of the  
25 contractual relationship; and (5) resulting damage.’”) (quoting Pac. Gas & Elec. Co. v.  
26 Bear Stearns & Co., 50 Cal.3d 1118 (1990)); Shamblin v. Berge, 166 Cal. App. 3d 118,  
27 122–23 (1985) (inducement to breach a contract “requires that a plaintiff prove: ‘(1) he had  
28 a valid and existing contract [with a third party]; (2) . . . defendant had knowledge of the

1 contract and intended to induce its breach; (3) the contract was in fact breached by the  
2 contracting party; (4) the breach was caused by . . . defendant’s unjustified or wrongful  
3 conduct; and (5) . . . damage[s] [were suffered as a result].”) (quoting Dryden v. Tri-  
4 Valley Growers, 65 Cal. App. 3d 990, 995 (1977)).

5 X Corp.’s many allegations about CCDH’s speech do more than add color to a  
6 complaint about data collection—they are not “incidental to a cause of action based  
7 essentially on nonprotected activity.” See Martinez, 113 Cal. App. 4th at 187. Instead, the  
8 allegations about CCDH’s misleading publications provide the only support for X Corp.’s  
9 contention that it has been harmed. See FAC ¶ 78 (breach of contract claim: alleging that  
10 CCDH “mischaracterized the data . . . in efforts to claim X is overwhelmed with harmful  
11 conduct, and support CCDH’s call to companies to stop advertising on X. . . . As a direct  
12 and proximate result of CCDH’s breaches of the ToS in scraping X, X has suffered  
13 monetary and other damages in the amount of at least tens of millions of dollars”); ¶¶ 92–  
14 93 (intentional interference claim: alleging that Defendants “intended for CCDH to  
15 mischaracterize the data regarding X in the various reports and articles . . . to support  
16 Defendants’ demands for companies to stop advertising on X” and that “[a]s a direct and  
17 proximate result of Defendants intentionally interfering with the Brandwatch Agreements .  
18 . . X Corp. has suffered monetary and other damages of at least tens of millions of  
19 dollars”); ¶¶ 98–99 (inducing breach of contract claim: alleging that “X Corp. was harmed  
20 and suffered damages as a result of Defendants’ conduct when companies paused or  
21 refrained from advertising on X, in direct response to CCDH’s reports and articles” and  
22 that “[a]s a direct and proximate result of Defendants inducing Brandwatch to breach the  
23 Brandwatch Agreements . . . X Corp. has suffered monetary and other damages in the  
24 amount of at least tens of millions of dollars.”).

25 The “at least tens of millions of dollars” that X Corp. seeks as damages in each of  
26 those claims is entirely based on the allegation that companies paused paid advertising on  
27 the X platform in response to CCDH’s “allegations against X Corp. and X regarding hate  
28 speech and other types of content on X.” See id. ¶ 70. As CCDH says, “X Corp. alleges

1 no damages that it could possibly trace to the CCDH Defendants if they had never spoken  
 2 at all.” Reply at 3. Indeed, X Corp. even conceded at the motion hearing that it had not  
 3 alleged damages that would have been incurred if CCDH “had scraped and discarded the  
 4 information,” or scraped “and never issued a report, or scraped and never told anybody  
 5 about it.” See Tr. of 2/29/24 Hearing at 7:22–8:3. The element of damages in each state  
 6 law claim therefore arises entirely from CCDH’s speech. See Bonni v. St. Joseph Health  
 7 Sys., 491 P.3d 1058, 1069–70 (Cal. 2021) (“a claim is subject to an anti-SLAPP motion to  
 8 strike if its elements arise from protected activity.”).

9 Accordingly, the state law claims arise from CCDH’s actions—its newsgathering  
 10 and writing of reports/articles—in furtherance of CCDH’s free speech rights.

### 11 3. “In Connection with a Public Issue”

12 Finally, CCDH’s actions in furtherance of its free speech rights were in connection  
 13 with a public issue. X Corp. alleges that CCDH uses its reports “to demand that platform  
 14 providers kick the targeted users off of their platforms, thus silencing their viewpoints on  
 15 broadly debated topics such as COVID-19 vaccines, reproductive healthcare, and climate  
 16 change.” FAC ¶ 3; see also id. ¶ 44 (March 24, 2021 CCDH report on anti-vaxxers), ¶ 46  
 17 (November 10, 2022 CCDH article on hate speech), ¶ 49 (February 9, 2023 CCDH report  
 18 on hate speech), id. ¶ 72 (“X Corp. has been harmed in its mission to provide its users with  
 19 a platform in which topics of paramount public concern can be discussed and debated free  
 20 from the censorship efforts of activist organizations advancing narrow ideological agendas  
 21 through deceitful means.”). These reports implicate public issues. See Resolute Forest  
 22 Prods., Inc. v. Greenpeace Int’l, 302 F. Supp. 3d 1005, 1025 (N.D. Cal. 2017) (“California  
 23 courts have broadly construed public interest to include not only governmental matters, but  
 24 also private conduct that impacts a broad segment of society and/or that affects a  
 25 community in a manner similar to that of a governmental entity.” (internal quotation marks  
 26 omitted); see also PPP Br. at 7 (“Public debate and interest on matters of disinformation  
 27 and hate speech on social media platforms have been profound in recent years, including  
 28 multiple congressional hearings and constant coverage by national media.”). X Corp. does

1 not dispute this point.

2 The Court therefore concludes that CCDH has met its burden at the first step of the  
3 anti-SLAPP analysis. This order will therefore go on to assess whether X Corp. has  
4 established that there is a probability that it will prevail on its claims. See Cal. Code Civ.  
5 Proc. § 425.16(b)(1).

6 **B. Breach of Contract Claim**

7 The complaint's first cause of action is for breach of contract. FAC ¶¶ 73–79. To  
8 state a claim for breach of contract, a plaintiff must allege (1) the existence of a contract,  
9 (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4)  
10 resulting damages to the plaintiff. See Oasis W. Realty, 250 P.3d at 1121.

11 X Corp. alleges that X Corp. and CCDH U.S. are parties to the ToS, which  
12 explicitly prohibits “scraping the Services without the prior consent of Twitter.” FAC ¶¶  
13 74, 75. X Corp. further alleges that it fully performed its obligations, but that CCDH U.S.  
14 violated the ToS by scraping the X platform, and that CCDH then “mischaracterized the  
15 data it obtained by unlawfully scraping in its reports and articles, in efforts to claim X is  
16 overwhelmed with harmful conduct, and support CCDH's call to companies to stop  
17 advertising on X.” Id. ¶¶ 76–78. X Corp. notes that CCDH's February 9, 2023 report  
18 admits that “[t]o gather tweets from each of the ten reinstated accounts, [CCDH's]  
19 researchers used the social media web-scraping tool SNScrape, which utilizes Twitter's  
20 search function to enable data collection.” Id. ¶ 77. And X Corp. alleges that “[a]s a  
21 direct and proximate result of CCDH U.S.'s breaches of the ToS in scraping X, X Corp.  
22 has suffered monetary and other damages in the amount of at least tens of millions of  
23 dollars.” Id. ¶ 78. The “at least tens of millions of dollars” of damages derives from  
24 companies pausing paid advertising on the X platform in response to CCDH's “allegations  
25 against X Corp. and X regarding hate speech and other types of content on X.” Id. ¶ 70.

26 CCDH argues that X Corp. fails to state a breach of contract claim, for three  
27 reasons: (1) X Corp. has failed to adequately allege a breach; (2) if the ToS's anti-scraping  
28 provision applies, it violates public policy; and (3) X Corp. has failed to adequately allege

1 recoverable damages. MTD&S at 9–18. The Court concludes that CCDH’s argument  
2 about damages is persuasive, and does not reach CCDH’s other arguments.

3 CCDH maintains that X Corp. fails to adequately allege damages resulting from  
4 CCDH’s alleged scraping of the X platform because: (a) under state contract law, X  
5 Corp.’s lost advertising revenue is not recoverable; (b) constitutional law bars X Corp.  
6 from using a non-defamation cause of action to recover reputational damages; and (c)  
7 allowing this cause of action, in which X Corp. seeks tens of millions of dollars, to stand  
8 would subject CCDH to “significant costs of enduring discovery and litigation . . . against  
9 a well-resourced adversary with every incentive to impose crushing burdens on the CCDH  
10 Defendants.” *Id.* at 15–18. That last argument is emotional rather than legal; while the  
11 Court is not blind to the David and Goliath dynamic here, the law does not bar big  
12 companies from suing small nonprofits, so long as the suit is otherwise up to snuff. This  
13 order therefore addresses only CCDH’s arguments based on state contract law and  
14 constitutional law.

### 15 1. State Contract Law

16 CCDH’s first argument about damages relies on state contract law. Under state  
17 contract law, when there is a breach, “the plaintiff is entitled to damages that are  
18 equivalent to the benefit of the plaintiff’s contractual bargain.” *Lewis Jorge Constr.*  
19 *Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 34 Cal. 4th 960, 967–68 (2004). But a  
20 plaintiff’s damages “cannot . . . exceed what it would have received if the contract had  
21 been fully performed on both sides.” *Id.* at 968 (citing Cal. Civ. Code § 3358). “This  
22 limitation of damages for breach of contract ‘serves to encourage contractual relations and  
23 commercial activity by enabling parties to estimate in advance the financial risks of their  
24 enterprise.’” *Id.* (quoting *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503,  
25 515 (1994)). While tort damages are intended to award a plaintiff for all injury suffered,  
26 “[c]ontract damages are generally limited to those within the contemplation of the parties  
27 when the contract was entered into or at least reasonably foreseeable by them at that time.”  
28 *Erlich v. Menezes*, 21 Cal. 4th 543, 550 (1999). This is a key “distinction between tort and

1 contract.” Id.

