

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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TANYA ZUCKERBROT MS RD, TANYA ZUCKERBROT
NUTRITION, LLC, D/B/A/ F-FACTOR

INDEX NO. 655110/2020

Plaintiffs,

MOTION DATE 12/23/2020,
02/26/2021

- V -

MOTION SEQ. NO. 002 003

EMILY GELLIS LANDE,

Defendant.

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 27, 28, 33, 34, 35, 36, 37, 38, 44, 46, 50, 56, 57, 60

were read on this motion to

DISMISS COMPLAINT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 45, 47, 48, 49, 51, 52, 58, 59, 61

were read on this motion to

DISMISS COUNTERCLAIM

Over the course of 75 days in 2020, Defendant Emily Gellis Lande (“Gellis”), an Instagram “influencer,” published over 4,500 Instagram posts assailing Plaintiffs Tanya Zuckerbrot and Tanya Zuckerbrot Nutrition, LLC, d/b/a/ F-Factor (“F-Factor” and, collectively, “Plaintiffs”). This barrage of posts leveled serious, specific accusations against Plaintiffs, often in intensely personal and vulgar terms. Gellis claimed, among many other things, that F-Factor products contained harmful ingredients, that the diet caused severe health problems, that F-Factor suppressed consumer complaints and engaged in unlawful activity, and that Zuckerbrot personally “sen[t] people” to harm or harass Gellis. The statements were broadcast to Gellis’s

growing audience of Instagram followers – at least 200,000 of them – and attracted the attention of mainstream media outlets.¹ Plaintiffs allege that Gellis’s accusations are simply false.

According to Plaintiffs, Gellis’s unfounded attacks caused “enormous financial harm, reputational damage, and devastating emotional distress.” F-Factor’s monthly revenue plummeted from over \$1 million to \$90,000. Plaintiffs filed this action asserting claims against Gellis for defamation, product disparagement, deceptive trade practices, intentional infliction of emotional distress, and civil harassment. Gellis filed a counterclaim seeking to recover damages from Plaintiffs for filing this lawsuit as a strategic lawsuit against public participation (“SLAPP”) in violation of New York’s recently amended anti-SLAPP law.

Gellis moves to dismiss Plaintiffs’ Complaint, and Plaintiffs move to dismiss Gellis’s counterclaim. For the reasons set forth below, Defendant’s motion to dismiss is **granted in part and denied in part**, and Plaintiffs’ motion to dismiss Defendant’s counterclaim is **granted**. In summary:

Plaintiffs state viable claims for defamation and product disparagement. They sufficiently allege that Gellis made or republished false statements with actual malice – that is, with knowledge of their falsity or with reckless disregard of whether they were false. Although the First Amendment gives Gellis broad freedom to express her thoughts and opinions, vulgar or otherwise, she does not have legal immunity to publish false factual information about people or products under the gauzy cloak of being “authentic” and “raw.” Of course, whether some or all of her statements were indeed false is a fact question that cannot be decided on this motion.

¹ See NYSCEF 22 [Katherine Rosman and Abby Ellin, *The Great Diet Crash: A crusade against Tanya Zuckerbrot’s F-Factor diet*, NY Times, Aug. 24, 2020].

Plaintiff's claims asserting that Gellis engaged in deceptive trade practices, intentional infliction of emotional distress, and civil harassment are dismissed, as is Gellis's anti-SLAPP counterclaim.

FACTUAL BACKGROUND²

A. Zuckerbrot, F-Factor, and Gellis

Zuckerbrot is the creator of the "F-Factor Diet," "a groundbreaking dietary program focused on high-fiber foods" (Compl. ¶¶ 3, 35 [NYSCEF 1]). She is an internationally-known dietitian, the author of two bestselling books endorsing the health benefits of fiber, an advisor in private practice to thousands of clients, including celebrities, business, and government leaders, and is also a lecturer, consultant, spokesperson, and national media personality to boot (*id.* ¶ 3). Zuckerbrot's company, F-Factor, helps support Zuckerbrot's efforts to promote the F-Factor diet (*id.* ¶ 50). Among other things, the company manufactures high-fiber protein powders and protein bars for customers following the F-Factor diet (*id.* ¶¶ 52-53). Before the controversy that gave rise to this action, F-Factor was generating over \$1 million in revenue per month (*id.* ¶¶ 4, 58). For purposes of this motion, Plaintiffs assume that they are "public figures," but preserve their right to challenge that classification — which is important to the assessment of defamation claims under the First Amendment — later in the proceedings (*see* NYSCEF 38 at 18 n.5).

Gellis is an Instagram influencer using the handle @emilygellis (*id.* ¶¶ 1, 25). An influencer is a social media personality who shares his or her daily life online with their followers (Gellis Decl. ¶ 4 [NYSCEF 21]), and uses that account to promote brands or products

² The following statement of facts is based primarily on the factual allegations in the Complaint, which are taken to be true solely for purposes of this motion to dismiss (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]).

in exchange for compensation (Compl. ¶ 25). For Gellis, in other words, this is a business. Being an influencer is “basically [her] full-time profession” (Gellis Decl. ¶¶ 2, 4). She generates income through paid advertisements with brands on her Instagram site, and through sharing fashion “picks” for which affiliate retailers pay her a commission (*id.* ¶ 4; *see* Compl. ¶ 25). Gellis says that her account is regularly viewed by more than 200,000 followers, a number she compares to the print circulation of several large daily newspapers (Gellis Decl. ¶ 2 n.1). According to Gellis, her Instagram account is “more and more becoming a source of ‘news’-like information” (*id.* ¶ 6), served up “authentic, honest, and raw” (*id.* ¶ 8; *see id.* ¶ 7 [“Although I do not have formal training in journalism, my entire career on Instagram is based on my followers trusting my recommendations, as well as other information that I provide.”])).

B. Gellis’s Campaign against F-Factor and Zuckerbrot

Beginning in mid-July 2020, Gellis has made (and, as of the filing of the Complaint, continued to make) numerous social media posts stating, or claiming that she has evidence to show, that the F-Factor diet and associated products are unsafe and that Zuckerbrot and F-Factor concealed safety information from clients and ignored concerns about product safety (*id.* ¶ 60). “Numerous” may be understating it. In just 75 days, Gellis published over 4,500 posts condemning the F-Factor diet, the F-Factor company, and Zuckerbrot personally (*id.* ¶ 1). This online onslaught can be divided, broadly, into three kinds of statements.

1. Statements about F-Factor Products

Many of Gellis’s Instagram posts attacked F-Factor products, claiming they were harmful and the cause of serious illnesses in women, even death. Plaintiffs allege that all of these statements are false and defamatory (*see id.* ¶¶ 60-72). For example, on July 22, 2020, Gellis posted that she had evidence that the F-Factor diet caused eating disorders and had “crippling

effects” on mental health (*id.* ¶ 61). She published the following statement, attributed to an anonymous Instagram user:

I did f factor before my wedding and lost 13 lbs in like 7 weeks. I am thankful that I didn’t have last damaging effects on my body like some of these women but I had crippling effects on my mental health. I spent my honeymoon in Italy and I cried after eating pasta bc I kept doing this f factor math in my head. I was at my lowest weight and refused to look at myself in the mirror in a bathing suit after a pasta dinner. Think it definitely gave me disordered eating and I am so sad it robbed me of those amazing moments.

(*id.*).

Then on August 5, Gellis accused F-Factor of deleting customer complaints and trying to conceal information:

To turn a conversation about people who have been harmed by your products and turn it into a conversation about cyber bullying is a low low I didn’t expect to see the f factor team go. You might not have liked how people tried to get your attention creating spam accounts but that’s because you kept blocking—deleting—and trying to silence them...stop attempting to manipulate the Story.

(*id.* ¶ 62).

