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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MARSHALL DANIELS, also known as Young Pharaoh, an individual,

Plaintiff,

v.

ALPHABET INC., a Delaware corporation; GOOGLE LLC, a Delaware limited liability company; YOUTUBE, LLC, a Delaware limited liability company; DOES 1 through 10, inclusive,

Defendants.

CASE NO.: 5:20-CV-04687-VKD

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Before: Hon. Virginia K. DeMarchi
Courtroom: 2
Hearing Date: October 6, 2020
Time: 10:00 a.m.

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 6, 2020, at 10 o'clock in the morning, before the Honorable Virginia K. DeMarchi of the United States District Court for the Northern District of California, Courtroom 2, Fifth Floor, 280 South 1st Street, San Jose, California, Defendants Alphabet Inc. ("Alphabet"), Google LLC ("Google"), and YouTube, LLC ("YouTube") (collectively "Defendants") shall and hereby do move for an order dismissing with prejudice all claims advanced by Plaintiff in his Complaint. The motion is based upon this Notice of Motion; the supporting Memorandum of Points and Authorities; the pleadings, records, and papers on file in this action; oral argument of counsel; and any other matters properly before the Court.

STATEMENT OF REQUESTED RELIEF

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and 47 U.S.C. § 230(c), Defendants request that the Court dismiss Plaintiff's claims without leave to amend.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Complaint should be dismissed under Rule 12(b)(6) for failure to state a claim.

2. Whether Plaintiff's claims challenging YouTube's decision to remove or demonetize Plaintiff's videos are barred by Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230 ("Section 230"), and the First Amendment to the U.S. Constitution.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Marshall Daniels ("Plaintiff") filed this lawsuit to challenge YouTube's decisions to remove two of his videos and limit his ability to monetize videos on his YouTube channel. In the first removed video, Plaintiff describes vaccines as dangerous concoctions made from "rat brains," asserts that HIV is a "biologically engineered, terroristic weapon," and claims that "Anthony Fauci has been murdering motherfuckers and causing medical illnesses since the 1980s." *See* ¶ 9;[1] Declaration of Lauren Gallo White ("White Decl."), Ex. 8 at 2:4-9, 96:1-11,

[1] Citations to "¶ _" are to the Complaint.

141:21-23. In the second, Plaintiff claims that the COVID-19 pandemic and George Floyd's killing were covert operations orchestrated by the Freemasons in furtherance of a "New World Order." *See* ¶ 10; White Decl., Ex. 9 at 2:6-9, 5:24-9:22. Among other things, Plaintiff labels Freemasons "the enemy of the people," asserts that Barack Obama "raped children in the White House," and threatens to "whoop your ass" if "I catch you talking shit about Trump." White Decl., Ex. 9 at 25:19, 115:25-116:1, 140:20-21. When it removed these videos, YouTube explained that they violated its Community Guidelines, including its policy on harassment and bullying. *See* ¶¶ 9-10.

Plaintiff's primary claims are the latest twist on a now familiar theme: that by removing or demonetizing some of his videos, YouTube violated the First Amendment and breached its Terms of Service agreement. These claims fail. As the Ninth Circuit recently confirmed, YouTube's content-moderation decisions are not constrained by the First Amendment because YouTube is not a state actor. *Prager University v. Google LLC*, 951 F.3d 991, 997-99 (9th Cir. 2020) ("*Prager III*"). Plaintiff tries to get around that holding with a novel argument: he asserts that because two members of Congress expressed concern about online misinformation, YouTube's restriction of such material is the equivalent of government censorship. That is not the law. The views of individual legislators about how private online services should moderate content do not transform those services into state actors who are constitutionally disabled from combating harmful disinformation on their platforms. Nor can Plaintiff proceed with a breach of contract or implied-covenant claim, as YouTube's removal and demonetization of Plaintiff's videos were expressly authorized by the parties' agreements. And while these claims fail of their own accord, Plaintiff's effort to hold YouTube liable for its editorial decisions is independently barred by Section 230 of the CDA and YouTube's own First Amendment rights.