2 There are two types of contractual damages: “general damages (sometimes called  
3 direct damages) and special damages (sometimes called consequential damages).” Lewis  
4 Jorge Constr. Mgmt., 34 Cal. 4th at 968. General damages “flow directly and necessarily  
5 from a breach of contract . . . or . . . are a natural result of a breach.” Id. (citing Cal. Civ.  
6 Code § 3300). X Corp.’s theory of damages—that CCDH violated the ToS by scraping the  
7 X platform, that CCDH used the data that it scraped to publish deliberately misleading  
8 publications criticizing X Corp., that those publications caused X Corp.’s advertisers to  
9 pause spending, and that the pause in spending caused X Corp. to lose “at least tens of  
10 millions of dollars” in revenue, see, e.g., FAC ¶¶ 70, 78<sup>12</sup>—do not flow directly and  
11 necessarily from CCDH’s breach of the ToS’s scraping provision. The question is whether  
12 they constitute special damages.

13 “[S]pecial damages are those losses that do not arise directly and inevitably from  
14 any similar breach of any similar agreement. Instead, they are secondary or derivative  
15 losses arising from circumstances that are particular to the contract or to the parties.”  
16 Lewis Jorge Constr. Mgmt., 34 Cal. 4th at 968. They “are recoverable if the special or  
17 particular circumstances from which they arise were actually communicated to or known  
18 by the breaching party (a subjective test) or were matters of which the breaching party  
19 should have been aware at the time of contracting (an objective test).” Id. at 968–69.<sup>13</sup>

20 **a. Knowledge at the Time of Contracting**

21  
22 <sup>12</sup> In its opposition brief, X Corp. asserts that it had further alleged that “CCDH’s conduct  
23 forced X Corp. to ‘conduct internal investigations,’” “‘allocate[] significant employee  
24 resources,’” and “‘incur[] attorneys’ fees.’” Opp’n at 18 (citing FAC ¶ 71). But those  
25 other sources of X Corp.’s damages appear in the complaint as allegations of harm caused  
26 by “CCDH’s unauthorized access to the [Brandwatch] data”—something not at issue in the  
27 first cause of action. See FAC ¶ 71.

28 <sup>13</sup> The classic case discussing special damages is an 1854 English case called Hadley v.  
Baxendale, in which, “[a]fter Hadley’s mill shut down because of a broken crankshaft, he  
entered into a contract to have a new one built.” Id. at 969 (citing Hadley v. Baxendale  
(1854) 156 Eng.Rep. 145). Hadley took the broken shaft to Baxendale, to deliver it to the  
builder to use as a model. Id. When Baxendale did not deliver the shaft for seven days,  
Hadley sued Baxendale for lost profits. Id. The court held that Hadley’s lost profits were  
not recoverable, because Hadley had not communicated the special circumstance—that the  
mill could not operate without the shaft—to Baxendale. Id.

1 X Corp. agreed at the motion hearing that its damages had to be foreseeable at the  
2 time of contracting. See Tr. of 2/29/24 Hearing at 10:7–14. But X Corp.’s complaint does  
3 not allege that CCDH knew at the time of contracting, or should have known at the time of  
4 contracting, that breach of the ToS’s scraping provision would result in damages of “at  
5 least tens of millions of dollars.” X Corp. alleges that “CCDH engaged in its unlawful  
6 scraping with the intent to improperly obtain data that would be used to cause X Corp. to  
7 lose significant advertising revenues.” FAC ¶ 78. It alleges nothing about CCDH’s intent  
8 or knowledge when it agreed to the ToS in 2019. This is a fatal flaw.

9 X Corp. argues that “the Motion . . . impermissibly demands that the Court engage  
10 in a fact-intensive analysis without the benefit of any discovery to determine what CCDH  
11 knew or could have known at the time of contracting and what CCDH knew or could have  
12 known would result from its actions.” Opp’n at 18. But cognizable damages are an  
13 element of a breach of contract claim, and either they have been plausibly pled or they  
14 have not. See King v. Facebook, Inc., 572 F. Supp. 3d 776, 790 (2021) (dismissing a  
15 claim for breach of contract in part because “much of the injury allegedly suffered . . . is  
16 injury to reputation” and “this kind of injury is generally not compensable for a breach of  
17 contract.”); Modden v. Ticketfly LLC, No. 18-cv-6450-RS, 2019 WL 4738237, at \*3  
18 (N.D. Cal. 2019) (“Nowhere has Modden alleged that Ticketfly knew or should have  
19 known about his special damages at the time of contracting. Regardless of whether he has  
20 shown the other elements, Modden has not sufficiently pled his damages. The breach of  
21 contract claim must therefore be dismissed.”) (emphasis in original). It is not facially  
22 plausible that “CCDH could have known, [when] it accepted the ToS [in 2019], that (for  
23 instance) the Twitter/X platform would abruptly change course to restore accounts that it  
24 had banned for spreading hate speech, misogyny, and conspiracy theories . . . ; that the  
25 CCDH Defendants would collect and review public posts on the platform to shed light on  
26 these issues . . . and that the CCDH Defendants’ subsequent reporting based on this data  
27 would allegedly affect advertiser revenue to the tune of ‘at least tens of millions of  
28 dollars.’” MTD&S at 16.

1 One might respond that CCDH—an organization that “prepare[s] and publish[es]  
2 what it refers to as ‘research’ reports and articles” about “organizations and individuals . . .  
3 who express viewpoints via social media platforms that differ from CCDH’s own views on  
4 widely debated topics including COVID-19 vaccinations, reproductive healthcare, and  
5 climate change,” FAC ¶ 17—could or should have known in 2019 that it was planning to  
6 report on objectionable posts on the X platform and encourage advertisers to flee. But  
7 when CCDH joined Twitter in 2019, *id.* ¶ 8, Twitter looked quite different. Elon Musk  
8 had not yet taken over and turned Twitter into the X platform. *See* Wile Timeline. The  
9 COVID pandemic (one of the subjects that the speech here concerned) had not yet  
10 occurred. *See* Derrick Bryson Taylor, “A Timeline of the Coronavirus Pandemic,” N.Y.  
11 Times, March 17, 2021, <http://nytimes.com/article/coronavirus-timeline.html>. Twitter had  
12 “content-moderation policies . . . designed, among other things, to minimize the reach of  
13 harmful and misleading information.” *See O’Handley v. Padilla*, 579 F. Supp. 3d 1163,  
14 1172 (N.D. Cal. 2022). As late as January of 2022, this Court was still fielding lawsuits  
15 from right-leaning users arguing that Twitter’s content-moderation policies discriminated  
16 against them. *See, e.g., id.*, 579 F. Supp. 3d 1163.<sup>14</sup>

17 Indeed, the February 9, 2023 CCDH report that admitted scraping the X platform  
18 was about how Twitter had changed. The report states that Musk had declared a “general  
19 amnesty” for banned Twitter users in November of 2022, thereby reinstating “tens of  
20 thousands of accounts, including neo-Nazis, white supremacists, misogynists and spreaders  
21 of dangerous conspiracy theories.” Toxic Twitter at 3. And it claimed that Twitter was  
22 generating millions of dollars in advertising revenue from the previously banned accounts.  
23 *See id.* Musk was not at the helm of Twitter reinstating previously banned accounts in  
24 2019. Nor was it foreseeable that he would be.

25  
26  
27 <sup>14</sup> Interestingly, the plaintiff in that case, Rogan O’Handley, is behind one of the “ten  
28 reinstated accounts” highlighted in CCDH’s Toxic Twitter report. *See* Toxic Twitter at 4  
 (“Rogan O’Handley, a Hollywood former entertainment lawyer turned far-right conspiracy  
 theorist, who has been criticized for fanning the flames of vaccine conspiracies in the wake  
 of the NFL athlete Damar Hamlin’s heart attack.”).

1 At the motion hearing, the Court observed that “it’s a very different thing to say”  
2 that CCDH understood the terms of the ToS in 2019 than it is to say that CCDH  
3 “understood that actually X Corporation would start allowing all of these people back on,  
4 which was different from the policy that was in place at the time that they entered the  
5 [ToS].” Tr. of 2/29/24 Hearing at 13:2–8. X Corp. responded that “the policies do say  
6 they’re subject to change, and users, when they stay on the platform, agree to the  
7 subsequent policy.” Id. at 14:24–15:1. This argument does not save the breach of contract  
8 claim, for at least three reasons. First, the FAC alleges that the time of contracting was  
9 2019—it does not allege that CCDH agreed to subsequent versions of the ToS. See FAC ¶  
10 8. Second, the argument that “it is foreseeable that we might change our policy” would  
11 work an absurd extension of the law, essentially eliminating the requirement of  
12 foreseeability altogether. Any change of policy would be foreseeable because it is always  
13 foreseeable that policy can change. Unsurprisingly, X Corp. offers no legal support for  
14 that reasoning. Third, the argument that logging back into the Twitter/X platform  
15 constitutes a reaffirmation of the ToS (and therefore that the Court must assess  
16 foreseeability at a later point in time than 2019) fails because it appears that the ToS in  
17 effect at the time of the February 9, 2023 report was in place from June 10, 2022 to May  
18 18, 2023, and June 10, 2022 predated Musk’s purchase of Twitter. See Tr. of 2/29/24  
19 Hearing at 29:3–14; see also Kaplan Decl. Ex. A; see also X, Previous Terms of Service,  
20 <https://twitter.com/en/tos/previous> (listing one version dated June 10, 2022 and a next  
21 version dated May 18, 2023). So there does not appear to have been a reaffirmation of the  
22 ToS at the time when Musk was changing the platform’s policies and reinstating “tens of  
23 thousands of anti-Semites and white supremacists and other people to the platform.” See  
24 Tr. of 2/29/24 Hearing at 29:11–13.

25 Accordingly, X Corp. has not plausibly pleaded that CCDH had knowledge at the  
26 time of contracting in 2019 of the “tens of millions of dollars” X Corp. now seeks in  
27 connection with advertisers’ decisions to pause spending in response to CCDH’s February  
28 9, 2023 report.

