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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

13 **ROGAN O’HANDLEY,**
14 **Plaintiff,**
15 **v.**

Case No. 2:21-cv-07063-CRB

DEFENDANT SKDKNICKERBOCKER’S
REPLY IN SUPPORT OF MOTION TO
DISMISS PLAINTIFF’S COMPLAINT

16 **ALEX PADIILLA, in his personal**
17 **capacity; SKDKNICKERBOCKER,**
18 **LLC, a Delaware company; PAULA**
19 **VALLE CASTANON, in her personal**
20 **capacity; JENNA DRESNER, in her**
21 **personal capacity; SAM MAHOOD, in**
22 **his personal capacity; AKILAH**
23 **JONES; in her personal capacity;**
24 **SHIRLEY N. WEBER, in her official**
25 **capacity as California Secretary of**
26 **State; TWITTER, INC., a Delaware**
27 **corporation; NATIONAL**
28 **ASSOCIATION OF SECRETARIES**
OF STATE, a professional nonprofit
organization,

Date: December 16, 2021
Time: 10:00 a.m.
Ctrm: Video Conference Only
Judge: Honorable Charles R. Breyer

Defendants.

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RULES

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1 In this case, aggrieved citizen Rogan O’Handley claims that Defendant SKDKnickerbocker
 2 (“SKDK”), a private company, violated his constitutional rights when Twitter suspended his
 3 account for repeated violations of its internal user policy. The Complaint does not allege that
 4 SKDK—a communications company who contracted with the California Office of Election
 5 Security to create and administer a voter information campaign, *see* Compl. ¶ 45—controlled,
 6 participated in, or even knew about Twitter’s decision. It does not allege that SKDK developed,
 7 implemented, or enforced Twitter’s policy. It does not allege that SKDK communicated with
 8 Twitter about his Tweets, asked anyone to remove O’Handley’s Tweet or Twitter access, or goaded
 9 O’Handley into making any of the five Tweets that ultimately led Twitter to suspend him.

10 Why, then, are we here? Because one morning in November of 2020, SKDK emailed
 11 California’s Office of Elections Cybersecurity (“OEC”) a document entitled “Misinformation Daily
 12 Briefing: 11/13” that listed articles from *The New York Times*, *Forbes*, CNN, Breitbart, ABC News,
 13 NBC 4, The Daily Breeze, Fox News, and Sputnik News, trending internet searches from Quora,
 14 several Tweets from various users, and a single Tweet from O’Handley:

15 [@DC_Draino](#) tweeted, "Audit every California ballot Election fraud is rampant nationwide and we all know California is one of the culprits Do it to
 16 protect the integrity of that state's elections."

17 Compl. Ex. 6. SKDK listed O’Handley’s Tweet in a single line, as one of 21 separate discussions
 18 relating to the subject of election misinformation. *See id*; *see also* Compl. ¶ 74.¹ On this gossamer
 19 thread, O’Handley claims that SKDK violated a wide variety of his constitutional and statutory
 20 rights, but his claims fail as a matter of law.

21 As a threshold jurisdictional matter, all claims against SKDK should be dismissed for lack
 22 of standing. This court lacks Article III jurisdiction for two independent reasons: (1) because
 23 O’Handley alleges no cognizable injury-in-fact, and (2) because his alleged injuries resulted from

24
 25 ¹ O’Handley does not respond to or even acknowledge SKDK’s point that he has included
 26 a doctored image of SKDK’s email in his Complaint. Mot. 3 n.1 (citing Compl. ¶ 74). Although
 27 misleadingly edited to make it appear as if SKDK sent an email with a standalone message about
 28 just O’Handley’s Tweet, Exhibit 6 to the Complaint contains the full page and makes clear that
 O’Handley’s Tweet was just one of 21 items listed, including links to news articles published by
 reputable news outlets. *See* Compl. Ex. 6. It was included without comment, other than the generic
 heading “California.” *Id.*

1 intervening acts taken by him and independent third parties, which are not fairly traceable to SKDK.
2 His response does not meaningfully engage these arguments or explain why the court has
3 jurisdiction over his claims against SKDK.