Beyond his primary theory, Plaintiff offers another set of claims that assert, with little detail or elaboration, that YouTube withheld certain "donations" that were submitted by fans through Daniels' YouTube channel. Plaintiff also fails to state a claim based on this theory. Plaintiff pleads this as a contract-based claim (¶ 13), which by definition rules out his quasi-contract causes of action (for conversion, money had and received, and unjust enrichment—the

latter of which does not exist under California law). But even as Plaintiff claims that a contract governs this issue, he fails to identify any actual promise that YouTube supposedly breached. Finally, Plaintiff's effort to assert a fraud claim—to the extent not duplicative of his breach of contract claim—fails for multiple reasons, most obviously because the Complaint does not come close to satisfying Rule 9(b)'s requirement to plead fraud with particularity. Indeed, Plaintiff does not identify a single statement that Plaintiff believes was false or misleading. Plaintiff's claims all should be dismissed.

FACTUAL BACKGROUND

A. The YouTube Service, Its Content Rules, And Monetization Policies

YouTube is a popular online service for sharing videos and related content. ¶ 6. YouTube, LLC is a subsidiary of Google LLC, which in turn is owned by Alphabet Inc. ¶¶ 41-43.[2] While YouTube strives to welcome creators with diverse backgrounds and perspectives, it is not a free-for-all. The use of YouTube is governed by rules and policies that make clear that certain kinds of content are not allowed and that YouTube has discretion to remove unwanted material from its service. ¶¶ 13, 85.

More specifically, to create a channel and post videos, Plaintiff agreed to YouTube's Terms of Service and their incorporated Community Guidelines. ¶ 85. The Terms of Service provide, among other things, that "YouTube is under no obligation to host or serve Content." White Decl., Ex. 1; *see also id.*, Ex. 2.[3] The Terms also expressly state: "If we reasonably believe

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[2] While Plaintiff names Alphabet as a defendant (solely in connection with his First Amendment claim), it is well-established that a parent corporation cannot be held liable for the alleged wrongs of its subsidiaries, *see, e.g.*, *Lancaster v. Alphabet Inc.*, 2016 U.S. Dist. LEXIS 88908, at *19 (N.D. Cal. July 8, 2016) (dismissing claims against Alphabet). The Court need not address that issue at this time, however, because Plaintiff's First Amendment claim plainly fails for lack of state action. *See infra* pp.7-11.

[3] The Complaint alleges that Defendants and Plaintiff entered into "written contracts (contained in Defendants' Terms of Service), which bind the parties" (¶ 39) and asserts a breach of contract and implied covenant claim based on those Terms of Service. ¶ 85. The Complaint also alleges that Plaintiff is a "YouTube Partner" (¶ 11), it expressly references the YouTube Community Guidelines and related content policies incorporated in YouTube's Terms (¶¶ 9-11, 54) and it quotes information in YouTube's Help Center about its "Super Chat" and "Super Stickers" features (¶ 13). The Complaint thus incorporates by reference the terms, policies, (continued...)

that any Content is in breach of this Agreement or may cause harm to YouTube, our users, or third parties, we may remove or take down that Content in our discretion." White Decl., Ex. 1. In turn, the Community Guidelines identify various categories of content that YouTube expressly does not permit, including harassment, cyberbullying, hate speech, and otherwise harmful or dangerous content. White Decl., Exs. 3- 7; *see also* ¶ 10.