**b. Reputation Damages**

Another reason that the damages X Corp. seeks—“at least tens of millions of dollars” of lost revenue that X Corp. suffered when CCDH’s reports criticizing X Corp. caused advertisers to pause spending, see FAC ¶ 70—are problematic is that X Corp. has alleged a breach of contract but seeks reputation damages. Of course, the main problem with X Corp.’s theory is that the damages alleged for the breach of contract claim all spring from CCDH’s speech in the Toxic Twitter report, and not its scraping of the X platform. See Reply at 7 (“Because X Corp. seeks (impermissibly) to hold CCDH U.S. liable for speech without asserting a defamation claim, it is forced to allege damages that are (impermissibly) attenuated from its claimed breach.”). One way we know that this is true is that if CCDH had scraped the X platform and never spoken, there would be no damages. Cf. ACLU Br. at 12. (“Had CCDH U.S. praised rather than criticized X Corp., there would be no damages to claim and therefore no lawsuit.”). Again, X Corp. conceded this point at the motion hearing. See Tr. of 2/29/24 Hearing at 7:22–8:3.

CCDH’s reputation damages argument is another way of saying that the damages X Corp. suffered when advertisers paused their spending in response to CCDH’s reporting was not a foreseeable result of a claimed breach. There is certainly support for that point. See Frangipani v. Boecker, 64 Cal. App. 4th 860, 865–66 (1998) (“The invariable rule is pronounced by a legion of cases that damages are not recoverable for . . . injury to reputation resulting from breach of contract”) (internal quotation marks omitted; cleaned up); see also Rice v. Cmty. Health Ass’n, 203 F.3d 283, 287–88 (4th Cir. 2000) (reputational damages “universally rejected” for breach of contract because they are “too speculative and could not reasonably be presumed to have been contemplated by the parties when they formed the contract.”).

X Corp. argues that this reputation argument is inapposite because X Corp. did not suffer amorphous reputational damages, but “tangible, economic losses . . . e.g., advertising revenue.” Opp’n at 18 (citing Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991); Planned Parenthood Fed’n of Am., Inc. v. Newman, 51 F.4th 1125, 1134 (9th Cir.

2022); Nat’l Abortion Fed’n v. Ctr. for Medical Progress, No. 15-cv-3522-WHO, 2018 WL 5879786, at \*6 (N.D. Cal. Nov. 7, 2018))<sup>15</sup>; see also Opp’n at 19 (the FAC “pleads specific and measurable harm”). But even if X Corp. can quantify its reputational harms (and “at least tens of millions of dollars” is not terribly specific or measured), it has not plausibly alleged that such harm was “contemplated by the parties when they formed the contract.” See Rice, 203 F.3d at 288.

**c. “Specifically Stated”**

One last reason that the breach of contract claim fails to adequately allege special damages is that Rule 9(g) of the Federal Rules of Civil Procedure requires that “[i]f an item of special damage is claimed, it must be specifically stated.” Fed. R. Civ. P. 9(g). “A specific statement of special damages requires not just the total lump sum, but a statement of the specific items which make up the lump sum.” City & Cnty. of S.F. v. Tutor-Saliba Corp., No. 02-5286 CW, 2005 WL 645389, at \*17 (N.D. Cal. March 17, 2005). Here, X Corp. does not attempt to identify the specific items that make up the lump sum of “at least tens of millions of dollars.” See FAC ¶ 70. Indeed, the “at least tens of millions of dollars” amount is the same amount X Corp. alleges as to all three state law claims, even though the first cause of action is about CCDH’s scraping of the X platform, and the third and fourth causes of action are about CCDH accessing X Corp. data held by Brandwatch. See id. ¶¶ 78, 93, 99.

This deficiency in the pleading, which X Corp. ignores in its opposition brief, see Opp’n at 18 (“These allegations satisfy the pleading requirements under Rule 8”); Reply at 6 (deeming this “an incomplete argument about a different rule”), is fixable in one sense. In an amended complaint, X Corp. could probably come up with a list of advertising revenues that it lost out on, and that add up to “tens of millions of dollars.” But in another sense, it would be hard for X Corp. to tie those losses back to CCDH’s alleged scraping, as opposed to CCDH’s speech based on that scraping, or CCDH’s accessing of the

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<sup>15</sup> X Corp. cites to a number of cases involving constitutional law in response to CCDH’s arguments under state contract law. The Court will address these cases in the next section.

1 Brandwatch data, or its speech based on the Brandwatch data, or the speech of other X  
2 Corp. critics, or other things happening in the market.<sup>16</sup>

3 For all of these reasons, the complaint fails to allege recoverable damages for the  
4 breach of contract under state contract law.

## 5 2. Constitutional Law

6 CCDH’s second argument about damages relies on constitutional law—specifically,  
7 the principle that the First Amendment bars plaintiffs from using non-defamation causes of  
8 action “to avoid the strict requirements for establishing a . . . defamation claim.” MTD&S  
9 at 17 (citing cases, including Cohen, 501 U.S. at 671). That principle arose out of the  
10 Supreme Court’s holding in Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988), that  
11 a public figure could not recover publication damages on a non-defamation claim without  
12 showing actual malice. This order will discuss some of the relevant cases before applying  
13 their holdings to this case.

### 14 a. Relevant Case Law

#### 15 i. Cohen

16 In Cohen, decided just a few years after Hustler Magazine, a confidential source  
17 brought suit for breach of contract and misrepresentation against newspaper publishers  
18 after the publishers—having promised the source confidentiality—published his name.  
19 501 U.S. at 665–66. “The same day the stories appeared, Cohen was fired by his  
20 employer.” Id. at 666. The Supreme Court concluded that Cohen had not brought his  
21 contract claim “to avoid the strict requirements for establishing a libel or defamation  
22 claim.” Id. at 671. Cohen could not have brought a defamation claim because the  
23 information the publishers had disclosed was true. Id.<sup>17</sup> The Court also rejected the idea  
24

25 <sup>16</sup> See, e.g., Reply at 16 (noting that “X Corp. has now carried out [its threat to bring suit]  
26 against yet another social-media-monitoring nonprofit, see X Corp. v. Media Matters for  
Am., No. 23 Civ. 1175 (N.D. Tex), all while engaging in conduct that plainly refutes its  
27 own theory of harm in both cases, see, e.g., Lora Kolodny, Elon Musk Claims Advertisers  
Are Trying to ‘Blackmail’ Him, Says ‘Go F---Yourself,’ CNBC (Nov. 29, 2023).”)

28 <sup>17</sup> At the motion hearing, X Corp. seemed to argue that the cases where courts have found  
that a plaintiff was making an end-run around a libel or defamation claim are “cases where  
the Court said you couldn’t have brought a defamation claim.” Tr. of 2/29/24 Hearing at

1 that Cohen was “seeking damages for injury to his reputation or his state of mind,” holding  
2 that he was seeking damages for “breach of a promise that caused him to lose his job and  
3 lowered his earning capacity.” Id. (distinguishing Hustler Magazine).

4 **ii. Food Lion**

5 The Fourth Circuit wrestled with both Hustler Magazine and Cohen in Food Lion,  
6 Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522 (4th Cir. 1999). In that case, Food  
7 Lion, a grocery store, had been the subject of an undercover investigation about its food  
8 handling practices. Id. at 510–11. Food Lion brought suit against the news network that  
9 aired the video. Id. at 511. It sought to recover “broadcast (publication) damages for  
10 matters such as loss of good will, lost sales and profits, and diminished stock value.” Id.  
11 The Fourth Circuit recognized that “an overriding (and settled) First Amendment principle  
12 precludes the award of publication damages in this case.” Id. at 522. It held that Food  
13 Lion had “attempted to avoid the First Amendment limitations on defamation claims by  
14 seeking publication damages under non-reputational tort claims, while holding to the  
15 normal state law proof standards for these torts” but that “[t]his is precluded by [Hustler  
16 Magazine].” Id. It further explained that “What Food Lion sought to do . . . was to  
17 recover defamation-type damages under non-reputational tort claims, without satisfying  
18 the stricter (First Amendment) standards of a defamation claim,” which was “an end-run  
19 around First Amendment strictures.” Id.

20 **iii. Planned Parenthood and National Abortion**  
21 **Federation**

22 Two recent cases decided by Judge Orrick, Planned Parenthood and National  
23 Abortion Federation, illustrate a district court’s conscientious analysis of this same issue.

24 In Planned Parenthood, 402 F. Supp. 3d at 632–33, defendants, who were part of a  
25 group called the Human Capital Project (HCP), infiltrated Planned Parenthood conferences

26 \_\_\_\_\_  
27 62:13–18. The Court does not know what cases X Corp. had in mind, as it did not cite  
28 any, but Cohen is an example of the opposite. One of the reasons the Court held that  
Cohen was not making an end-run around a defamation claim is that he could not have  
brought a defamation claim. See Cohen, 501 U.S. at 671.

1 and facilities “to surreptitiously record conversations with the conference attendees” and  
 2 staff. Judge Orrick, at summary judgment,<sup>18</sup> assessed defendants’ argument that “the First  
 3 Amendment . . . precludes any award of . . . damages . . . because plaintiffs’ damages flow  
 4 solely from the actual or feared response of third parties to the publication of the HCP  
 5 videos.” *Id.* at 641–42. He then noted that the defendants, relying on Food Lion, argued  
 6 that the damages the plaintiffs were seeking also “stem[med] from the public’s reaction (or  
 7 feared or expected reaction) to the contents of the HCP videos and should have been  
 8 sought through a defamation claim.” *Id.* at 642. Judge Orrick recognized that it was  
 9 “difficult” given the lack of a defamation claim “to draw the line between impermissible  
 10 defamation-like publication damages that were caused by the actions and reactions of third  
 11 parties to the HCP videos and permissible damages that were caused by [defendants’]  
 12 breaches of contract” and other acts. *Id.* at 643 (emphasis in original). He concluded that  
 13 some of the damages the plaintiffs were seeking were “more akin to publication or  
 14 reputational damages that would be barred by the First Amendment” but that others were  
 15 “economic damages that are not categorically barred.” *Id.* at 644. He also explained that  
 16 “[t]hose that fall in the latter category”—the permissible damages—“result not from the  
 17 acts of third parties who were motivated by the contents of the videos, but from the direct  
 18 acts of defendants—their intrusions, their misrepresentations, and their targeting and  
 19 surreptitious recording of plaintiffs’ staff.” *Id.* at 644–45 (emphasis in original).