4 Even if O’Handley had alleged facts sufficient to establish standing, he fails to plead any
5 cognizable claims against SKDK. Robust constitutional guarantees of free speech, equal protection,
6 and due process were designed to shield citizens against overreach by the government itself, not by
7 private companies. Although O’Handley insists that SKDK’s status as a private contractor renders
8 all subsequent foreseeable aftereffects as state action, courts have repeatedly rejected this argument.
9 Even if he could clear that essential hurdle, the Complaint’s allegations still do not present any
10 deprivation of his free speech, equal protection, or due process rights by SKDK. His civil
11 conspiracy claim fails because his Complaint fails to allege even a single factual allegation that, if
12 true, would support the inference that SKDK had a meeting of the minds with other Defendants to
13 deprive him of his rights. All claims against SKDK should be dismissed.

14 **I. All claims against SKDK should be dismissed for lack of standing.**

15 All claims against SKDK should be dismissed because O’Handley fails to satisfy the injury-
16 in-fact and traceability requirements of Article III standing. To have standing, a plaintiff must show
17 they have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the
18 defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v.*
19 *Robins*, 578 U.S. 330, 338 (2016). Where there are multiple defendants, a plaintiff must allege
20 Article III standing as to each named defendant, for each claim. *See Wash. Env’t Council v. Bellon*,
21 732 F.3d 1131, 1139 (9th Cir. 2013); *see also Golden Gate Transactional Indep. Serv., Inc. v.*
22 *California*, No. CV18-08093, 2019 WL 4222452, at *7 (C.D. Cal. May 1, 2019). The Complaint’s
23 allegations fail to establish that O’Handley satisfies the injury-in-fact and traceability requirements
24 for his claims against SKDK.

25 **A. The Complaint does not establish that O’Handley was actually injured**
26 **by any specific action by SKDK.**

27 The Complaint fails to allege that O’Handley was actually injured by any of SKDK’s
28 actions. An injury in fact must be “concrete and particularized” and must be established with the

1 “manner and degree of evidence required at the successive stages of the litigation.” *Lujan v. Defs.*
 2 *of Wildlife*, 504 U.S. 555, 560-61 (1992). The crux of the Complaint is that O’Handley was injured
 3 by Twitter’s decision to remove his Tweets and ultimately suspend his account. Compl. ¶¶ 108,
 4 135, 139, 152, 169. The Complaint alleges a variety of injuries resulting from Twitter’s suspension,
 5 including loss of income and influence. Compl. ¶¶ 91-94; *see also* Compl. ¶¶ 3, 71, 82, 92-94 (citing
 6 loss of his 440,000 Twitter followers). But SKDK is not Twitter. It did not suspend O’Handley’s
 7 account. SKDK’s sole act was to send an email to OEC that included one of O’Handley’s Tweets
 8 in a list of 21 links to discussions of election information. Compl. ¶¶ 56-58; *see also* Compl. Ex. 6.
 9 O’Handley does not fully explain how SKDK’s email caused him a legally actionable injury, nor
 10 does he even acknowledge that SKDK has First Amendment rights of its own to communicate with
 11 government officials without fear of the civil liability O’Handley now seeks to inflict through this
 12 Court. Mot. 5; *see E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38
 13 (1961) (recognizing the right of petition falls in the Bill of Rights and noting that “[i]n a
 14 representative democracy such as this . . . the whole concept of representation depends upon the
 15 ability of the people to make their wishes known to their representatives”).

16 Instead of showing that SKDK caused his ban from Twitter, O’Handley tries to argue
 17 instead that SKDK caused him to receive a “strike,” and that the strike itself was somehow a
 18 cognizable injury of its own. He now claims that his injury is “not limited to his ultimate removal
 19 from Twitter, as the strikes issued against his account also serve to chill protected speech.” Opp’n
 20 2 (citing Compl. ¶¶ 56-57, 68, 74). But O’Handley fails to show how a strike chills speech or could,
 21 by itself, constitute an Article III injury-in-fact. He further undercuts his own claim by alleging that
 22 his number of Twitter followers *increased* after the issuance of his first disciplinary strike. Compl.
 23 ¶ 71. He does not explain how his speech could be “chilled” by a strike when the size of his audience
 24 actually expanded afterward. If O’Handley wanted to allege that the strike, standing alone and apart
 25 from the ban, was a discrete Article III injury of its own, then he should have done that in the
 26 Complaint itself—not in an opposition to a motion to dismiss. *See Lee v. City of Los Angeles*, 250
 27 F.3d 668, 688 (9th Cir. 2001) (“[W]hen the legal sufficiency of a complaint’s allegations is tested
 28 by a motion under Rule 12(b)(6), ‘[r]eview is limited to the complaint.’”).