The next day, on August 6, Gellis posted the following from an anonymous Instagram user: “I became very ill in March after following F-Factor for three months (GGs, powders, bars and all). I literally shit myself a few times a day and couldn’t keep any food down for two weeks. No lie” (*id.* ¶ 63).

On August 18, Gellis posted another statement from an anonymous Instagram user:

I miscarried 9 weeks & they said there were high traces of lead in my blood that could have been the reason I miscarried. I never even thought about the powders/bars etc. I hired a specialist to come to my apartment for \$10K and run all these crazy tests thinking maybe there was a lead based paint in my apartment as we live in a coop and I’m sure you know the apartments are so old! I am freaking out. ***I had a miscarriage because of these damn powders.*** I cried all week reading these as I put 2 and 2 together. I remember the doctor saying after the miscarriage, your blood work came back and there was something very odd.... You have high

levels of lead. I am beside myself. I never would have known – one of my friends said to me – did you hear what’s going on with TZ/FFactor? She knew I went....

(*id.* ¶ 64 [emphasis added]).

On August 21, Gellis posted the following from someone who identified him- or herself as a Physician Assistant and Registered Dietitian:

Been looking in to the FFactor protein. “Organic Guar Gum” is the second ingredient listed- this has been banned in a lot of countries and at one point was banned in the US. It basically slows down emptying and digestion by the gallbladder and creates “steatosis” and essentially can cause fatty liver disease which would explain the elevated liver enzymes and gallbladder attacks people are having on it[.]

(*id.* ¶ 65).

On August 26, Gellis herself stated:

We have victims with their colons removed. Victims with rashes + hives. Victims with severe Gastro pain leading to hospital visits. Victims with kidney stones + hernias. What gives? DEMAND JUSTICE NOW DEMAND YOUR \$ back. Demand a COA. Enough of the bullying silence culture! I want to see you guys on top.

(*id.* ¶ 66).

And on August 30, Gellis wrote:

My final thoughts for today, truly, what is the fair punishment for encouraging women and pregnant women to ingest arsenic and fucking massive amounts of guar gum protein powder four times a day? You decide. I love it, now. Now all the DMs: This person just a nice girl and she’s a nice pregnant girl, why are you attacking her? I’m not attacking her. ***Why is she telling women and pregnant women that they should eat arsenic and guar gum in massive amounts, four times a day?*** Why would a nice person do that? What’s nice about that? Hm? What’s nice about that? So let me ask you something, it’s OK for you to suggest it to other people and hurt them, right?

(*id.* ¶ 67 [emphasis added]).

Then on September 6, Gellis implied that someone had died as a result of consuming F-Factor products:

I feared the day would come when I would heard [sic] a story about someone who died. Yesterday, I heard from someone, about their client who was bowel obstructed. She was obsessed with this diet. She was in her fifties. She is no longer with us.

This was followed by a video in which Gellis continued to speak about the death (*id.* ¶ 68).

The next day, on September 7, Gellis posted another statement from an anonymous Instagram user, this time linking F-Factor products to anxiety and panic attacks: “I have to say I stopped the powders when I first messaged you on August 16th. And I have to say I stopped having anxiety and daily panic attacks” (*id.* ¶ 69). Gellis added: “Wow” (*id.*).

The drumbeat of criticism continued on September 8, when Gellis posted that she had evidence that F-Factor products would “destroy” the intestinal lining of those who consumed them:

That’s what is called green washing and it’s a marketing tactic her products aren’t even organic and the whey isn’t grass fed sooo yum!!!... Love eating glyphosate. That will destroy your intestinal lining Would love to see the amount of pesticides residue on that coa....

(*id.* ¶ 70).

On October 1, Gellis posted that she had evidence that F-Factor products caused a heart attack:

Today I met a healthy 44-year old woman at Kyma. She said she had wanted to write me forever but instead told me yesterday. She had a heart attack at 44 years old. Perfectly healthy woman. She also was broken out in hives. ***What she believed led to it? F Factor protein powder she only stopped eating it once I exposed the diet.*** She said she feels great now.... But seriously people when will you realize the diet industry is about \$\$\$\$ not your health?

(*id.* ¶ 71 [emphasis added]).

2. Statements about the F-Factor Company and Employees

Gellis's Instagram posts also took aim at the F-Factor company and its employees. On August 4, 2020, for instance, Gellis posted a video in which she claimed that F-Factor required employees to sign nondisclosure agreements:

Ask yourself that question, why do they—why do they want us to sign an NDA to work at F-Factor? You don't have to sign an NDA to work with me.... We're not talking about, like, working with the Kardashians here, you know, like we have to sign an NDA. You know, normal people, regular life, nothing to hide, you don't have to sign an NDA to work for me, no worries. Why do you have to sign an NDA to work there? What the fuck goes on there that you got to hide?

(*id.* ¶ 80).

In another post on August 24, Gellis urged the Miss Universe pageant to sever ties with F-Factor (Zuckerbrot has been the Official Dietitian for the organization for more than ten years) based on her allegations about the safety of F-Factor products (*id.* ¶ 81).

On August 25, Gellis suggested that F-Factor and F-Factor dietitians had engaged in criminal activity, prescribed unsafe diets, and violated the Health Insurance Portability and Accountability Act ("HIPAA") by disclosing clients' personal records:

I hope to see f factor and their dietitians behind bars. That's where they belong. ***Prescribing diets that are single handedly sending women to the emergency room every week.*** HIPAA violations of clients personal records. Glamorizing diet culture and pushing powder, dangerous powder !! To the special dietitians there who had their relative plant a fake miscarriage story, I didn't know such sick fucks like you exist. Now I know. ***As you may have been able to tell I am a wonderful opponent - one who doesn't back down - I'll rest when you are behind bars.***

(*id.* ¶ 82 [emphasis added]). Plaintiffs say these allegations are false and defamatory (*id.*).

Following up on that post, on August 27 Gellis purported to list in detail F-Factor's HIPAA violations:

Violations 1. Hippa [sic] Violation sharing personal client records with NYT. 2. FTC violation deleting comments. 3. Lies about #of complaints (claims only 50 in

176,000 purchase order [sic]) 4. Lies on diets starts tomorrow podcast about treating patients with eating disorder 5. Lies about COA being proprietary 6. Refused to release COA.

(*id.* ¶ 83). Plaintiffs say each of these purported “violations” is a false statement (*id.*).

That same day, Gellis continued her vocal efforts to convince other companies to break ties with F-Factor. She publicly called on Bloomingdale’s to stop carrying F-Factor products based on her allegations about the safety of F-Factor products (*id.* ¶ 84). Gellis again urged Bloomingdale’s to stop carrying F-Factor products on September 1, when she posted an advertising photo of F-Factor 20/20 Fiber/Protein powder with the caption “@bloomingdales @fortycarrots don’t pretend you haven’t heard this story” (*id.*). A week later, Gellis urged @theskinnyconfidential, another Instagram influencer account, to retract its prior promotion of F-Factor based on her allegations as to the safety of F-Factor products (*id.* ¶ 85).

Then on September 12, Gellis posted a photo of Jessica Rossman, F-Factor’s Director of Communications & Marketing, posing with a bag of F-Factor Fiber/Protein powder (*id.* ¶ 86). Gellis questioned Rossman’s role at the company, saying, “I feel it’s important to note her role here” just before posting a video of herself listening to the song “Cocaine” by Eric Clapton, with a photo of the album cover and song name, then “Adderall” by Almighty, MyM, with a photo of the album cover and song name (*id.*). Plaintiffs say the implication intended by these posts – that Rothman’s position at F-Factor involves selling or using drugs – is false and defamatory (*id.*).

On September 15, Gellis again stated that F-Factor concealed complaints about its product:

When they go on national television... And tell you all... They’ve only received 50 complaints.... This isn’t even ¼ of them.