20 The Ninth Circuit later affirmed that decision, stating that “two categories of  
 21 compensatory damages permitted by the district court, infiltration damages and security  
 22 damages, were awarded by the jury to reimburse Planned Parenthood for losses caused by  
 23 Appellants’ violations of generally applicable laws.” Newman, 51 F.4th at 1134. The

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24  
 25 <sup>18</sup> At the motion to dismiss stage, Judge Orrick had held that “the First Amendment does  
 26 not impose heightened standards on plaintiffs’ tort claims as long as plaintiffs do not seek  
 27 reputational damages . . . stemming from the publication conduct of defendants.” Planned  
 28 Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress, No. 16-cv-236-WHO (Order on  
 Motions to Dismiss and Strike, dkt. 124) (Sept. 30, 2016) at 36 (emphasis in original). He  
 concluded that “discovery will shed light on the nature of the damages for which plaintiffs  
 seek recovery” and that the issue “is more appropriately addressed at summary judgment  
 or trial.” *Id.*

1 court deemed Appellants “incorrect in arguing that the infiltration and security damages  
2 awarded by the jury are impermissible publication damages.” Id. The court declared that  
3 the infiltration and security damages were “for economic harms suffered by Planned  
4 Parenthood, not the reputational or emotional damages sought in Hustler Magazine.” Id.  
5 It continued by explaining that Planned Parenthood could have recovered its infiltration  
6 and security damages “even if Appellants had never published videos of their surreptitious  
7 recordings. Regardless of publication, it is probable that Planned Parenthood would have  
8 protected its staff who had been secretly recorded and safeguarded its conferences and  
9 clinics from future infiltrations.” Id.

10 In Judge Orrick’s related case, National Abortion Federation, 2018 WL 5879786, at  
11 \*1, the defendants allegedly “used false identification and a ‘phony’ corporation to” get  
12 into National Abortion Federation (NAF) conferences and meetings. The defendants  
13 argued in support of a motion to dismiss that “because NAF ha[d] not asserted a  
14 defamation claim, its claim for ‘damages’ stemming from all remaining causes of action  
15 are barred by the First Amendment.” Id. at \*5. Judge Orrick stated that “[t]he line  
16 demarking permitted damages from purely reputational damages (that stem only from  
17 truthful, non-misleading publication of material), as I noted in the Planned Parenthood  
18 case, cannot be determined on a motion to dismiss.” Id. He then commented that the  
19 defendants had “mischaracterize[d] the FAC as only seeking damages caused by the  
20 publication of the recordings and the resulting actions of third parties.” Id. at \*6. And he  
21 explained that just because the plaintiff had “only learned of the infiltration after  
22 publication began does not mean the damages are from the publication.” Id. He  
23 continued: “At least some of the damages pleaded are the result of the infiltration and  
24 would have been incurred even if none of the recordings were published and [the plaintiff]  
25 learned of the infiltration through some other means.” Id.

26 The Ninth Circuit also affirmed Judge Orrick’s National Abortion Federation  
27 decision, holding that the plaintiff had “frame[d] its theory of damages as compensation  
28 for non-reputational harm—namely its increased expenditures on security measures—

1 which is a cognizable theory of damages.” National Abortion Fed’n v. Ctr. for Med.  
2 Progress, No. 18-17195, 793 Fed. Appx. 482, 485 (9th Cir. Nov. 15, 2019) (citing Planned  
3 Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress, 735 F. App’x 241, 247 (9th Cir.  
4 2018)).

5 **b. Takeaways from Relevant Case Law**

6 In both Planned Parenthood and National Abortion Federation, Judge Orrick held  
7 that plaintiffs could recover damages based directly on the defendant’s breach (the  
8 infiltration and security losses that they suffered from the defendants’ entering and filming  
9 in their facilities) without running afoul of Hustler Magazine. See Planned Parenthood,  
10 402 F. Supp. 3d at 644–45; National Abortion Federation, 2018 WL 5879786, at \*5–6.  
11 Such damages would have existed regardless of the publication of the inflammatory  
12 videos. See Newman, 51 F.4th at 1134. Judge Orrick held that the plaintiffs could not  
13 recover reputational damages that stemmed from publication—specifically, “acts of third  
14 parties who were motivated by the contents of the” publication. See Planned Parenthood,  
15 402 F. Supp. 3d at 644–45.

16 This is consistent with Food Lion, where the plaintiff was trying to recover damages  
17 based on third parties’ reactions to watching the news broadcast, see Food Lion, 194 F.3d  
18 at 522, and also with Cohen, although the latter is less obvious. In Cohen, 501 U.S. at 671,  
19 even though Cohen’s damages were based in part on the actions of a third party—the  
20 employer who fired him after seeing his identity revealed—the Court recognized that a  
21 defamation claim was unavailable to Cohen because the speech at issue was undeniably  
22 true, and that the damages represented “breach of a promise that caused him to lose his job  
23 and lowered his earning capacity.” The conduct that gave rise to the damages in Cohen  
24 was the publishers’ speech: that speech is what breached the publishers’ contract with  
25 Cohen and so it was not reputational. See id. The conduct that gave rise to the permissible  
26 damages in Judge Orrick’s cases was the defendants’ infiltration and security conduct—  
27 not the later publication of the videos, which would have given rise to impermissible  
28 reputational harm.

1 Judge Orrick found it “difficult” “to draw the line” in his cases “between  
2 impermissible defamation-like publication damages that were caused by the actions and  
3 reactions of third parties to the HCP videos and permissible damages that were caused by  
4 [defendants’] breaches of contract” in part because there were so many different types of  
5 damages claimed in those cases. See Planned Parenthood, 402 F. Supp. 3d at 643–45  
6 (listing the myriad categories of damages plaintiff sought) (emphasis in original). Judge  
7 Orrick determined that he was not well-positioned to sort those numerous types of losses  
8 into permissible/impermissible buckets on a motion to dismiss. See Planned Parenthood,  
9 No. 16-cv-236-WHO (Order on Motions to Dismiss and Strike) at 36; National Abortion  
10 Federation, 2018 WL 5879786, at \*5.

11 **c. Application Here**

12 Here, X Corp. is not seeking some complicated mix of damages—some caused by  
13 the reactions of third parties and some caused directly by the alleged breach. The Court  
14 can say, as a matter of law, whether the single type of damages that X Corp. seeks  
15 constitutes “impermissible defamation-like publication damages that were caused by the  
16 actions and reactions of third parties to” speech or “permissible damages that were caused  
17 by [CCDH’s] breaches of contract.” See Planned Parenthood, 402 F. Supp. 3d at 643.

18 The breach that X Corp. alleges here is CCDH’s scraping of the X platform. FAC ¶  
19 77. X Corp. does not allege any damages stemming directly from CCDH’s scraping of the  
20 X platform.<sup>19</sup> X Corp. seeks only damages based on the reactions of advertisers (third  
21 parties) to CCDH’s speech in the Toxic Twitter report, which CCDH created after the  
22 scraping. See FAC ¶¶ 70, 78; see also ACLU Br. at 12 (“The damages X Corp. seeks . . .  
23 are tied to reputational harm only, with no basis in any direct physical, operational or other  
24 harm that CCDH U.S.’s alleged scraping activities inflicted on X Corp.”). That is just  
25 what the Fourth Circuit disallowed in Food Lion, 194 F.3d at 522. The speech was not the  
26 breach, as it was in Cohen. And X Corp.’s damages would not have existed even if the

27 \_\_\_\_\_  
28 <sup>19</sup> This order will discuss in the following section X Corp.’s proposed amendment to the  
complaint.

1 speech had never occurred, as in Newman, 51 F.4th at 1134. Here, there would be no  
2 damages without the subsequent speech. Accordingly, the Court can hold as a matter of  
3 law that the damages alleged are impermissible defamation-like publication damages  
4 caused by the actions of third parties to CCDH’s report.

5 X Corp.’s main response to all of this is that it has alleged “tangible, economic  
6 losses.” See Opp’n at 18 (citing Cohen, Newman, National Abortion Federation). But that  
7 is not the question. See Reply at 8 (“X Corp. never explains why core constitutional  
8 protections would turn arbitrarily on whether harm to a plaintiff’s reputation from a  
9 defendant’s speech happens to have manifested in a way where the dollars and cents can  
10 easily be counted before a complaint is filed.”). The “lost sales” in Food Lion, 194 F.3d  
11 505, could presumably have been quantified. Numerous quantifiable expenses in Planned  
12 Parenthood (like “grants for security enhancements to affiliates experiencing increased  
13 security threats as a result of CMP’s videos”) were disallowed. See Planned Parenthood,  
14 402 F. Supp. 3d at 645. Judge Orrick properly drew the line not between tangible and  
15 intangible losses, but between losses from direct harms and losses from reputational harms.  
16 See id. at 644–45. Drawing the same line here leads to the conclusion that the complaint  
17 fails to allege recoverable damages for the breach of contract under constitutional law.