In addition to hosting videos, YouTube allows creators whose channels meet certain requirements to earn revenue from (or "monetize") their videos by running advertisements with them as part of the YouTube Partner Program. ¶ 11. Plaintiff acknowledges his "status as a YouTube partner" (¶ 11), and alludes to a "contractual agreement" related to monetization (¶ 13), but he does not specifically identify—nor seek to premise a claim on—any agreement governing advertising. Plaintiff also alleges that he enabled YouTube's "Super Chat" and "Super Stickers" features, which represent an additional "way[] to monetize … through the YouTube Partner Program" by allowing viewers during a "live stream" to "purchase chat messages that stand out and sometimes pin them to the top of a chat feed." *Id*.; *see also* White Decl., Ex. 15. Given that, Plaintiff cannot deny or plead around those agreements or their incorporated policies, which provide, among other things, that "YouTube is not obligated to display any advertisements alongside your videos" and that YouTube has the right to demonetize content that it determines does not meet its standards. White Decl., Ex. 10; *see also id.* Exs. 11, 13-14.

B. Plaintiff, His Videos, And His Claims Against YouTube

According to the Complaint, Plaintiff Marshall Daniels is an "educator, spiritual leader, motivational speaker, journalist, researcher, and social commentator," who goes by the name "Young Pharaoh" on social media. ¶ 40. Plaintiff alleges that he is a prolific user of social media who "has been creating social, political and educational social commentary since at least 2015." ¶¶ 5-6. According to the Complaint, Daniels started using YouTube in July 2015. ¶ 6. Since then, he has uploaded 760 videos to YouTube. *Id*. Plaintiff does not allege that his YouTube account

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guidelines, and Help Center pages attached to the White Declaration. The Court therefore may consider these documents in ruling on this motion. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

has been suspended or that he has been prevented from uploading content to YouTube. His allegations are far more limited: he alleges that YouTube removed some of his videos, found some unspecified videos inappropriate for advertising (or "demonetized" them), withheld some unspecified amount of revenue earned through his YouTube channel, and took other actions that allegedly made it harder for viewers to find or access his videos (what he calls "shadowbanning"). *See, e.g.*, ¶¶ 9-11.

Plaintiff identifies only two of his videos that were ever removed by YouTube. ¶¶ 9-10. Both were lengthy live-streams in which Plaintiff expounded theories about recent events. The first ("Fauci Silenced Dr. Judy Mikovits from Warning the American Public," streamed on April 21, 2020) is a sustained attack on Dr. Anthony Fauci and what Plaintiff calls the "vaccine deep state establishment." ¶ 9; White Decl., Ex. 8 at 21:20-22:3; *see, e.g.*, *id.* at 2:14-16 ("Why Anthony Fauci has not been arrested yet, I have no clue. But we're going to break him all the way the fuck up."), 141:21-23 ("Anthony Fauci has been murdering motherfuckers and causing medical illnesses since the 1980s with these vaccines. Anthony Fauci has been killing Americans for damn near 60 years with these vaccines."). Though Plaintiff does not claim to be a doctor, his video also contains numerous statements about public health, the origins of HIV and AIDS, and the supposed dangers of vaccinations:

- "So, if you have autism, if you have chronic fatigue syndrome, or if you have any illness, it's damn near a 1,000 percent chance you got it from the fucking vaccine."
- "You're not supposed to be mixing DNA with animals. It's not supposed to be happening. This is why motherfuckers is getting paralyzed. This is why motherfuckers is having autism. This is why motherfuckers is dying. This is why motherfuckers is getting sick. This is why motherfuckers is having neurological problems.…"
- HIV "was engineered to affect humans from monkeys the same way that COVID-19 was engineered to affect humans, from bats."
- "These motherfuckers hybridized leukemia and gave it to you in a manner where it could be sexually transmitted. They did told you that you had a STD. You do not have a STD. You have a biologically engineered, terroristic weapon inside you."
- "I knock my doctor the fuck out before I get a vaccine. So, I'm going to tell you that. When I go to the doctor, don't ask me shit about no vaccine. I'm not taking it. I don't give a fuck. If you back a needle out when I'm in a room, … you better be ready to go

> for broke. I don't give a fuck about no charge. I don't give a fuck about the hospital security."