(*id.* ¶ 87).

All of the statements above, Plaintiffs say, are false and defamatory.

3. Statements about Zuckerbrot

Gellis reserved some of her most vituperative – and profane – comments for Zuckerbrot herself. One recurring theme in Gellis’s broadsides against Zuckerbrot is Gellis’s conviction that F-Factor – or Zuckerbrot – was “sending people” to harass, intimidate, or harm Gellis. Case in point, on August 6, Gellis fumed:

Can you imagine the gall? The gall. The F-Factor team is sending people to harass me on my page about my mental health. Those DMs are no coincidence, sending people to my husband’s page to tell him not to procreate with me because I’m bat shit crazy. And you’re telling me I owe you an apology? Get the fuck out of here. And when you land back on planet mother fucking Earth, let me know because, bitch, everyone is fucking watching and the gig is up. The curtain is pulled, the shtick is over, however you want to call it. Everyone sees you people for what you are. Shameless, disgusting, narcissistic bullies. And nobody likes it. You’re sick. This is a sickness. You want an apology for me? Go fuck yourself.

(*id.* ¶ 99).

Continuing with this theme, on August 12 Gellis posted that she heard from other sources that Zuckerbrot and her family would “send people to physically harm” her:

I’ve heard from several people that I should be scared for my life, that F-Factor and Co., wife, husband, will stop at nothing. That they will physically send people to physically harm me. So you guys can all be my witnesses, thousands of you watching, if something happens to me over me sharing this story, you’ll know exactly where it came from and then you can be the witness to my story.

(*id.* ¶ 89). Again that day: “Wow. F factor. you are disgusting. Sending trolls for me again. You are the definition of losers” (*id.* ¶ 100). Again on August 13: “Tanya, you’re a loser cyber bully who is poisoning people on the daily. Worry about yourself fool” (*id.* ¶ 90).

And again on August 19:

You [i.e., Zuckerbrot] want to send people to harass me 24/7. I haven’t sent one person to your account because I don’t need to. The stories speak volumes... But here’s the deal, if I get one more message from an anonymous account, threatening

me, stalking me out and harassing me, *I'm coming for you criminally. We will meet you in court and the world will watch.* Your move. Stop being a damn fool...In your famous words, “everything on the internet has a digital footprint”. Oh yes, yes it does. And that goes for your assistant – for your nanny – for your staff. For every single one of them who reached out to me. *I will pursue you criminally for damages – for harassment.* Buckle up, it’s gonna be a bumpy ride!

(*id.* ¶ 91 [emphasis added]).

On August 25, Gellis posted a photograph of Zuckerbrot that she edited to draw an orange prison jumpsuit onto Zuckerbrot and captioned it, “How you will loook [sic] behind bars!” (*id.* ¶ 92). Later the same day she posted: “These girls deserve justice! And justice will be tanya zuckerbrot behind bars” (*id.* ¶ 93).

On August 30, Gellis posted a video alleging, yet again, that Zuckerbrot sent people to follow and intimidate her:

We’ve been in this for almost a month now. I’m sorry. How much more of my life do I need to sacrifice for this woman to be honest? And literally, this is just the fact, I can’t control that they only like playing dirty, like they don’t want to play nice. They want to play dirty, like they’re sending fucking Mossad people to follow me in the street in East Hampton and like, guys, what do you want me to do? You don’t want me to fucking talk? I’m going to talk. And this is the only thing that gets them to respond. This is not my choice. So make yourself fully aware of that. This is not my decision, OK? This is how they like to play. So I am going to play with them in the same sandbox.

(*id.* ¶ 94).

August 30 turned out to be particularly eventful. In the morning, Gellis posted:

Where the fuck are you? Why the fuck are you on Instagram every fucking day you’re on Instagram making your fucking coffee and you’re fucking smoothies and you’re fucking and now all of a sudden you’re not fucking there. So where the fuck are you, OK? Where are you? We all want to know, where are you? Are you still eating the powder or did you decide to—no more powder? Were you ever eating the powder or were you just selling the powder to people? What are you doing? What are you doing? Are you enjoying your last moments of freedom? I’m sorry, what are you doing? Where are you? RESPOND!

(*id.* ¶ 103).

That afternoon, Gellis lashed out at Instagram users who responded negatively to her morning post and suggested that F-Factor's products were poison:

You know what's so funny, all these people that are writing me that I sound unhinged. I sound unhinged? There's a woman that's been selling fucking packaged poison and getting hundreds of thousands of people to buy it. Now that she got caught, she's gas lighting me and I'm unhinged? Literally, go fuck yourself.

(*id.* ¶ 104).

Later that same afternoon, Gellis compared her campaign against Zuckerbrot to the government investigations of Harvey Weinstein and Jeffrey Epstein, stating, "There are fucking FBI agents on fucking Harvey Weinstein and Jeffrey Epstein for fucking years. Look what I've done in four weeks, OK?" (*id.* ¶ 105).

That evening, Gellis trained her fire on a pregnant F-Factor dietitian who had posted, on her own Instagram page, a photograph of a slice of pizza:

[D]o you feel that the former dietitians of Factor and the current dietitians of FFactor deserve to go down? Or does all the blame fall on one person? Like, you guys follow these people, they've never posted a fucking slice of pizza. So here's the problem, they fucking sell you on eating high fiber all day long. So it's like either they've been lying to you about what they actually eat. Either way, they're lying to you because they never show you pizza, all of a sudden they're telling you to eat pizza? Like again, like they actually think you guys are stupid. Like, I hope you go and fucking spam that post and write, like, "do you think we are fucking stupid?"

(*id.* ¶ 106).

About one hour later, Gellis suggested that F-Factor was harming unborn children:

This is the only question I have for you, you shameful human beings. Are you ingesting the arsenic powder, while you're pregnant? You know, the same arsenic powder that you're recommending and telling everyone on the Internet is safe? So you post about it, but are you drinking it? Is your future going to be impacted by the arsenic powder?

(*id.* ¶ 107).

Around 10:00 p.m., Gellis doubled down on her assertions that F-Factor was poisoning pregnant women:

My final thoughts for today, truly. What is the fair punishment **for encouraging women and pregnant women to ingest arsenic** and fucking massive amounts of guar gum protein powder four times a day? You decide.... **Why is she telling women and pregnant women that they should eat arsenic** and guar gum in massive amounts four times a day? Why would a nice person do that? What's nice about that? Hm? What's nice about that? So let me ask you something, it's OK for you to suggest it to other people and hurt them, right?

(*id.* ¶ 108 [emphasis added]).

The following day brought more of the same, with Gellis threatening Zuckerbrot: “Oh, and one more thing. On the mother fucking record. Tanya, i forgive you for calling me ‘the girl who just sells clothes’ in the New York Times. Boy are you going to fucking eat those words” (*id.* ¶ 109).

On September 2, Gellis stated that Zuckerbrot’s family had “attack[ed] [her] in public,” and added: “You guys are disgusting cowards and I hope the criminal justice system does its job. Fuck you, Your [sic] scum” (*id.* ¶ 110).

On September 8, 2020, Gellis stated that Zuckerbrot had “shamed” her for her mental health struggles, and continued: “For me there is nothing lower than shaming someone’s mental health struggles.... Tanya you are despicable. You are the scum of the earth. I hope we come face to face one day so I can stare you right in the eyes and tell you what a bottom feeder you are” (*id.* ¶ 111). Gellis also stated: “I’m nauseated that you have profited off this cult like mentality for so long. Preying on women and their vulnerabilities for your own personal gain” (*id.*).