18 X Corp. therefore fails to state a claim for breach of contract.

### 19 3. Amendment

20 The Court must next decide whether to allow X Corp. leave to amend its breach of  
21 contract claim. The Court is mindful that “[t]he anti-SLAPP statute was enacted to allow  
22 early dismissal of meritless first amendment cases aimed at chilling expression through  
23 costly, time-consuming litigation,” Metabolife Int’l, Inc. v. Wornick, 264 F.3d 832, 839  
24 (9th Cir. 2001), but also that “granting a defendant’s anti-SLAPP motion to strike a  
25 plaintiff’s initial complaint without granting the plaintiff leave to amend would directly  
26 collide with Fed. R. Civ. P. 15(a)’s policy favoring liberal amendment,” Verizon  
27 Delaware, Inc. v. Covad Commc’ns Co., 377 F.3d 1081, 1091 (9th Cir. 2004). To be clear,  
28 the operative complaint here is not X Corp.’s “initial complaint”—X Corp. initially filed

1 suit on July 31, 2023, see Compl., and amended about a week later, adding ECF as a  
2 defendant, see FAC. Nevertheless, the Court agrees with X Corp. that it “is not as if [the  
3 defendants] have been dragged through multiple, multiple rounds” of amendments. See  
4 Tr. of 2/29/24 Hearing at 34:8–18;<sup>20</sup> but see Gardner v. Martino, 563 F.3d 981, 991 (9th  
5 Cir. 2009) (“Appellants had already filed the first amended complaint as a matter of right  
6 and Verizon specifically held that a first amended complaint is subject to anti-SLAPP  
7 remedies.”) (citing Verizon Del., Inc., 377 F.3d at 1091).

8 The question is whether X Corp. should receive leave to amend under Rule 15. See  
9 Mahoney v. Meta Platforms, Inc., No. 22-cv-02873-AMO, 2024 WL 68550, at \*5–6 (N.D.  
10 Cal. Jan. 6, 2024) (holding that plaintiff failed to state a claim, but because amendment  
11 was “not clearly futile,” it was appropriate to defer consideration of defendant’s anti-  
12 SLAPP motion pending filing of amended complaint). A court should “freely give leave”  
13 to amend “when justice so requires.” Fed. R. Civ. Proc. 15(a)(2). It may deny leave to  
14 amend due to “undue delay, bad faith or dilatory motive on the part of the movant,  
15 repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to  
16 the opposing party by virtue of allowance of the amendment, [and] futility of amendment.”  
17 Leadsinger, 512 F.3d at 532.

18 The Court believes that amendment would be futile, and that X Corp.’s desire to  
19 amend may well be based on a dilatory motive.

20 At the motion hearing, X Corp. argued for the first time that there were damages  
21 that it had “not pleaded in the complaint,” but could add upon amendment, “which [are] in  
22 direct response to this scraping incident.” Tr. of 2/29/24 Hearing at 8:18–20. X Corp.  
23 described these damages as “dozens, if not over a hundred personnel hours across  
24 disciplines such as engineering and security that were spent trying to figure out not only  
25 what data was gained via access to the Brandwatch systems”—time not relevant to the

26 \_\_\_\_\_  
27 <sup>20</sup> At the motion hearing, CCDH responded, not unreasonably, that “[i]t’s not exactly a[n]  
28 earth-shattering rule of law that contract damages have to be foreseeable and comport with  
the Constitution” and that, in “two shots at this,” X Corp. had only pled publication  
damages. See id. at 20:18–23.

1 breach of contract claim—“but what data was scraped, how it was done.” Id. at 8:7–11. It  
2 further referenced “anti-scraping measures implemented, again, at great expense from  
3 engineering time in tens of thousands, if not over a hundred thousand dollars to deal with  
4 this security risk that was identified via this incident.” Id. at 8:21–24; see also id. at 9:3–6  
5 (“I’m sure we had, from what I understand, cost for the servers dealing with the load of  
6 just receiving all these requests. So expensive electricity cost at data centers, as well as  
7 loss of computing power.”).

8 Damages stemming from X Corp.’s response to CCDH’s alleged scraping—rather  
9 than advertisers’ responses to CCDH’s reports—do not present the same constitutional  
10 concerns that the current damage allegations do. But they must still have been “within the  
11 contemplation of the parties when the contract was entered into or at least reasonably  
12 foreseeable by them at that time,” under state contract law. See Erlich, 21 Cal. 4th at 550.  
13 The Court is unpersuaded that the proposed allegations clear that hurdle. Fundamentally,  
14 neither of the two main reasons that X Corp. asserted for having to spend time and money  
15 responding to CCDH’s alleged scraping—(a) “safety and security” and (b) harm to X  
16 Corp.—make very much sense.

17 **a. Safety and Security**

18 First, X Corp. argued that it needed to expend resources responding to CCDH’s  
19 alleged breach in order to safeguard its users’ data. Over and over again, X Corp. played  
20 up its obligation to “keep [its users’] data safe,” Tr. of 2/29/24 Hearing at 7:13–14, called  
21 scraping a “security risk,” id. at 8:23–24, and declared that this case was “about” “the  
22 importance of data security,” id. at 12:10–11; see also id. at 14:9–10 (arguing that the  
23 CCDH report acknowledging scraping “raised a potential security issue”); id. at 35:13–15  
24 (“we put up anti-scraping measures to stop this kind of thing so that users feel as if their  
25 data is safe.”); id. at 39:22–24 (“This is about the security of data and whether or not we’re  
26 going to honor ways that people try to keep it safe contractually and otherwise.”).

27 While security and safety are noble concepts, they have nothing to do with this case.  
28 The Toxic Twitter report stated that CCDH had used the SNScrape tool, “which utilizes

1 Twitter’s search function,” to “gather tweets from” “ten reinstated accounts,” resulting in a  
 2 “dataset of 9,615 tweets posted by the accounts.” Toxic Twitter at 17. There is no  
 3 allegation in the complaint, and X Corp. did not assert that it could add an allegation, that  
 4 CCDH scraped anything other than public tweets that ten X platform users deliberately  
 5 broadcast to the world.<sup>21</sup> No private user information was involved—no social security  
 6 numbers, no account balances, no account numbers, no passwords, not even “gender,  
 7 relationship status, ad interests etc.” See Meta Platforms, Inc. v. BrandTotal Ltd., 605 F.  
 8 Supp. 3d 1218, 1273 (2022).

9 When asked why the collecting of public tweets implicates users’ security interests,  
 10 X Corp. insisted that “this all goes to control over your data,” and that users expect that  
 11 they will be able to take down their tweets later, or to change them—abilities they are  
 12 robbed of when the “data” is scraped. See Tr. of 2/29/24 Hearing at 40:17–24. But even  
 13 assuming that it is “very important” to a user that he be able to amend or remove his pro-  
 14 neo-Nazi tweets at some point after he has tweeted them, see id. at 40:24–25, a user can  
 15 have no expectation that a tweet that he has publicly disseminated will not be seen by the  
 16 public before that user has a chance to amend or remove it. While scraping is one way to  
 17 collect a user’s tweets, members of the public could follow that user and view his tweets in  
 18 their feeds, or use the X platform’s search tool (as SNScrape did) and view his tweets that  
 19 way.

20 X Corp.’s assertion that the scraping alleged here violates a user’s “safety and  
 21 security” in his publicly disseminated tweets is therefore a non-starter. CCDH would not,  
 22 and should not, have foreseen at the time of contracting that X Corp. would need to expend  
 23 money to address “safety and security” issues following the scraping of ten users’ public  
 24 tweets.

25 \_\_\_\_\_  
 26 <sup>21</sup> While the Court recognizes that technically, who sees a post might “depend[] on the  
 27 privacy settings,” see Tr. of 2/29/24 Hearing at 40:9–16, that is a red herring here. The  
 28 whole reason that CCDH wrote about these ten users is that a large audience viewed their  
 tweets. See Toxic Twitter at 3 (“The analysis shows that the ten accounts have already  
 amassed 2.5 billion tweet impressions”). It is not a reasonable inference that these ten  
 users had selected privacy settings that limited their posts to friends and family.

**b. Harm to X Corp.**

Second, X Corp. argued that it was entitled to expend resources responding to CCDH’s scraping because that scraping might have caused harm to X Corp.’s systems. X Corp. maintained that it was entitled to “dive in and understand what was done, how it was done, what data was taken, whether there was any damage,” and to conduct “a large investigation and then remedial action,” Tr. of 2/29/24 Hearing at 9:16–20, adding that “[i]t is well known in this space that if you scrape,” the scrapee will need to investigate and “put up anti-scraping measures,” *id.* at 35:9–14. X Corp. conceded that it is not able to prevent scraping “100 percent” of the time, but stated that it can make scraping more difficult, and should be compensated for trying to do so. *Id.* at 35:21–36:7.<sup>22</sup> The problem with this argument is that it is at odds with what X Corp. has alleged.

Although social media platforms do not like it, scraping, for various ends, is commonplace. *See, e.g.,* ACLU Br. at 7 (“Researchers and Journalists Use Scraping to Enable Speech in the Public Interest and Hold Power to Account.”); *see also id.* at 8–9 (collecting sources); Andrew Sellars, “Twenty Years of Web Scraping and the Computer Fraud and Abuse Act,” 24 B.U. J. Sci. & Tech. L 372, 375 (2018) (“Web scraping has proliferated beneath the shadow of the [CFAA].”); *hiQ 2022 Circuit opinion*, 31 F.4th at 1202 (“HiQ points out that data scraping is a common method of gathering information, used by search engines, academic researchers, and many others. According to hiQ, letting established entities that already have accumulated large user data sets decide who can scrape that data from otherwise public websites gives those entities outsized control over how such data may be put to use . . . the public interest favors hiQ’s position.”); *see also id.* at 1186 (“LinkedIn blocks approximately 95 million automated attempts to scrape data every day”).

<sup>22</sup> At times, it seemed as if X Corp. was suggesting that whenever a user breaches any term within X Corp.’s nineteen-page ToS, X Corp. is entitled to spend money to prevent further breaches of that term, and then to be compensated for that expenditure. That is not the law. If it was, then a plaintiff could state a claim merely by alleging the existence of a contract, its performance, and the defendant’s breach; there would be no separate requirement of proving foreseeable damages. But there is such a requirement. *See Oasis W. Realty*, 250 P.3d at 1121; *Erlich*, 21 Cal. 4th at 550.