1 Even if O’Handley had alleged that a single strike chilled his speech, he could not establish
 2 that SKDK is liable for the strike. At bottom, the legal injury O’Handley described in the Complaint
 3 is Twitter’s suspension of his account, and the Complaint does not and cannot explain how SKDK’s
 4 email caused it. O’Handley has failed to allege that SKDK caused him any cognizable injury-in-
 5 fact, and his claims against SKDK must be dismissed.

6 **B. The Complaint does not establish that O’Handley’s purported injuries**
 7 **are fairly traceable to SKDK.**

8 O’Handley’s claimed injury—his suspension from Twitter—is not fairly traceable to
 9 SKDK. Courts have been clear that allegations that “rest on speculation about the decisions of
 10 independent actors” do not satisfy the traceability element of standing. *Clapper v. Amnesty Int’l*
 11 *USA*, 568 U.S. 398, 414 (2013).

12 According to the Complaint, at least *ten* separate intervening events—by three independent
 13 actors other than SKDK, and four actions by O’Handley himself—took place between SKDK’s
 14 email and the Twitter suspension:

- 15 1. An unnamed OEC employee flagged the Tweet to Twitter.
- 16 2. Twitter determined that the Tweet violated Twitter’s internal
 17 guidelines and issued a first disciplinary strike against
 18 O’Handley.
- 19 3. O’Handley published another Tweet that violated Twitter’s
 20 policies.
- 21 4. Twitter issued a second disciplinary strike.
- 22 5. O’Handley published another Tweet that violated Twitter’s
 23 policies.
- 24 6. Twitter issued a third disciplinary strike.
- 25 7. O’Handley published another Tweet that violated Twitter’s
 26 policies.
- 27 8. Twitter issued a fourth disciplinary strike and locked
 28 O’Handley’s account for seven days.
9. O’Handley published another Tweet that violated Twitter’s
 policies.
10. Twitter suspended O’Handley’s account.

O’Handley insists that the attenuated causal link does not matter because the actions were
 all “reasonably foreseeable” results of SKDK’s email, and thus actionable as a conspiracy. Opp’n
 2, 5. Even setting aside the fatal deficiencies in the conspiracy claim, *see infra at 9-10*, a plaintiff

1 cannot use a fact-free conspiracy claim as a glue to attach the actions of others to a defendant.
2 O’Handley alleges five causes of action against SKDK: violations of the First Amendment, Free
3 Speech under the California Constitution, Equal Protection, Due Process, and Conspiracy to
4 Interfere with Civil Rights. Compl. ¶¶ 101-58, 167-76. But “standing is not dispensed in gross.”
5 *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). O’Handley must demonstrate standing
6 for each claim he alleges. *Id.* Although a conspiracy claim may “enlarge the pool of responsible
7 defendants by demonstrating their causal connections to the violation,” it does not “enlarge the
8 nature of the claims asserted by the plaintiff.” *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 935 (9th Cir.
9 2012). O’Handley has no standing to bring his constitutional claims against SKDK because
10 SKDK’s single action—the inclusion of a single Tweet in a briefing to OEC about election
11 misinformation—is too far attenuated from any of his alleged constitutional injuries. *Wash. Env’t*
12 *Council*, 732 F.3d at 1142 (“The line of causation between the defendant’s action and the plaintiff’s
13 harm must be more than attenuated.”).