On September 9, when she noticed that Zuckerbrot was sharing a video on Zuckerbrot's own Instagram page, Gellis stated: "Of course, she started a live. She's trying to steal my thunder. What a hoe. You's a hoe. You's a ho ho ho ho ho, ho, ho. Merry Christmas" (*id.* ¶ 112).

On September 10, Gellis wrote: "Tanya Zuckerbrot has gas lighted 10,000 plus victims on @todayshow and on her Instagram," "I have learned how dark it can be to develop disordered eating . . . the founder will not apologize to you," and "Tanya... go FUCK YOURSELF. Quote me" (*id.* ¶ 113).

On September 11:

There is the element of bullying and stalking and harassment and defamation or blackmail about my life, threats to kill my family, that elevate the story to a different level. ***Why threaten to kill my family over a diet?*** When you look at it on that basis alone, it's completely illogical. ***Why would anyone threaten to kill my mother, or my father, or my sister over a diet?*** It doesn't even make sense...

(*id.* ¶ 95 [emphasis added]).

On September 30:

Tanya Zuckerbrot has sent hundreds of people to the hospital, hundreds of people to the hospital from going on F-Factor, OK?

(*id.* ¶ 96).

That same day:

Where is Tanya Zuckerbrot? I don't know... Tanya has gone silent. It was her birthday I heard yesterday. Total silence. One post for Rosh Hashanah, one post for Yom Kippur, taking a picture of Central Synagogue. Good for you. No fucking amount of praying can save her, um, from all the horror—horror—that she's done.

(*id.* ¶ 114).

Again the same day:

Tanya Zuckerbrot is the worst example to young women.... Everything in life does not depend on your fucking size and how, how much money you have. And those are the two things that [she] strive[s] for. Be skinny, be rich. If you live your life

according to [her], those are the only two things you'll ever strive for. Oh, maybe famous. Be skinny, rich and famous. Fuck off. Fuck you. You're [a] fucking horrible example to women.

(*id.*).

Still the same day:

Going to lunches all the time and drinking in the middle of the day. Dude, don't you have children to take care of? Like, what are you doing? Like, what are you doing? Drinking and eating lettuce? And this is like your diet and you're like a leading example on health and fitness for the world? Get the fuck out of here. Give me a break. I swear, it's soooooo crazy. I mean, it's really crazy. It's nuts.

(*id.*).

And finally on October 5:

And me saying that I think that Tanya belongs in jail? ***I will stand behind that until the day that I die. She hurt people. She had people in the hospital, physically sick.*** I mean, she still remains the worst of the worst as far as all these stories go. ***People losing their colons, people having hives all over their body, distended stomachs, like, somebody even died. It's—may have been a cause of it.*** A heart attack at 45 years old. Now, you tell me that this person should be walking the street? I mean, maybe if she would have agreed to take the products off the market, we wouldn't be having any of these discussions. But she chose not to do that. That was her decision. She's an adult. I can't, I can't help that. So I believe it's my opinion in America that somebody like that belongs in jail.

(*id.* ¶ 97 [emphasis added]).

Plaintiffs allege that all of these statements are false and defamatory).

C. The Alleged Harm to Plaintiffs

As this war of words unfolded online, Plaintiffs sought to do damage control. In August 2020, F-Factor posted multiple messages on its Instagram page defending the safety of its products (*id.* ¶¶ 74-76). On August 27, Zuckerbrot appeared on national television, on *The Today Show*, where she again defended the F-Factor diet and F-Factor products (*id.* ¶ 77). (According to the Complaint, “NBC independently reviewed F-Factor’s Certificate of Analysis in advance of

the interview and confirmed that the levels of all naturally occurring compounds listed on the Certificate were safe for consumption.” (*id.*). And in September, F-Factor issued a press release announcing the launch of a new page on F-Factor’s website called *Correcting the Record*, on which it posted information about F-Factor products in response to the statements made by Gellis (*id.* ¶ 78). For example, in response to Gellis’s repeated assertions that F-Factor products contain “guar gum,” F-Factor stated that its products contain “partially hydrolyzed guar gum,” which it maintains is “a safe and healthy source of fiber” (*id.*).

Nonetheless, Plaintiffs allege that Gellis’s social media crusade has caused “enormous financial harm, reputational damage, and devastating emotional distress” (*id.* ¶ 117). They allege that F-Factor’s monthly sales revenue has dropped from approximately \$1 million per month to less than \$90,000 per month, specifically as a result of Gellis’s social media activity (*id.*). Plaintiffs also allege lost investment opportunities and other economic harms totaling “tens of millions of dollars in damages” (*id.*). In addition, Plaintiffs allege serious reputational damage resulting from Gellis’s statements, which were broadcast to over 200,000 followers on Instagram (and available to view by any of Instagram’s 1 billion users) and reported by major mainstream publications, including *The New York Times* (*id.* ¶¶ 118, 125). And Zuckerbrot is also alleged to have suffered severe emotional distress, including anxiety, panic attacks, and a fear for her safety (*id.* ¶ 119).

Gellis, on the other hand, has allegedly profited. As an Instagram influencer, Gellis is more valuable to brands the more followers she can attract (*id.* ¶ 25). And since launching her attacks against Plaintiffs in 2020, Gellis has gained nearly 50,000 followers, not to mention the publicity she has garnered from media coverage of the dispute (*id.*). Therefore, according to

Plaintiffs, “dragging F-Factor and Zuckerbrot through the mud has attracted attention, and thus dollars for Gellis” (*id.*).

D. The Instant Action

Plaintiffs initiated this action on October 8, 2020, by filing a Summons and Complaint (NYSCEF 1). The Complaint asserts six causes of action, three on behalf of F-Factor and three on behalf of Zuckerbrot individually: (1) product disparagement (on behalf of F-Factor), (2) defamation (on behalf of F-Factor), (3) deceptive trade practices (on behalf of F-Factor), (4) defamation (on behalf of Zuckerbrot), (5) intentional infliction of emotional distress (on behalf of Zuckerbrot), and (6) civil harassment (on behalf of Zuckerbrot).

Gellis filed a counterclaim on December 23, 2020, seeking to recover damages from Plaintiffs for allegedly filing this action in violation of the recently-amended anti-SLAPP legislation (*see* NYSCEF 25; N.Y. Civil Rights Law § 70-a).

DISCUSSION

I. Gellis’s Motion to Dismiss (MS 002)

A. Section 230 of the Communications Decency Act of 1996 Does Not Shield Gellis from Liability.

As a threshold matter, Gellis contends that under the Communications Decency Act of 1996 (the “CDA”), 47 USC § 230, she is “immune from liability for the content of messages posted on her Instagram account by third parties” (NYSCEF 24 at 8 [Def.’s mot. to dismiss]). She is not.

The CDA states, in relevant part, that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by *another*

information content provider” (47 USC § 230 [c] [1] [emphasis added]).³ The law draws “a dividing line between ‘interactive computer service’ providers—which are generally eligible for CDA section 230 immunity—and ‘information content provider[s],’ which are not entitled to immunity” (*Bennett v Google, LLC*, 882 F3d 1163, 1167 [DC Cir 2018]). In other words, it “distinguishes ‘service’ from ‘content’” (*id.*; *Kuersteiner v Schrader*, 2008 NY Slip Op. 33614[U] [Sup Ct, New York County 2008] [same]). “It follows that if a defendant service provider is itself the ‘content provider,’ it is not shielded from liability” (*Shiamili v Real Estate Group of New York, Inc.*, 17 NY3d 281, 289 [2011]). And “[s]ince a content provider is any party ‘responsible . . . in part’ for the ‘creation or development of information’” (47 USC § 230 [f] [3]), any piece of content can have multiple providers” (*id.* at 289).