1           Some scraping activity can be harmful not only to the users of a website but also to  
2 the website itself. See, e.g., hiQ 2022 district opinion, 639 F. Supp. 3d at 954 (scraping  
3 can burden servers and inhibit a website’s performance); Ryanair DAC v. Booking  
4 Holdings Inc., 636 F. Supp. 3d 490, 503 (D. Del. 2022) (scraping can “greatly increase[]  
5 the quantifies of queries” on a website, “impair[] the . . . availability and/or usability” of a  
6 website, “and cause [a] website’s response times to deteriorate.”). Scraping can harm a  
7 website because a bot “can make many requests automatically and much more rapidly than  
8 any human could,” “request[ing] a huge amount of data from the target’s server.” See  
9 Compulife Software Inc. v. Newman, 959 F.3d 1288, 1299 (11th Cir. 2020). X Corp. has  
10 another case pending in this district, not before this Court, involving allegations of that  
11 kind of scraping. See X Corp. v. Bright Data Ltd., No. 23-cv-3698-WHA, First Amended  
12 Complaint (dkt. 36) (N.D. Cal. July 26, 2023) ¶ 1 (defendant “scrapes and sells millions of  
13 records from X Corp.’s X platform”), ¶ 98 (such actions “have diminished the server  
14 capacity that X Corp. can devote to its legitimate users, and thereby injured X Corp. by  
15 depriving it of the ability to use its personal property”), ¶ 102 (alleging “damage in the  
16 form of impaired condition, quality, and value of its servers, technology infrastructure,  
17 services, and reputation”); see also X Corp. v. John Doe 1, No. DC-23-09157, Original  
18 Petition (Tex. Dist. Ct., Dallas Co., July 6, 2023) ¶¶ 21–22, 24 (alleging “widespread  
19 unlawful scraping,” “flooding Twitter’s sign-up page with automated requests,” “severely  
20 tax[ing] X Corp.’s servers,” “impair[ing] the user experience for millions of X Corp.”  
21 users).

22           This is not such a case. Here, CCDH is alleged to have used Twitter’s own search  
23 tool to collect 9,615 public tweets from ten Twitter users, see FAC ¶ 77; Toxic Twitter at  
24 17, and then to have announced that it did so in a public report, see id. Assuming for  
25 present purposes that this conduct amounts to the “scraping” barred by the ToS,<sup>23</sup> the  
26 extent of CCDH’s scraping was not a mystery. As CCDH asked at the motion hearing,  
27

28 <sup>23</sup> CCDH argues that it does not. See MTD&S at 10–13.

1 “What CCDH did and the specific tweets that it gathered, what tool it used, how it used  
2 that tool and what the results were are documented explicitly in its public report. So what  
3 is it that they’re investigating?” Tr. of 2/29/24 Hearing at 22: 3–7. Nor was this the kind  
4 of large-scale, commercial scraping—as in hiQ, as alleged in Bright Data—that could  
5 conceivably harm the X platform or overburden its servers. It is not plausible that this  
6 small-scale, non-commercial scraping would prompt X Corp. to divert “dozens, if not over  
7 a hundred personnel hours across disciplines,” see Tr. of 2/29/24 Hearing at 8:7–11, of  
8 resources toward the repair of X Corp.’s systems. Nor would such expenditures have been  
9 foreseeable to CCDH in 2019. In 2019, if CCDH had thought about the no-scraping  
10 provision in the ToS at all, it would have expected X Corp. to incur damages only in  
11 response to breaches of that provision that could actually harm the X platform. It would  
12 not have expected X Corp. to incur damages in connection with a technical breach of that  
13 provision that involved the use of Twitter’s search tool to look at ten users and 9,615  
14 public tweets.

15 It is clear to the Court that if X Corp. was indeed motivated to spend money in  
16 response to CCDH’s scraping in 2023, it was not because of the harm such scraping posed  
17 to the X platform, but because of the harm it posed to X Corp.’s image. CCDH’s data  
18 collection allowed it to claim knowledge of what was occurring on the X platform in a  
19 cumulative sense. According to CCDH, its scraping revealed that X Corp. was generating  
20 millions of dollars in advertising revenue from previously banned accounts. See FAC ¶  
21 49; Kaplan Decl. Ex. B. X Corp.’s desire to keep entities like CCDH from drawing such  
22 unflattering conclusions about the X platform is entirely reasonable from a business point  
23 of view. But that motivation would not have been foreseeable to CCDH in 2019. In 2019,  
24 CCDH would not have understood, and should not have understood, that Twitter would  
25 wish to prevent scraping in order to keep cumulative information about the platform from  
26 the public view.<sup>24</sup> CCDH would certainly not have known that Twitter would change

27 \_\_\_\_\_  
28 <sup>24</sup> CCDH framed this point thusly at the motion hearing: “the notion that CCDH . . . should have foreseen Twitter’s costs in better hiding white supremacist content on the platform is

1 course on some of its content-moderation policies, reinstating what CCDH later described  
2 as “tens of thousands of accounts, including neo-Nazis, white supremacists, misogynists  
3 and spreaders of dangerous conspiracy theories,” see Toxic Twitter at 3, and then desire to  
4 shield the financial ramifications of that policy shift from the public. That is the kind of  
5 theoretical, speculative harm that California contract law rejects. See Erlich, 21 Cal. 4th at  
6 550.

7 Neither the “safety and security” rationale, nor the “harm to X Corp.” rationale for  
8 X Corp. spending time and money in response to CCDH’s scraping make any sense given  
9 the scraping alleged in this case. Such damages simply were not foreseeable when CCDH  
10 entered into the ToS in 2019. Accordingly, allowing X Corp. to amend in order to add the  
11 proposed new allegations about damages in connection with its response to CCDH’s  
12 scraping would be futile.

13 The Court notes, too, that X Corp.’s motivation in bringing this case is evident. X  
14 Corp. has brought this case in order to punish CCDH for CCDH publications that criticized  
15 X Corp.—and perhaps in order to dissuade others who might wish to engage in such  
16 criticism.<sup>25</sup> Although X Corp. accuses CCDH of trying “to censor viewpoints that CCDH  
17 disagrees with,” FAC ¶ 20, it is X Corp. that demands “at least tens of millions of dollars”  
18 in damages—presumably enough to torpedo the operations of a small nonprofit—because  
19 of the views expressed in the nonprofit’s publications, see, e.g., id. ¶¶ 1, 3–4, 5, 12, 17–24,  
20 38, 41, 43–52, 54–60, 62, 65–70, 77–78, 84–85, 92, 96, 98; see also PPP Br. at 1 (“X  
21 Corp. . . . seeks to silence critique rather than to counter it.”). If CCDH’s publications  
22 were defamatory, that would be one thing, but X Corp. has carefully avoided saying that  
23 they are.

24  
25 \_\_\_\_\_  
26 utterly implausible as a matter of law.” Tr. of 2/29/24 Hearing at 36:8–11.

27 <sup>25</sup> “A recent survey of 167 academics and researchers found that over 100 studies about X  
28 Corp. have been diverted, stalled, or canceled, with over half of those interviewed citing a  
fear of being sued by X Corp. over their findings or data.” ACLU Br. at 14 (citing Sheila  
Dang, “Exclusive: Elon Musk’s X Restructuring Curtails Disinformation Research, Spurs  
Legal Fears,” Reuters (Nov. 6, 2023), <https://www.reuters.com/technology/elon-musks-x-restructuring-curtailsdisinformation-research-spurs-legal-fears-2023-11-06>).

1           Given these circumstances, the Court is concerned that X Corp.’s desire to amend  
2 its breach of contract claim has a dilatory motive—forcing CCDH to spend more time and  
3 money defending itself before it can hope to get out from under this potentially ruinous  
4 litigation. See PPP Br. at 2 (“Without early dismissal, the free speech interests that the  
5 California legislature sought to protect will vanish in piles of discovery motions.”). As  
6 CCDH argued at the motion hearing, the anti-SLAPP “statute recognizes that very often  
7 the litigation itself is the punishment.” Tr. of 2/29/24 Hearing at 33:12–34:5. It would be  
8 wrong to allow X Corp. to amend again when the damages it now alleges, and the damages  
9 it would like to allege, are so problematic, and when X Corp.’s motivation is so clear.

10           Accordingly, the Court STRIKES the breach of contract claim and will not allow X  
11 Corp. to add the proposed new allegations as to that claim.

12           **C. Violation of CFAA<sup>26</sup>**

13           The complaint’s second cause of action is for violation of the CFAA. See FAC ¶¶  
14 80–88. “Congress enacted the CFAA in 1984 primarily to address the growing problem of  
15 computer hacking.” United States v. Nosal, 676 F.3d 854, 858 (9th Cir. 2012) (“Nosal I”).  
16 Under the CFAA, a party may be subject to liability if it “intentionally accesses a computer  
17 without authorization or exceeds authorized access, and thereby obtains . . . information  
18 from any protected computer.” 18 U.S.C. § 1030(a)(2)(C).<sup>27</sup> Courts are to interpret this  
19 prong of the statute narrowly, as the CFAA “is primarily a criminal statute” and is  
20 interpreted similarly across criminal and civil cases. See LVRC Holdings LLC v. Brekka,  
21 581 F.3d 1127, 1134 (9th Cir. 2009). A private right of action is available to “[a]ny person  
22 who suffers damage or loss by reason of a violation of this section.” 18 U.S.C. § 1030(g).

23           X Corp. alleges that “Defendants, except ECF, have violated the CFAA by  
24 knowingly, and with intent to defraud X Corp., accessing a protected computer, without  
25

26 \_\_\_\_\_  
27 <sup>26</sup> Again, the CFAA cause of action is not subject to the motion to strike because it is  
28 federal. See Hilton, 599 F.3d at 901 (“[T]he anti-SLAPP statute does not apply to federal  
law causes of action.”).

<sup>27</sup> A “protected computer” includes essentially any computer connected to the Internet.  
See hiQ 2022 Circuit opinion, 31 F.4th at 1195; 18 U.S.C. § 1030(e)(2).