14 O’Handley’s citations to *Barnum*, *Ocean Advocates*, and *Maya* only further undermine his
15 position. *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011); *Ocean Advocates v. U.S.*
16 *Army Corps of Eng’rs*, 402 F.3d 846, 860 (9th Cir. 2005); *Maya v. Centex Corp.*, 658 F.3d 1060,
17 1070 (9th Cir. 2011). In *Barnum*, the court made clear that a causal link must be more than “tenuous
18 or abstract” and held that a plaintiff satisfied the traceability requirement only where it “alleged
19 specific facts plausibly explaining causality and supported by competent declarations”—a far cry
20 from the bare allegations here. *Barnum*, 633 F.3d at 899, 901. In *Ocean Advocates*, the court
21 explained that causation “cannot be too speculative” and held traceability satisfied only where the
22 plaintiff had alleged increased risk of environmental harm as a direct result of defendants’ planned
23 construction project. *Ocean Advocates*, 402 F.3d at 860. Finally, *Maya* emphasized that “[i]n cases
24 where a chain of causation ‘involves numerous third parties’ whose ‘independent decisions’
25 collectively have a ‘significant effect’ on plaintiffs’ injuries, the Supreme Court and this court have
26 found the causal chain too weak to support standing at the pleading stage.” *Maya*, 658 F.3d at 1070
27 (citing *Allen v. Wright*, 468 U.S. 737, 759 (1984), *abrogated on other grounds by Lexmark Int’l,*
28 *Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)). Further, when the decisions of third

1 parties are “sufficiently uncertain,” that uncertainty “break[s] the chain of causation between the
 2 plaintiffs’ injury and the challenged . . . action.” *Allen*, 468 U.S. at 759. Here, no fewer than ten
 3 intervening events and three independent actors stand between SKDK’s email and O’Handley’s
 4 Twitter suspension. Because that is not sufficient to satisfy the traceability requirement,
 5 O’Handley’s claims against SKDK should be dismissed for lack of Article III jurisdiction. *Maya*,
 6 658 F.3d at 1070.

7 **II. All claims against SKDK should be dismissed for failure to state a cognizable**
 8 **cause of action.**

9 Even if the Court had jurisdiction over this case, it should still dismiss O’Handley’s claims
 10 against SKDK for failure to state a claim. The allegations are unsupported by the facts alleged in
 11 the Complaint and unmoored from the law.

12 **A. SKDK’s email cannot be fairly characterized as state action.**

13 O’Handley’s claims under the First and Fourteenth Amendments, Section 1983, and the
 14 California Constitution each fail because those provisions do not apply to private actors like SKDK,
 15 but only against the government or those acting under color of state law. That SKDK was a state
 16 contractor does not help O’Handley, who fails to confront or engage with the cases particularly
 17 addressing government contractors.

18 O’Handley ignores the differences between the state action analyses under the First and
 19 Fourteenth Amendments and Section 1983 that SKDK pointed out in its motion to dismiss, *see*
 20 Mot. 6-10, and collapses the inquiries into the two-step test discussed in *Lugar v. Edmondson Oil*
 21 *Co.*, 457 U.S. 922 (1982). Under *Lugar*, a plaintiff must show (1) that “the claimed constitutional
 22 deprivation resulted from ‘the exercise of some right or privilege created by the State or by a rule
 23 of conduct imposed by the state or by a person for whom the State is responsible,’” and (2) “whether
 24 the party charged with the deprivation could be described in all fairness as a state actor.” *Naoko*
 25 *Ohno v. Yuko Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013) (citing *Lugar*, 457 U.S. at 937).²

26 ² O’Handley is not correct. *See Collins v. Womancare*, 878 F.2d 1145, 1148 (9th Cir. 1989)
 27 (explaining that “Section 1983’s under-color-of-state-law requirement and the fourteenth
 28 amendment’s ‘state action’ requirement are closely related” but not the same). As explained in the
 Motion, the Complaint does not establish state action under any of the applicable tests. Mot. 6-10.

1 But SKDK is not a state actor under *Lugar* either. O’Handley fails the first half of the *Lugar*
2 test because he does not show that SKDK’s action—flagging his Tweet to OEC as a potential source
3 of election misinformation—is traceable to a right, privilege, or rule of conduct imposed by a
4 government official. O’Handley fixates on the fact that SKDK provided daily briefings in
5 accordance with a contract with OEC, and argues that the contract transformed SKDK’s email into
6 governmental action. Opp’n 2-3. But the Supreme Court has emphasized that private acts “do not
7 become acts of the government by reason of their significant or even total engagement in
8 performing public contracts.” *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982).