The upshot of all this is robust protection from liability for an internet service provider “when it merely provides a neutral means by which third parties can post information of their own independent choosing online” (*Klayman v Zuckerberg*, 753 F3d 1354, 1356 [DC Cir 2014]). To that end, courts have applied the CDA in dismissing defamation claims brought against internet service providers (*Zeran v America Online, Inc.*, 129 F3d 327, 330 [4th Cir 1997] [dismissing defamation claim against AOL for defamatory statements posted anonymously on online message board]), blog-hosting services (*Bennett*, 882 F3d at 1164 [dismissing defamation claim against Google for failing to remove offensive blog post]), and social media networks (*Caraccioli v Facebook, Inc.*, 167 F Supp 3d 1056, 1066 [ND Cal 2016] [dismissing defamation claim against Facebook based on offensive material posted by an anonymous user], *affd*, 700 Fed Appx 588 [9th Cir 2017]).

³ The statute provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section” (47 USC § 230 [e] [3]).

The CDA does not shield Gellis here. Gellis is being sued as a “content provider,” not a “service provider.” She was not a passive conduit for the messages of third parties. All of the statements at issue were allegedly posted on Gellis’s Instagram page by Gellis herself. This is important to underscore. Gellis insists she cannot be held liable “for the content of messages posted on her Instagram account by third parties,” but the Complaint does not allege that any third parties posted on Gellis’s Instagram account. Rather, Gellis allegedly curated what messages she reposted, added commentary, and included the reposted messages as part of her own ongoing discussion of F-Factor and Zuckerbrot. Indeed, Gellis’s affidavit, submitted with her motion to dismiss, describes her role as “report[ing]” the complaints against F-Factor on her Instagram page (Gellis Decl. ¶ 19). Because Gellis actively “creat[ed] or develop[ed] . . . information provided through the Internet” (47 USC § 230 [f] [3]), the CDA does not immunize her from Plaintiffs’ claims.

B. New York’s Amended anti-SLAPP Statute Does Not Apply

In briefing these motions, the parties vigorously disputed whether New York’s amended anti-SLAPP statute applies retroactively. The version of the statute in effect at the time Plaintiffs filed the Complaint was limited in scope. It “was enacted to address a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards” (*Mable Assets, LLC v Rachmanov*, 192 AD3d 998 [2d Dept 2021], quoting *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 138, n.1 [1992]). Shortly after Plaintiffs filed the Complaint, the anti-SLAPP statute was amended, significantly broadening the statute’s reach to include claims based upon “any communication in a place open to the public or a public forum in connection with an issue of public interest” (N.Y. Civil Rights Law § 76-a [1] [a] [as

amended])). The new law further directs that the term “public interest” is to “be construed broadly, and shall mean any subject other than a purely private matter” (*id.* § 76-a [1] [d]). Gellis argued that the amended version of the statute should apply, thus subjecting Plaintiffs’ allegations to heightened pleading standards. Plaintiffs maintained that such retroactive application was improper.

Gellis’s arguments in favor of retroactive application of the anti-SLAPP law recently were rejected by the First Department, in a decision that reversed one of the cases upon which she relied. In *Gottwald v Sebert*, -- NYS3d --, 2022 NY Slip Op. 01515 [1st Dept Mar. 10, 2022], the court held that “there is insufficient evidence supporting the conclusion that the legislature intended its 2020 amendments to the [anti-SLAPP statute] to apply retroactively to pending claims such as the defamation claims asserted by plaintiffs in this action.” Therefore, the amended anti-SLAPP law – and the heightened pleading standard it would impose – does not apply here.⁴

Instead, the ordinary pleading standard applies. On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], “the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory” (*Frank v. DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002]). However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence

⁴ In any event, Plaintiffs’ detailed factual allegations are sufficient to satisfy the standards set forth in the amended anti-SLAPP law, even if that law were to be found applicable in this case.

are not entitled to such consideration” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

C. Defamation (Counts II and IV)

“Defamation is the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society” (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014], quoting *Foster v Churchill*, 87 NY2d 744, 751 [1996]). Under New York law, a claim for defamation must allege “a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se” (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). “[S]ince only assertions of fact are capable of being proven false,” a defamation claim therefore must be “premised on published assertions of fact, rather than on assertions of opinion” (*Sandals Resorts Int’l Ltd. v Google, Inc.*, 86 AD3d 32, 38 [1st Dept 2011] [internal citation omitted]).

Gellis makes three overarching arguments for dismissing Plaintiffs’ defamation claims: (1) that the statements alleged are non-actionable opinions, (2) that “[v]irtually all” of the statements alleged are “substantially true,” and (3) that none of her statements were made with actual malice.

For the reasons discussed below, each of these arguments is unavailing.

1. Statements alleged in the Complaint are actionable assertions of fact.

Three factors distinguish an actionable statement of fact from a non-actionable opinion: “(1) whether the specific language in issue has a precise meaning which is readily understood;

(2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact” (*Brian v Richardson*, 87 NY2d 46, 51 [1995], quoting *Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]). “[R]hetorical hyperbole’ or ‘vigorous epithet’ will not suffice” (*Finkel v Dauber*, 29 Misc 3d 325, 328 [Sup Ct, Nassau County 2010], quoting *Greenbelt Cooperative Publishing Assn. v Bressler*, 398 US 6 [1970]). “Distinguishing between fact and opinion is a question of law for the courts, to be decided based on what the average person hearing or reading the communication would take it to mean” (*Davis v Boenheim*, 24 NY3d 262, 269 [2014] [internal citations and quotation marks omitted]).

The Complaint alleges, with abundant evidence, that Gellis asserted specific, verifiable statements of fact about the F-Factor diet, the F-Factor company, and Zuckerbrot personally. She repeatedly stated or republished that it caused a wide array of negative health effects, including disordered eating, mental health problems, severe gastrointestinal problems, pregnancy miscarriage, colon damage, kidney stones, hernias, anxiety, panic attacks, a heart attack, and death (Compl. ¶¶ 60–61, 63–64, 66, 68–71). She also claimed and republished that F-Factor products contain an unsafe ingredient called guar gum, unsafe levels of arsenic, and that F-Factor concealed information about the safety of its products (*id.* ¶¶ 62, 65, 67). When speaking about F-Factor as a company, Gellis stated, among other things, that it forced employees to sign non-disclosure agreements (*id.* ¶ 80), sold unsafe products (*id.* ¶¶ 81, 84, 85), misreported the number of complaints it received (*id.* ¶ 87), and impermissibly disclosed the contents of confidential patient records (*id.* ¶¶ 82–83). And as to Zuckerbrot personally, Gellis claimed, among other things, that Zuckerbrot “sen[t] people” to physically harm and to harass her (*id.* ¶¶ 89, 94, 95).

Because such statements convey a precise, objective meaning, which are verifiably true or false, they constitute potentially actionable statements of fact.⁵

Gellis's arguments to the contrary miss the mark. For one thing, while she repeats the mantra that her statements were "loose and figurative," her argument is short on specifics. For example, Gellis does not identify which, if any, disparaging statements about the F-Factor diet she is now claiming are protected opinion. In other places, the specifics are glossed over. Consider Gellis's accusations that F-Factor engaged in unlawful activity ("loose and figurative accusations," says Gellis). In August 2020, Gellis asserted that F-Factor violated HIPAA by disclosing clients' personal records (Compl. ¶ 82). But that was not all. Gellis went on to list—in detail—other purported violations by the company:

Violations 1. Hipa [sic] Violation sharing personal client records with NYT. 2. FTC violation deleting comments. 3. Lies about #of complaints (claims only 50 in 176,000 purchase order [sic]) 4. Lies on diets starts tomorrow podcast about treating patients with eating disorder 5. Lies about COA being proprietary 6. Refused to release COA.