1 authorization, and by means of such conduct furthered the fraud and obtained one or more  
2 things of value.” FAC ¶ 82. It alleges that X Corp. provided non-public data to  
3 Brandwatch, which Brandwatch stored on a protected computer “accessible to only those  
4 with login credentials.” *Id.* ¶ 83. It alleges that Defendants other than ECF “were never  
5 validly given login credentials,” knew that the data was secured by the Brandwatch  
6 Agreements, and knew that they did not have authorization to access it, but nonetheless  
7 “conspired with ECF[] to share its login credentials.” *Id.* ¶ 84. It continues: “Defendants  
8 other than ECF then accessed that data without authorization” in order to mischaracterize  
9 the data in CCDH publications. *Id.* It further alleges that ECF and CCDH conspired to  
10 violate the CFAA so that CCDH could access X Corp.’s data, and, in knowing violation of  
11 X Corp.’s agreements with Brandwatch and ECF’s agreements with Brandwatch, ECF  
12 gave CCDH its login credentials. *Id.* ¶ 85. X Corp. finally alleges that it suffered a loss of  
13 over \$5,000 as a result of the violations, including money spent on internal investigations,  
14 employee resources and time to assist in those investigations, and attorneys’ fees. *Id.* ¶ 87.

15 CCDH argues that X Corp. fails to state a claim for violation of the CFAA because  
16 (1) X Corp. has not adequately alleged that CCDH accessed the Brandwatch data “without  
17 authorization”; (2) X Corp. has not adequately alleged loss; and (3) X Corp. has failed to  
18 specify which CFAA subsection was violated. MTD&S at 19–23. The Court concludes  
19 that CCDH’s argument about loss is persuasive, and does not reach CCDH’s other  
20 arguments.

21 A civil claim under the CFAA requires “loss to 1 or more persons during any 1-year  
22 period . . . aggregating at least \$5,000 in value.” 18 U.S.C. § 1030(c)(4)(A)(i)(I); Andrews  
23 v. Sirius XM Radio Inc., 932 F.3d 1253, 1262 (9th Cir. 2019). The CFAA “defines ‘loss’  
24 as ‘any reasonable cost to any victim, including the cost of responding to an offense,  
25 conducting a damages assessment, and restoring the data, program, system, or information  
26 to its condition prior to the offense, and any revenue lost, cost incurred, or other  
27 consequential damages incurred because of interruption of service.’” Andrews, 932 F.3d  
28 at 1262 (quoting 18 U.S.C. § 1030(e)(11)).

1 CCDH argues that X Corp.’s loss allegations are inadequate because they are not  
2 losses from technical harms. MTD&S at 21. That is indeed a requirement under the  
3 CFAA, as the Supreme Court held in Van Buren v. United States, 141 S. Ct. 1648, 1659–  
4 60 (2021). The Court explained that “[t]he term ‘loss’ . . . relates to costs caused by harm  
5 to computer data, programs, systems, or information services.” Id. Despite X Corp.’s  
6 suggestion at the motion hearing that only damages must relate to “damage to the system,”  
7 see Tr. of 2/29/24 Hearing at 26:9–24, the Court in Van Buren stated that both damages  
8 and loss under the CFAA “focus on technological harms—such as the corruption of files—  
9 of the type unauthorized users cause to computer systems and data,” Van Buren, 141 S. Ct.  
10 at 1660. It observed that “[l]imiting ‘damage’ and ‘loss’ in this way makes sense in a  
11 scheme ‘aimed at preventing the typical consequences of hacking.’” Id. (quoting Royal  
12 Truck & Trailer Sales & Serv., Inc. v. Kraft, 974 F.3d 756, 760 (6th Cir. 2020)). The  
13 Ninth Circuit recognized this required showing of “technological harms” in the hiQ case.  
14 See hiQ 2022 Circuit opinion, 31 F.4th at 1195 n.12 (quoting Van Buren, 141 S. Ct. at  
15 1659–60).

16 X Corp. responds that “[c]osts to investigate and stop alleged violations of the  
17 CFAA are cognizable losses,” but it cites only to an unopposed Report and  
18 Recommendation, and a distinguishable one. See Opp’n at 26 (citing Facebook, Inc. v.  
19 Holper, No. 20-cv-6023-JCS, 2022 WL 17167958, at \*8 (N.D. Cal. Sept. 27, 2022)). In  
20 Holper, 2022 WL 17167958, at \*8, in trying to meet the CFAA’s damages threshold,  
21 Facebook pointed to its employees’ “efforts to investigate and stop” the defendant’s  
22 conduct. Facebook’s employees had disabled the defendant’s accounts, blocked his  
23 access, and sent him a cease and desist letter. Id. at \*2. Here, though, X Corp. employees  
24 did not disable CCDH’s Brandwatch account, or block CCDH’s Brandwatch access, and  
25 they could not “stop” CCDH from accessing Brandwatch, because X Corp. is not  
26 Brandwatch.

27 X Corp.’s losses in connection with “attempting to conduct internal investigations  
28 in efforts to ascertain the nature and scope of CCDH’s unauthorized access to the data,”

1 see FAC ¶ 87, are not technological in nature. The data that CCDH accessed does not  
 2 belong to X Corp., see Kaplan Decl. Ex. A at 13 (providing that users own their content  
 3 and grant X Corp. “a worldwide, non-exclusive, royalty-free license”), and there is no  
 4 allegation that it was corrupted, changed, or deleted. Moreover, the servers that CCDH  
 5 accessed are not even X Corp.’s servers. X Corp. asserted at the motion hearing that its  
 6 servers “stream data to Brandwatch servers in response to queries from a logged in user”  
 7 and so “you cannot say fairly it’s not our systems.” Tr. of 2/29/24 Hearing at 28:16–20.  
 8 But that is not what the complaint alleges. The complaint alleges that “X Corp. provided  
 9 non-public data to Brandwatch” and “[t]hat data was then stored on a protected computer.”  
 10 FAC ¶ 83; see also id. ¶ 86 (“the Licensed Materials were stored on servers located in the  
 11 United States that Brandwatch used for its applications. CCDH and ECF thus knew that,  
 12 in illegally using ECF’s login credentials and querying the Licensed Materials, CCDH was  
 13 targeting and gaining unauthorized access to servers used by Brandwatch in the United  
 14 States.”) (emphasis added); id. ¶ 29 (Twitter would stream its Licensed Materials from its  
 15 servers, “including in California,” to “servers used by Brandwatch [] located in the United  
 16 States, which Brandwatch’s applications accessed to enable [its] users with login  
 17 credentials to analyze the data.”).<sup>28</sup> It is therefore hard to see how an investigation by X  
 18 Corp. into what data CCDH copied from Brandwatch’s servers could amount to “costs  
 19 caused by harm to computer data, programs, systems, or information services.” See Van  
 20 Buren, 141 S. Ct. at 1659–60.

21 Additionally, it is impossible to see how attorneys’ fees could amount to  
 22 technological harm. See Delacruz v. State Bar of Cal., No. 16-cv–6858-BLF, 2018 WL  
 23 3077750, at \*8 (N.D. Cal. Mar. 12, 2018) (“legal expenses are not a cognizable loss under  
 24

25 <sup>28</sup> FAC ¶ 36 is a slightly closer fit to what X Corp. argued at the motion hearing, as it  
 26 references both X Corp.’s servers and Brandwatch’s servers, but it is vaguer than  
 27 paragraphs 29, 83, and 86 about where the Licensed Materials were stored. Even if the  
 28 Licensed Materials were stored on the X Corp. servers and then streamed to Brandwatch  
 servers whenever a Brandwatch user ran a query, X Corp. did not articulate how CCDH  
 logging into the Brandwatch system using a Brandwatch subscriber’s valid login  
 information could cause technological harm to X Corp.’s server.

1 the CFAA”) (citing Wichansky v. Zowine, 150 F. Supp. 3d 1055, 1071–72 (D. Ariz.  
2 2015); Nexans Wires S.A. v. Sark-USA, Inc., 319 F. Supp. 2d 468, 474–75 (S.D.N.Y.  
3 2004)); cf. Fraser v. Mint Mobile, LLC, No. C 22-138 WHA, 2022 WL 2391000, at \*2  
4 (N.D. Cal. July 1, 2022) (fees to expert to trace stolen assets “were not related to  
5 remedying technological harms inflicted on the breached computer or system”).

6 Loss incurred “not . . . to assess the breached system but to ‘assess [one’s]  
7 damages” are not cognizable under the CFAA. See Fraser, 2022 WL 2391000, at \*2. The  
8 Court will therefore dismiss the CFAA claim based on X Corp.’s failure to allege losses  
9 based on technological harms. See also NovelPoster v. Javitch Canfield Grp., 140 F. Supp.  
10 3d 954, 964 (N.D. Cal. 2014) (“the majority of cases cited by defendants in which the  
11 court found an absence of CFAA-qualifying loss are summary judgment cases,” but  
12 “[t]hose cases cited by defendants that do concern pleading motions involve situations  
13 where the plaintiff failed to allege that the defendant’s conduct caused impairment of data  
14 or interruption of service.”).

#### 15 **D. Tort Claims**

16 The complaint’s third and fourth causes of action are for intentional interference  
17 with contractual relations and inducing breach of contract, respectively. Intentional  
18 interference with contractual relations “protects against intentional acts not necessarily  
19 resulting in a breach.” Shamblin, 166 Cal. App. 3d at 122–23. It “requires that a plaintiff  
20 prove: (1) he had a valid and existing contract with a third party; (2) defendant had  
21 knowledge of this contract; (3) defendant committed intentional and unjustified acts  
22 designed to interfere with or disrupt the contract; (4) actual interference with or disruption  
23 of the relationship; and (5) resulting damages.” Id. at 123. Inducement of a breach of  
24 contract “protects against intentional acts designed to produce an actual breach and  
25 requires that a plaintiff prove: (1) he had a valid and existing contract [with a third party];  
26 (2) . . . defendant had knowledge of the contract and intended to induce its breach; (3) the  
27 contract was in fact breached by the contracting party; (4) the breach was caused by . . .  
28 defendant’s unjustified or wrongful conduct; and (5) . . . damage[s] [were suffered as a

1 result.” Id. (internal quotation marks omitted). The two claims are “separate theories upon  
2 which the tort of interference with economic relations may be based.” Id. at 122.