9 O’Handley does not respond to or engage with *Rendell-Baker*, which is highly relevant to
10 this case. In *Rendell-Baker*, a private high school received funds from the state and, in turn, was
11 obligated to comply with a variety of regulatory and contractual requirements. *Id.* at 841. Several
12 teachers alleged that their constitutional rights were violated by wrongful terminations and
13 theorized that the contractual and monetary relationship transformed the school’s personnel
14 decisions into state action. *Id.* at 834. The Court disagreed and dismissed the case, observing that
15 although many aspects of school governance were governed by the state, the specific decisions to
16 discharge the teachers were not “compelled or even influenced by any state regulation.” *Id.* at 841.
17 So too here. O’Handley does not argue that the briefing itself somehow deprived him of rights; he
18 claims that it was SKDK’s specific choice to include his Tweet in that briefing that purportedly
19 deprived him of his rights. Compl. ¶ 74. The Complaint does not allege that OEC coerced,
20 encouraged, or required SKDK to include O’Handley’s Tweet, or any other specific content. Like
21 the personnel decisions in *Rendell-Baker*, SKDK’s specific complained-of action was “not
22 compelled or even influenced by any state regulation,” and so no state action is present. 457 U.S.
23 at 840; *see also Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982) (holding that, although the state
24 required a nursing home to perform periodic medical assessments, the assessments themselves did
25 not constitute state action because they “ultimately turn[ed] on medical judgments made by private
26 parties according to professional standards that are not established by the State”).

27 Although that ends the inquiry, O’Handley also fails the second prong of the *Lugar* test.
28 The Supreme Court has articulated four tests for determining whether a private actor can be fairly

1 characterized as a state actor: “(1) the public function test; (2) the joint action test; (3) the state
2 compulsion test; and (4) the governmental nexus test.” *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir.
3 2002). O’Handley argues that his conspiracy claim satisfies the joint action and nexus tests, but his
4 allegations do not come close to meeting the bar. Those tests require “a sufficiently close nexus
5 between the state and the private actor so that the action of the latter may be fairly treated as that
6 of the State itself,” or such a close level of government “interdependence with the private party” to
7 the point where it is “a joint participant in the enterprise.” *Rawson v. Recovery Innovations, Inc.*,
8 975 F.3d 742, 748 (9th Cir. 2020), *cert. denied*, No. 20-1287, 2021 WL 4507633 (U.S. Oct. 4,
9 2021). Specifically, that “require[s] a substantial degree of cooperation,” *Franklin*, 312 F.3d at 445,
10 with respect to the “particular decision challenged,” *Mathis v. Pacific Gas & Electric Co.*, 75 F.3d
11 498, 503-504 n.4 (9th Cir. 1996). O’Handley never alleges that any government official had
12 anything to do with SKDK’s decision to include O’Handley’s Tweet in its briefing, let alone that
13 any official substantially cooperated in that choice. Besides O’Handley’s conclusory statements,
14 which this Court need not consider, not a single alleged fact demonstrates that SKDK and
15 government actors specifically agreed to “violate constitutional rights.” *Fonda v. Gray*, 707 F.2d
16 435, 438 (9th Cir. 1983). Because the Complaint fails to plausibly allege that SKDK’s email was
17 an action of the State of California, O’Handley’s claims must be dismissed.

18 **B. The Complaint does not establish facts that, if true, would support the**
19 **remaining claims.**

20 For the plaintiff to survive a motion to dismiss, the complaint must contain “enough facts
21 to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
22 (2007). “Plausibility” requires more than a “sheer possibility that a defendant has acted
23 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Moreover, conclusory allegations “do
24 not suffice.” *Id.* at 678. O’Handley fails to meet that standard here.

25 **Conspiracy.** O’Handley has no credible theory that SKDK’s email directly inflicted legally
26 actionable harm on him. Instead, his theory of SKDK’s liability hinges entirely on his conspiracy
27 claim. Under O’Handley’s theory, SKDK’s email *indirectly* harmed him by forming the first
28 domino in a chain of events that led to his ultimate legal injury—his eventual suspension from

1 Twitter. He presents conclusory allegations that SKDK, OEC, NASS, various members of the
2 California government, and Twitter intentionally orchestrated these events to silence him. Compl.
3 ¶¶ 3, 69, 98-99; *see also* Opp’n 2, 4.