(*id.* ¶ 83). These are not "figurative" statements. Gellis accuses F-Factor of violating specific laws (HIPAA, FTC regulations) in specific, verifiable ways ("sharing personal client records with NYT," "deleting comments"). Gellis's accusations contrast, therefore, with "accusations of 'extortion,' 'blackmail,' and related crimes," which "are often construed as merely rhetorical hyperbole **when they are not accompanied by additional specifics of the actions purportedly constituting the crime**" (*McDougal v Fox News Network, LLC*, 489 F Supp 3d 174, 182 [SD NY

⁵ This is not an exhaustive list of potentially actionable factual allegations. It is impractical and unnecessary for the Court to separately evaluate, at this stage, each of the thousands of allegedly defamatory statements. To resolve Gellis's motion, which is addressed to the Complaint as a whole, it is sufficient to hold that Plaintiffs have pleaded facts sufficient to state a cause of action.

2020] [emphasis added]).⁶ Indeed, in *McDougal*, “[t]he context in which the offending statements were made [] make it abundantly clear that [defendant] was not accusing [plaintiff] of actually committing a crime” (*id.*). Not so here.

Gellis urges that the informal internet context of her statements excuses their content. But “[w]eb content, like all content, must be assessed on a case by case basis” (*Eros Intern. PLC v Mangrove Partners*, 2019 NY Slip Op. 30604[U], *17 [Sup Ct, New York County 2019], *affd*, 191 AD3d 465 [1st Dept 2021]):

Although several years ago it was suggested that “readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts,” [*Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 36 Misc. 3d 1231(A), 11 [Sup Ct, New York County 2012]], this observation, even if it is assumed to be true, should not be read to “immunize [content] the focus and purpose of which are to disseminate injurious falsehoods about their subjects,” [*Sandals Resorts International, Ltd. v Google, Inc.*, 86 AD3d 32, 42-44 [1st Dept 2011]]. ***Our “broader social context”—a necessary element of the defamation analysis—suggests that online commentary is just as capable as print or broadcast media of inflicting the kinds of harm the defamation laws are designed to protect against.*** Indeed, online communications can spread more quickly, and to all corners of the world, than can print or broadcast media statements.

(*id.* [emphasis added]). Ultimately, context is more than just the medium through which a statement is conveyed; it is a holistic inquiry concerning “the content of the communication as a whole,” including “its tone and apparent purpose” (*Brian v Richardson*, 87 NY2d 46, 51 [1995]).

In proper context, an ordinary reader plainly could (and, Plaintiffs allege, did) understand Gellis’s Instagram commentary as conveying facts, not merely opinion. By her own account,

⁶ Gellis seeks refuge in *McDougal*’s statement that “accusations of crimes also are unlikely to be defamatory when, as here, they are made in connection with debates on a matter of public or political importance” (*id.*). In *McDougal*, the “matter of public or political importance” was the impeachment of the President of the United States for campaign finance violations (*id.*). At issue here is the safety of high-fiber protein powders and protein bars. Gellis does not cite to any authority suggesting this kind of dispute – one person’s social media holy war against a private company – warrants heightened protection under the First Amendment.

Gellis is not an anonymous message-board dweller. She “shares [her] daily life online” with hundreds of thousands of followers (*see* Gellis Decl. ¶ 4; Compl. ¶ 25). To maintain her credibility with followers – and generate income – Gellis stresses it is critical that her online persona be “authentic, honest and raw” (Gellis Decl. ¶¶ 7–8; Compl. ¶ 25).⁷ Indeed, Gellis seems to see herself as a modern-day muckraker, “a source of ‘news’-like information” (*id.* ¶ 6), providing “public service announcements for anyone considering the F-Factor diet and/or the products being marketed along with the diet” (*id.* ¶ 18; *see id.* ¶ 7 [“Although I do not have formal training in journalism, my entire career on Instagram is based on my followers trusting my recommendations, as well as other information that I provide.”]; *compare with, e.g., Eros*, 191 AD3d at 467 [concluding “[t]he context of the ‘Market Farce’ tweets weighs against a finding that these tweets are actionable” where, among other things, the Twitter account included the self-description “0% investment advice, 100% personal opinions”]). There is an obvious tension here. On the one hand, Gellis touts her journalistic impulses to bolster her credibility, while on the other hand she dismisses everything she posts online as “breezy, loose, [and] figurative” to avoid any liability. The final result remains to be seen. But at this stage, Plaintiffs have sufficiently alleged that Gellis’s statements are statements of fact.

2. “Substantial truth” does not bar Plaintiffs’ claims at this stage.

Gellis next contends that she is insulated from liability here because “virtually all” of the statements alleged in the Complaint are “substantially true” (NYSCEF 24 at 14), including her

⁷ Her “raw” communiqués often veered into the vulgar, but to be clear, Gellis’s *style* of expression does not control the analysis here. Vulgarity, as Gellis correctly notes, is protected expression (*Cohen v California*, 403 US 15, 25 [1971] [Statement “Fuck the Draft” protected under the First Amendment, noting “one man’s vulgarity is another’s lyric.”]). The focus remains on the substance of Gellis’s unvarnished expression – specifically, whether it can be understood to convey statements of fact.

posting of messages sent to her by third parties. At the pleading stage, “[t]o satisfy the falsity element of a defamation claim, plaintiff must allege that the complained of statement is ‘substantially false’” (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 94 [1st Dept 2015]). “Because the falsity of the statement is an element of the defamation claim, the statement’s truth or substantial truth is an absolute defense” (*Stepanov v Dow Jones & Co.*, 120 AD3d 28, 34 [2014]).

“[A] statement is substantially true if the statement would not ‘have a different effect on the mind of the reader from that which the pleaded truth would have produced’” (*Franklin*, 135 AD3d at 94). “When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done” (*Tannerite Sports, LLC v NBCUniversal News Group, a division of NBCUniversal Media, LLC*, 864 F3d 236, 243 [2d Cir 2017], quoting *Cafferty v S. Tier Pub. Co.*, 226 NY 87, 93 [1919] [reasoning “[t]he libel law is not a system of technicalities, but reasonable regulations whereby the public may be furnished news and information, but not false stories about any one”]). In assessing whether an allegedly defamatory statement meets this standard, “[c]ourts typically compare the complained of language with the alleged truth to determine whether the truth would have a different effect on the mind of the average reader” (*Franklin*, 135 AD3d at 94).

The Second Circuit Court of Appeals’ decision in *Tannerite* illustrates the analysis. *Tannerite*, the manufacturer of “exploding rifle targets,” sued NBC for defamation over a broadcast and written article that repeatedly compared the products to “bombs” (864 F3d at 248). *Tannerite* alleged that the statements were false because the exploding rifle targets “are not bombs” (*id.* at 241). Critically, *Tannerite*’s argument focused mainly on the descriptor NBC

attached to the products – Tannerite did not contend, for example, that NBC mischaracterized the ingredients in the products (“ammonium nitrate and pyrotechnic grade aluminum powder”) or what the products did (explode). Tannerite simply objected to NBC’s unflattering description of these exploding objects as “bombs.” The court dismissed Tannerite’s claim, however, holding that “NBC’s description of the product as a ‘bomb’ was, at the least, substantially true” (*id.* at 249). Like a bomb, the court reasoned, “the primary purpose of a Tannerite exploding rifle target is to explode” (*id.* at 248-49; *see id.* at 249 [“The target’s singularity of explosive purpose . . . marks it as a kind of bomb.”])).