3 X Corp. alleges in support of its interference with contractual relations claim that  
4 “Defendants knew, based upon their experience in CCDH purporting to analyze data  
5 associated with social media platforms,” that “for Brandwatch to have access to X Corp.  
6 data for its SaaS products to analyze, X Corp. must have contracts with Brandwatch, and  
7 that Brandwatch would be prohibited under the terms of [its contract with X Corp.] from  
8 providing access to unauthorized parties.” FAC ¶ 91. X Corp. further alleges that  
9 “Defendants’ conduct prevented Brandwatch from performing under [its contract with X  
10 Corp.]” because “Brandwatch failed to secure the data from X Corp. according to the terms  
11 of the agreements.” Id. ¶ 93. X Corp. alleges that “[a]s a direct and proximate result of  
12 Defendants intentionally interfering with [Brandwatch’s contract with X Corp.], X Corp.  
13 has suffered monetary and other damages of at least tens of millions of dollars.” Id.

14 X Corp. alleges in support of its inducing breach of contract claim that “Defendants  
15 knew, based on their experience in CCDH purporting to analyze data associated with  
16 social media platforms . . . that for Brandwatch to have access to X Corp. data for its SaaS  
17 products to analyze, X Corp. must have contracts with Brandwatch, and that Brandwatch  
18 would be prohibited under the terms of [its contract with X Corp.] from providing access  
19 to unauthorized parties, or allowing any unauthorized parties to access that data.” Id. ¶ 96.  
20 X Corp. further alleges that “Defendants knew . . . that CCDH obtaining login credentials  
21 from a valid user such as ECF to access the data would cause Brandwatch to breach [its  
22 contract with X Corp.] by allowing an unauthorized third party . . . to gain access to the  
23 data without proper permissions or authorizations.” Id. ¶ 97. X Corp. alleges that it was  
24 harmed “as a result of Defendant’s conduct when companies paused or refrained from  
25 advertising on X, in direct response to CCDH’s reports and articles,” and that “[a]s a direct  
26 and proximate result of Defendants inducing Brandwatch to breach [its contract with X  
27 Corp.], X Corp. has suffered monetary and other damages in the amount of at least tens of  
28 millions of dollars.” Id. ¶¶ 98, 99.

1 CCDH argues as an initial matter that the two claims are redundant. MTD&S at 23.  
2 They certainly are. Inducing a breach of contract is a “species of intentional interference  
3 with contractual relations.” See 1-800 Contacts, Inc. v. Steinberg, 132 Cal. Rptr. 2d 789,  
4 802 (Cal. Ct. App. 2003). The difference is that an “interference” claim does not require a  
5 breach. See Shamblin, 166 Cal. App. 3d at 123; see also Opp’n at 29 (interference claim is  
6 “narrower”). Here, because the only form of interference alleged is inducement of a  
7 breach, see FAC ¶¶ 93, 97, the claims allege the same thing. Accordingly, they rise and  
8 fall together.

9 CCDH’s arguments for dismissing the tort claims are that: (1) the complaint shows  
10 that CCDH did not cause a breach; (2) the complaint has failed to plausibly allege a  
11 breach; (3) the complaint has failed to plausibly allege CCDH’s knowledge; and (4) the  
12 complaint fails to adequately allege damages. MTD&S at 23–26. The Court concludes  
13 that CCDH’s arguments about causation and about damages are persuasive, and does not  
14 reach its other arguments.

### 15 1. Causation

16 CCDH argues that X Corp. fails to allege that CCDH’s conduct caused Brandwatch  
17 to breach its agreement with X Corp. MTD&S at 23–24. The Court agrees. Both tort  
18 claims envision that the defendant has done something to “push[] a contracting party to act  
19 in a way that disrupts the contract.” Id. at 24 (citing Jenni Rivera Enters., LLC v. Latin  
20 World Ent. Holdings, Inc., 249 Cal. Rptr. 3d 122, 129 (Cal. Ct. App. 2019) (defendant  
21 induced counterparty to breach a nondisclosure agreement); Savage v. Pac. Gas & Elec.  
22 Co., 26 Cal. Rptr. 2d 305, 315 (Cal. Ct. App. 1993) (defendant persuaded plaintiff’s  
23 employer to terminate employment agreement); SCEcorp v. Super. Ct. of San Diego Cnty.,  
24 4 Cal. Rptr. 2d 372, 373–74, 378 (Cal. Ct. App. 1992) (defendant forced counterparty to  
25 abandon merger)).

26 X Corp. does not allege that CCDH got Brandwatch to do anything at all. X Corp.  
27 alleges that Brandwatch agreed to keep Twitter’s content secure, FAC ¶ 31, that CCDH’s  
28 “obtain[ing] access to and access[ing] the Licensed Materials improperly and without

1 authorization” was “unknown to Brandwatch . . . until recently,” *id.* ¶ 41, and that CCDH’s  
2 access “prevented Brandwatch from performing” because it meant that “Brandwatch failed  
3 to secure the data . . . according to the terms of the agreements,” *id.* ¶ 93. As CCDH  
4 argues, those allegations “show that any breach occurred independently of (and by  
5 necessity, before) [CCDH’s] actions.” MTD&S at 24 (adding: “the access did not cause  
6 the breach, the breach caused the access.”).

7 X Corp.’s response is that “the access is the breach.” Opp’n at 30. In other words,  
8 Brandwatch agreed to keep the Licensed Materials secure, and by allowing CCDH to  
9 access the Licensed Materials, Brandwatch necessarily—and simultaneously—breached its  
10 agreement to keep the Licensed Materials secure. The Court rejects that tortured  
11 reasoning. Any failure by Brandwatch to secure the Licensed Materials was a precondition  
12 to CCDH’s access. In addition, to the extent that X Corp. maintains that CCDH need not  
13 have done anything to impact Brandwatch’s behavior, then it is seeking to hold CCDH  
14 liable for breaching a contract to which it was not a party. That does not work either. *See*  
15 Tri-Continent Int’l Corp. v. Paris Sav. & Loan Ass’n, 16 Cal. Rptr. 2d 508, 511 (Cal. Ct.  
16 App. 1993) (a plaintiff “cannot assert a claim for breach of contract against one who is not  
17 a party to the contract.”).

18 Causation is therefore one basis for striking the tort claims.

## 19 2. Recoverable Damages

20 CCDH also argues that X Corp. fails to allege plausible damages because (a) the  
21 complaint fails to allege that any breach by Brandwatch proximately caused the damage  
22 that X Corp. seeks, and (b) the same constitutional principle that prohibits X Corp. from  
23 recovering publication damages on its contract claim prohibit it from recovering  
24 publication damages on its non-defamation tort claims. *See* MTD&S at 25–26.

25 The Court agrees with CCDH’s argument on constitutional grounds. X Corp.  
26 cannot seek damages for the independent acts of third parties based on CCDH’s speech.  
27 Accordingly, the “at least tens of millions of dollars” that X Corp. seeks in connection with  
28 CCDH allegedly causing Brandwatch to breach its contract with X Corp. are

1 impermissible. See Planned Parenthood, No. 16-cv-236-WHO (Order on Motions to  
2 Dismiss and Strike) at 36 (“the First Amendment does not impose heightened standards on  
3 plaintiffs’ tort claims as long as plaintiffs do not seek reputational damages (lost profits,  
4 lost vendors) stemming from the publication conduct of defendants.”) (emphasis in  
5 original).<sup>29</sup>

6 Because the tort claims fails to allege a theory of causation that makes sense, and  
7 seek impermissible publication damages, the Court STRIKES them.<sup>30</sup>

#### 8 **E. Doe Defendants**

9 CCDH’s last argument is that X Corp. fails to state a claim against the Doe  
10 defendants. MTD&S at 26. X Corp. alleges that “one [unnamed] United States senator  
11 referred to CCDH as ‘[a] foreign dark money group,’” and that “[o]ther articles have  
12 claimed that CCDH is, in part, funded and supported by foreign organizations and entities  
13 whose directors, trustees, and other decision-makers are affiliated with legacy media  
14 organizations.” FAC ¶ 62. It further alleges that “CCDH is acting . . . at the behest of and  
15 in concert with funders, supporters, and other entities.” Id. ¶ 63. These allegations are  
16 vague and conclusory, and do not state a plausible claim against the Doe defendants. See  
17 Iqbal, 556 U.S. at 678 (claim is plausible “when the plaintiff pleads factual content that  
18 allows the court to draw the reasonable inference that the defendant is liable for the  
19 misconduct alleged.”).

#### 20 **IV. CONCLUSION**

21 For the foregoing reasons, the Court STRIKES the breach of contract and tort  
22 claims, because CCDH has met its burden at the first step of the anti-SLAPP analysis, X  
23 Corp. has not established that there is a probability that it will prevail on those claims, and  
24

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25 <sup>29</sup> X Corp. suggests that it is also seeking damages based on “actions it took—including  
26 internal investigations and allocation of employee resources—to address the security  
27 breach.” Opp’n at 31 (citing FAC ¶¶ 70–71). These tort claims do not reference that type  
28 of damage, instead using the “at least tens of millions of dollars” language that the  
complaint consistently attributes to the pause of advertiser spending, see FAC ¶¶ 93, 99, 5,  
70.

<sup>30</sup> At the motion hearing, X Corp. did not identify any new allegations that it could add to  
the tort claims if given leave to amend.

1 X Corp. has not satisfied the Court that amendment is appropriate under Rule 15. The  
2 Court also DISMISSES the CFAA claim for failure to adequately allege loss, and  
3 DISMISSES the Doe defendants.

4 **IT IS SO ORDERED.**

5 Dated: March 25, 2024



6 CHARLES R. BREYER  
7 United States District Judge

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