4 But these allegations do not present a valid conspiracy claim. To state a conspiracy claim
5 under Section 1985, “a complaint must allege (1) a conspiracy, (2) to deprive any person or a class
6 of persons of the equal protection of the laws, or of equal privileges and immunities under the laws,
7 (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury,
8 property damage or a deprivation of any right or privilege of a citizen of the United States.”
9 *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980) (citing *Griffin v. Breckenridge*, 403 U.S. 88,
10 102-03 (1971)). To be liable for conspiracy, each participant “must at least share the common
11 objective of the conspiracy.” *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539,
12 1540–41 (9th Cir. 1989) (en banc). “A mere allegation of a conspiracy without factual specificity
13 is insufficient.” *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1039 (9th Cir. 1991).

14 O’Handley’s Complaint and response are heavy on rhetoric and light on facts; his actual
15 allegations about SKDK’s participation in that purported conspiracy are conclusory and do not meet
16 minimum pleading standards. He claims that he “was injured by the foreseeable consequences of
17 the Defendants’ conspiracy, whose objectives SKDK both agreed to and contributed overt acts
18 towards.” Opp’n 2. He cites paragraphs 56, 57, 68, and 74 of his complaint, but those paragraphs
19 offer no facts showing the existence of a conspiracy or an agreement to its supposed objectives. *See*
20 Compl. ¶¶ 56 (failing to allege that SKDK shared a common objective with other Defendants to
21 intentionally deprive anyone of their constitutional rights), ¶ 57 (same), ¶ 58 (same), ¶ 59 (same).
22 Further, the single alleged “overt act” by SKDK—emailing the briefing to OEC—involved no other
23 Defendants and did not even include a request that O’Handley’s Tweet be removed. *See* Compl.
24 Ex. 6. Without any non-conclusory allegations that SKDK had a meeting of the minds with the
25 other Defendants with the shared goal of depriving him of his constitutional rights, O’Handley has
26 failed to plead a conspiracy under Section 1985.

27 O’Handley’s conspiracy claim also fails for a separate, independent reason: SKDK’s email
28 violated none of O’Handley’s substantive rights, and thus cannot be a basis for a conspiracy claim.

1 *Infra* at 10-12. “Section 1985(3) provides no substantive rights itself; it merely provides a remedy
 2 for violation of the rights it designates.” *Great Am. Fed. S & L Ass’n v. Novotny*, 442 U.S. 366, 372
 3 (1979). Thus, if a plaintiff’s “allegations are insufficient to support a claim based on a violation of
 4 his constitutional rights,” then “his allegations of a conspiracy to violate these constitutional rights
 5 do not state a claim.” *Pelozo v. Capistrano Unified School Dist.*, 37 F.3d 517, 523-24 (9th Cir.
 6 1994). Because O’Handley does not adequately plead that SKDK’s email inflicted constitutional
 7 harm on him, *infra* at 10-12, his conspiracy claim likewise fails.

8 **Freedom of Speech.** O’Handley’s argument for liability under the federal and state free
 9 speech guarantees also fails. Consistent with federal interpretations, California courts have
 10 emphasized that “[a] person’s free speech rights under the federal and state constitutions are not
 11 infringed unless there is state action.” *Yu v. Univ. of La Verne*, 196 Cal. App. 4th 779, 790 (2011);
 12 *see also Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 26 Cal. 4th 1013, 1031 (2001)
 13 (plurality op.) (“Neither the text of California’s free speech clause nor California case law reveals
 14 an intent to depart from the bedrock principle” of requiring state action) (cleaned up). But SKDK
 15 is not a state actor. *Supra* at 6-8.³

16 Moreover, the Complaint fails to establish that SKDK’s email did—or even plausibly
 17 *could*—violate his federal or state speech rights. O’Handley passionately, if wrongly, argues why
 18 *Twitter* should be considered a state actor and why *Twitter* purportedly violated his speech rights.
 19 Opp’n 8. But he fails convincingly to argue why *SKDK* violated those rights. Here, again, he leans
 20 on his conspiracy claim, arguing that the deprivation of rights was a “reasonably foreseeable result
 21 of the conspiracy” and thus SKDK is liable for *Twitter*’s actions. *Id.* His speech claim thus rises
 22 and falls on his conspiracy claim. Because his conspiracy claim fails, *infra* at 9-10, his speech claim
 23 fails, too.