Here, unlike in *Tannerite*, the Complaint pleads facts that, if proven, would allow a reasonable person to consider Gellis’s statements to be substantially false. The gravamen of Plaintiffs’ claim is that Gellis’s statements falsely asserted or implied that the F-Factor diet, or the products associated with it, are unsafe (*see, e.g.*, Compl. ¶¶ 60-72, 80-87, 91-99). Gellis claimed, for example, that Zuckerbrot forced “women and pregnant women” to ingest “massive amounts” of arsenic (*id.* ¶ 67). Plaintiffs allege this statement is false because F-Factor products do not contain unsafe levels of arsenic (*id.*). Gellis argues not that she is right, or that Plaintiffs are wrong, but that it makes no difference. “What matters for substantial truth purposes,” Gellis says, is that F-Factor products “do contain” arsenic, regardless of the amount (NYSCEF 49 at 7). That argument defies common sense – or, at the least, it presents a fact issue that cannot be resolved at the pleading stage. If Plaintiffs are correct, then Gellis’s statements could plausibly “have a different effect on the mind of the reader from that which the pleaded truth would have produced” (*Franklin*, 135 AD3d at 94). Knowing a product contains harmless trace levels of arsenic is qualitatively different than knowing it contains harmful “massive amounts” of it. The

analogy to *Tannerite* falls short, therefore, because Gellis's statements do more than merely mislabel F-Factor's diet and products; they allegedly misrepresent its properties and effects.

Moreover, "substantial truth" refers to the content of an allegedly defamatory statement, not the act of republishing it. So, to the extent Gellis suggests she can escape liability for statements ascribed to anonymous Instagram users because she "accurately posted those statements" (NYSCEF 24 at 14), that argument is a non-starter. "[U]nder New York law, [a] speaker who repeats another's defamatory statements is not made immune from liability for defamation merely because another person previously made the same demeaning claim" (*Watson v NY Doe 1*, 439 F Supp 3d 152, 161 [SD NY 2020] [rejecting argument that "comments are 'republishations' of the comments of others and that therefore [defendant] cannot have liability for defamation"])). Accurately republishing a defamatory statement is still defamation (*Schoepflin v Coffey*, 162 NY 12, 18 [1900] [stating "principle that every person who repeats a slander is responsible for the damage caused by such repetition"]; *Biro v Condé Nast*, 883 F Supp 2d 441, 461 [SD NY 2012] [noting "well settled" principle that "Defendants cannot escape liability simply because they are conveying someone else's defamatory statements without adopting those viewpoints as their own"]; *see also Franklin*, 135 AD3d at 94 ["Although it is conceded that defendant accurately quoted plaintiff's own words from Twitter, that does not necessarily mean that the statement could not have produced a worse effect on the mind of a reader than the truth as alleged by plaintiff."]).⁸

⁸ Further, Plaintiffs do not concede that Gellis actually received messages from others. That is a fact issue for discovery.

3. The Complaint sufficiently alleges actual malice.

Defamation claims asserted by public figures (which Plaintiffs are assumed to be for purposes of this motion) must also withstand Constitutional scrutiny. “As set forth in *New York Times Co. v Sullivan* (376 US 254 [1964]) and its progeny, the US Constitution’s First Amendment bars a public figure from recovering damages in a libel action unless clear and convincing evidence proves that a false and defamatory statement was published with ‘actual malice’ - ‘that is, with knowledge that it was false or with reckless disregard of whether it was false or not’” (*Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 353 [2009], quoting 376 US at 279-80). “This rule was promulgated in recognition ‘of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on [public figures]’” (*Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 474 [1993], quoting 376 US at 270). Assessing actual malice is “a subjective” inquiry, “focusing upon the state of mind of the publisher of the allegedly libelous statements at the time of publication” (*Kipper*, 12 NY3d at 354).

“[C]lear and convincing evidence” proving actual malice is not needed to survive a motion to dismiss: it is enough, at this stage, that Plaintiffs “allege facts showing that defendant acted with actual malice” (*Gear Up, Inc. v City of New York*, 140 AD3d 515, 515 [1st Dept 2016]; *Fairstein v Netflix, Inc.*, 20-CV-8042 (PKC), 2021 WL 3501527, at *2 [SD NY Aug. 9, 2021] [“[T]he issue of actual malice is more appropriately weighed at a later stage of the proceedings”]; see *Silsdorf v Levine*, 59 NY2d 8, 17 [1983] [“Plaintiff’s complaint alleges the actual malice element of the defamation cause of action,” so “there is no reason to prevent plaintiff from attempting to prove that defendants published the letter with actual malice.”]; see

also *Kipper*, 12 NY3d at 354 [describing “clear and convincing evidence standard” as “applicable to . . . motion for summary judgment”]).

In *St. Amant v Thompson*, 390 US 727, 731 [1968], the U.S. Supreme Court “found the following factors to be relevant to a showing that the defendant harbored actual malice: (1) whether a story is fabricated or is based wholly on an unverified, anonymous source, (2) whether the defendant's allegations are so inherently improbable that only a reckless person would have put them in circulation, or (3) whether there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports” (*Church of Scientology Int'l v Behar*, 238 F3d 168, 174 [2d Cir 2001], citing *St. Amant*, 390 US at 732). “[A] plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence” (*Harte-Hanks Communications, Inc. v Connaughton*, 491 US 657, 668 [1989]; *Celle v Filipino Reporter Enterprises Inc.*, 209 F3d 163, 183 [2d Cir 2000] [“Actual malice can be established ‘[t]hrough the defendant's own actions or statements, the dubious nature of his sources, [and] the inherent improbability of the story [among] other circumstantial evidence’”] [internal citation omitted]; see *Prozeralik*, 82 NY2d at 475).

Here, Plaintiffs sufficiently allege that Gellis acted with actual malice. The Complaint asserts that Gellis relied on “unverified, anonymous source[s]” (*Behar*, 238 F3d at 174), without further investigation (*Biro v Condé Nast*, 807 F3d 541, 546 [2d Cir 2015] [“[R]eliance on anonymous or unreliable sources without further investigation may support an inference of actual malice.”], citing *St. Amant*, 390 US at 732). It also alleges that Gellis’s leveled “inherently improbable” accusations (*Behar*, 238 F3d at 174), like the claim that Zuckerbrot and her family dispatched “people” to follow, intimidate, and potentially “physically harm” her (Compl. ¶¶ 89, 94). In addition, Plaintiffs allege that Gellis ignored “obvious reasons to doubt the veracity of

the informant or the accuracy of [her] reports” (*Behar*, 238 F3d at 174), including the findings in an independently-verified certificate of analysis for the F-Factor protein powder (Compl. ¶¶ 73-78) and Gellis’s own admission that the miscarriage story she has published was false (*id.* ¶ 18; see *Smolla*, § 3:48 [“Once a defendant is on notice that there are or may be serious flaws with a story . . . a duty to resolve the subjective doubt that such notice might engender may be triggered, since publication in the face of unresolved subjective doubt is actual malice.”]).

Finally, Gellis’s alleged personal animus toward Zuckerbrot provides further circumstantial evidence of actual malice. To be sure, the two concepts are distinct. “The sort of actual malice required under *New York Times* ‘should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will’” (*Kipper*, 12 NY3d at 355). But at the same time, “such motivations are not irrelevant to the actual malice inquiry” (*id.*; *Harte-Hanks Communications, Inc. v Connaughton*, 491 US 657, 668 [1989] [“[I]t cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry”]; see *Biro*, 963 F Supp 2d at 277 [noting that a defendant’s “intent” and “motive” are “relevant to the actual malice inquiry”]). Gellis’s statements about F-Factor and Zuckerbrot plainly brimmed with raw personal contempt. Such “[e]vidence of ill will combined with other circumstantial evidence indicating that the defendant acted with reckless disregard of the truth or falsity of a defamatory statement may . . . support a finding of actual malice” (*Celle*, 209 F3d at 183).

Discovery may yield more direct evidence about Gellis’s state of mind, which may bolster or undermine Plaintiffs’ claims. But for now, Plaintiffs have pleaded sufficiently detailed allegation to establish a substantial legal basis for their contention that Gellis acted with actual malice.

D. Product Disparagement (Count I)

Gellis's arguments for dismissing the product disparagement claim repeat her arguments for dismissing the defamation claim. Therefore, for the reasons set out *supra*, the branch of the motion to dismiss the first cause of action is denied.

E. Deceptive Trade Practices (Count III)

F-Factor fails to state a cause of action for deceptive trade practices. Section 349 of New York's General Business Law makes unlawful "[d]eceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service" (NY Gen. Bus. Law ["GBL"] § 349). "Though originally intended to be enforced by the Attorney General, the statute was amended in 1980 to include a private right of action . . . intended to afford additional protection for consumers, allowing them to bring suit on their own behalf without relying on the Attorney General for enforcement" (*Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 205 [2004] [internal citations omitted]; see GBL § 349 [h]).

The statute, on its face, "appl[ies] to virtually all economic activity" (*Karlin v IVF Am., Inc.*, 93 NY2d 282, 293 [1999]). When interpreting it, the Court must be "mindful of the potential for a tidal wave of litigation against businesses that was not intended by the Legislature" (*Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d 20, 26 [1995]; see *City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 623 [2009] [rejecting interpretation of statute that would beget "the very 'tidal wave of litigation' that we have guarded against since *Oswego*"]).

F-Factor cites to no case in which GBL § 349 has been held to apply in circumstances analogous to those alleged here. In the prototypical GBL § 349 claim, affected consumers sue a

business to recover losses suffered as a result of allegedly deceptive practices (*see Oswego*, 85 NY2d at 26 [customers suing bank for lost interest income stemming from allegedly deceptive account documents]). Corporate competitors can also sue under the statute, “so long as some harm to the public at large is at issue,” when it is alleged that one competitor disseminated false information about the other in the marketplace (*Securitron Magnalock Corp. v Schnabolk*, 65 F3d 256, 264 [2d Cir 1995]). And in a similar vein, businesses that employ deceptive practices “in favor of a competing business” may also face liability under the statute (*N. State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 17 [2d Dept 2012]).

But in none of those cases – or in any case cited by F-Factor – has statutory liability been imposed on someone who merely comments on a business, no matter how unflattering those comments may be. In substance, the GBL claim here is, as Gellis suggests, “nothing more than a repackaged defamation claim” (NYSCEF 24 at 21). F-Factor does not allege that Gellis is a competitor in the marketplace, or that Gellis made statements “in favor of a competing business,” or that she profited from drawing customers to F-Factor’s competitors. Nor is she plausibly acting here in the role of consumer advocate. Indeed, under F-Factor’s reasoning, the threat of GBL § 349 liability would hang over anyone who earns compensation for publicly sharing their views about businesses. A website that publishes negative reviews about a new product, for example, could find itself sued for deceptive trade practices because it, like Gellis, made such statements in the course of business directed at consumers. Were F-Factor permitted to expand the scope of GBL § 349 here, “the very ‘tidal wave of litigation’ that we have guarded against since *Oswego* would loom ominously on the horizon” (*Smokes-Spirits.Com, Inc.*, 12 NY3d at 623).

Therefore, the third cause of action is dismissed.

F. Intentional Infliction of Emotional Distress (Count V)

Zuckerbrot's claim for intentional infliction of emotional distress ("IIED") is also dismissed. The elements of the tort are "(1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" (*Klein v Metro. Child Services, Inc.*, 100 AD3d 708, 710 [2d Dept 2012], citing *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). "Intentional infliction of emotion distress is a 'highly disfavored [tort] under New York law'" (*HC2, Inc. v Delaney*, 510 F Supp 3d 86, 104 [SD NY 2020], quoting *Turley v ISG Lackawanna, Inc.*, 774 F.3d 140, 158 [2d Cir. 2014]; see *Fischer v Maloney*, 43 NY2d 553, 557-58 [1978] ["[I]t may be questioned whether the doctrine of liability for intentional infliction of extreme emotional distress should be applicable where the conduct complained of falls well within the ambit of other traditional tort liability."]).⁹ "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v Am. Home Products Corp.*, 58 NY2d 293, 303 [1983]).

IIED claims are routinely dismissed when the underlying allegations duplicate those of a defamation claim (*e.g.*, *Matthaus v Hadjedj*, 148 AD3d 425, 425 [1st Dept 2017]). Here, Zuckerbrot's IIED claim repackages the same conduct that underlies her defamation claim. In the Complaint, the IIED claim is predicated on 4,500+ "vicious, unwarranted, and harassing

⁹ New York is not alone in that regard. As the U.S. Supreme Court noted, "[g]enerally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude" (*Hustler Mag., Inc. v Falwell*, 485 US 46 [1988]).

statements” which “[c]umulatively” went “beyond the bounds of decent behavior and is intolerable in a civilized community” (Compl. ¶ 172). These are the same 4,500+ statements that form the basis for Plaintiffs’ defamation claims (*see id.* ¶ 23 [alleging “4,500-plus false, defamatory, and/or harassing statements about the safety of the F-Factor diet and products, about F-Factor and its employees, and about Zuckerbrot personally”]). Zuckerbrot argues in her brief that some of Gellis’s statements are “entirely distinct to” the IIED claim (NYSCEF 38 at 24 [Pls.’ opp. to mot. to dismiss]). But the examples listed – fact-free insults like “Go fuck yourself,” “You are the scum of the earth,” and “Fuck you, Your [sic] scum” – are statements of pure opinion protected under the First Amendment (*Hustler Magazine, Inc.*, 485 US at 56).

Therefore, the fifth cause of action is dismissed.

G. Civil Harassment (Count VI)

Zuckerbrot’s claim for “civil harassment” is also dismissed. Simply put, “there is no cognizable claim for civil harassment in New York State” (*Shafran v Goldman*, 2016 WL 359110, at *1 [Sup Ct, New York County Jan. 26, 2016]; *Santoro v Town of Smithtown*, 40 AD3d 736, 738 [2d Dept 2007] [“New York does not recognize a common-law cause of action to recover damages for harassment”]; *see Bahar v Sanieoff*, 2020 WL 6714980, at *3 [Sup Ct, New York County Nov. 16, 2020] [“While it is true that conduct sufficient to invoke criminal liability for harassment may be the basis for private action. . . . this does not mean, as plaintiff contends, that a private citizen may sue for relief under the criminal statute.”]; *see also Finkel*, 29 Misc 3d at 330 [noting “the courts of New York do not recognize cyberbullying or Internet bullying as a cognizable tort action” and “[a] review of the case law in this jurisdiction has disclosed no case precedent which recognized cyberbullying as a cognizable tort action”]).

Therefore, the sixth cause of action is dismissed.

II. Plaintiffs' Motion to Dismiss Gellis's SLAPP Counterclaim (MS 003)

Because Gellis's counterclaim is premised on the amended anti-SLAPP statute, which does not apply retroactively for the reasons stated *supra*, the counterclaim is dismissed. In any event, Plaintiffs' allegations are sufficient to withstand scrutiny under the amended statute even if it did apply to this case.

* * * *

Accordingly, it is

ORDERED that Defendant's motion to dismiss (MS 002) is GRANTED as to Plaintiffs' third cause of action (deceptive trade practices), fifth cause of action (intentional infliction of emotional distress) and sixth cause of action (civil harassment), and is otherwise DENIED; it is further

ORDERED that Plaintiffs' motion to dismiss Defendant's counterclaim (MS 003) is GRANTED; and it is further

ORDERED that the parties appear for a telephonic preliminary conference on **April 5, 2022 at 11 a.m.**, with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference date.¹⁰

This constitutes the Decision and Order of the Court.

¹⁰ If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.

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3/17/2022

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

☐

SETTLE ORDER

APPLICATION:

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

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GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

JOEL M. COHEN, J.S.C.