24 _____
 25 ³ O’Handley disputes the state-action requirement by relying on a case that pre-dates the
 26 holding in *Golden Gateway*. *See* ECF No. 69 at 13 n.6 (citing *Gerawan Farming, Inc. v. Lyons*, 24
 27 Cal. 4th 468, 492 (2000)). He does not mention *Yu* at all, or explain why the California Supreme
 28 Court would have denied review if it felt that the Court of Appeals had wrongly interpreted
 California law on such a profoundly important constitutional question. *See Yu*, 196 Cal. App. 4th
 at 790 (citing *Golden Gateway* for proposition that state action is required) (review denied Sept.
 14, 2011).

1 As further explained in the Motion, government can constitutionally characterize speech,
2 even with unfavorable labels, as long as it does not burden or silence the speech. *See* Mot. 11 (citing
3 *Meese v. Keene*, 481 U.S. 465, 478, 480 (1987)). Without any allegation that SKDK actually
4 prohibited, chilled, burdened, penalized, or silenced any speech on behalf of the State, O’Handley’s
5 free speech claim must be dismissed.

6 **Equal Protection.** The Equal Protection Clause forbids the government from “deny[ing] to
7 any person within its jurisdiction the equal protection of the laws.” *City of Cleburne v. Cleburne*
8 *Living Ctr.*, 473 U.S. 432, 439 (1985). Setting aside the fact that SKDK is not the government,
9 O’Handley’s claim fails because he does not allege that he is a member of an identifiable group that
10 was treated differently or intentionally discriminated against—nor that the treatment lacked a
11 rational basis. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

12 Although O’Handley’s Complaint appears to plead a “class-of-one” equal protection claim,
13 Mot. 12-13, his response again resorts to a post-hoc re-write of the Complaint. He now asserts that
14 the Complaint “alleges that SKDK conspired to deprive him of his constitutional rights based on
15 his conservative political affiliation.” Opp’n 13. But O’Handley alleged in the Complaint that he
16 suffered discrimination “based on his viewpoint.” Compl. ¶ 142. He fails to say how this places
17 him within a federally protected class or even a readily identifiable group, and this failure puts him
18 at odds with binding precedent. *See United Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S.
19 825, 834-36 (1983) (noting that political, non-racial conspiracies are likely not actionable); *Schultz*
20 *v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (holding that an alleged class did not suffice where
21 there was no “governmental determination that such a class merits special protection”).
22 O’Handley’s Complaint falls far short of his obligation to show that SKDK specifically and
23 intentionally discriminated against him or any federally protected class, let alone that SKDK did so
24 under the guise of the government. *Barren*, 152 F.3d at 1194. And even setting aside those critical
25 failures, SKDK’s action would still pass constitutional muster because the email was sent in
26 furtherance of a rational, even compelling, state interest: ensuring the integrity of the state’s
27 elections. Compl. ¶ 64 (noting that OEC’s goal was “to increase voter awareness about election
28 misinformation online and provide official, trusted election resources”); *Burson v. Freeman*, 504

1 U.S. 191, 199 (1992) (recognizing a state’s interest in protecting the integrity of elections). This
2 claim should be dismissed.

3 **Procedural Due Process.** O’Handley’s due process claim fails because a Twitter account
4 is not a constitutionally protected property interest. *See* Compl. ¶¶ 150-51. His arguments to the
5 contrary have been repeatedly rejected, including by this very circuit. *See, e.g., WMX Techs., Inc.*
6 *v. Miller*, 197 F.3d 367, 376 (9th Cir. 1999). Even if a Twitter account could serve as a property
7 interest for procedural due process purposes, O’Handley still cannot establish that SKDK was
8 responsible for his Twitter suspension given that ten intervening actions by independent actors—
9 including four actions taken by O’Handley himself—led to that suspension. *Supra* at 4-6. His claim
10 fails and must be dismissed.

11 CONCLUSION

12 For the reasons stated above, the Court should dismiss all claims against SKDK.
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