Id. at 14:25-15:3, 50:18-24, 51:9-17, 75:3-5, 96:5-11. According to the Complaint, YouTube removed this video for violating the Community Guidelines. ¶ 13.

The second video ("George Floyd Riots & Anonymous Exposed as Deep State Psyop for NWO," streamed on May 28, 2020) focuses on the COVID-19 pandemic and killing of George Floyd, both of which Plaintiff contends were covert "psyops" orchestrated by the Freemasons working within the "deep state," intended to destroy America and replace it with a "New World Order." ¶ 10; White Decl., Ex. 9 at 2:6-9, 2:25-3:1, 5:24-9:22, 16:25-17:6, 51:24-52:6. In addition to repeatedly attacking Freemasons—who Daniels labels "the enemy of the people"—Plaintiff's video advances wild claims about Hillary Clinton ("there is video tape of her murdering and torturing children on Anthony Weiner's laptop"); Barack Obama ("raped children in the White House"); John Podesta ("tortures children"); and George Floyd's death ("staged"). White Decl., Ex. 9 at 11:8-10, 22:25-23:4, 25:19, 27:23, 115:25-116:1. At the end of the video, Plaintiff pronounced: "If I catch you talking shit about Trump, I might whoop your ass fast. I might whoop your ass, nigga...." White Decl., Ex. 9 at 140:20-22. According to the Complaint, this video was removed for "violating YouTube's policy on harassment and bullying." ¶ 10.

Following the removal of these videos, Plaintiff filed this lawsuit. While he asserts nine different causes of action, Plaintiff's claims are based on one of two theories. First, Plaintiff's principal theory seeks to hold YouTube liable—under the First Amendment, the parties' agreements, and the UCL—for removing, demonetizing, or restricting access to his videos. ¶¶ 2, 47-63, 65-70, 85-91, 96-97. Second, Plaintiff vaguely asserts that YouTube retained an unspecified amount of money donated by his subscribers during his live streams "despite its contractual agreement that it would share them with Mr. Daniels." ¶ 13. Based on this theory, Plaintiff asserts claims for breach of contract (¶¶ 68, 85); quasi-contract claims for conversion, unjust enrichment, and money had and received (¶¶ 72-79, 81-83, 93-94); and claims for fraud under the UCL, fraud in the inducement, and "wire fraud" (¶¶ 98-101, 103-112, 114-25).

ARGUMENT

To survive a motion under Rule 12(b)(6), "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, Plaintiffs must allege "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The Court is not required to "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Prager University v. Google LLC*, 2018 U.S. Dist. LEXIS 51000, at *9 (N.D. Cal. Mar. 26, 2018) ("*Prager I*") (quoting *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011)). Nor should the Court accept allegations that contradict documents attached to the Complaint or incorporated by reference, *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1115 (9th Cir. 2014), or that rest on "unwarranted deductions of fact[] or unreasonable inferences," *Sepehry-Fard v. MB Fin. Servs.*, 2014 U.S. Dist. LEXIS 71568, at *4 (N.D. Cal. May 23, 2014)).

II. PLAINTIFF FAILS TO STATE A VIABLE CAUSE OF ACTION

A. Plaintiff Fails To State A Claim Under The First Amendment

Plaintiff's core claim is that Defendants violated the First Amendment when YouTube removed two of his videos and prevented him from monetizing other unspecified content. This claim fails as a matter of law because "[t]he Free Speech Clause does not prohibit *private* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Earlier this year, the Ninth Circuit applied these principles specifically to Google and YouTube, confirming that they are not state actors and cannot be sued under the First Amendment for editorial decisions to restrict or demonetize content. *Prager III*, 951 F.3d at 997-99. The *Prager* decision echoes a long and unbroken line of cases rejecting similar First Amendment claims against Google and other private online service providers. *See, e.g.*, *Freedom Watch, Inc. v.*

Google, Inc., 368 F. Supp. 3d 30, 40 (D.D.C. 2019), *aff'd*, 2020 U.S. App. LEXIS 16948 (D.C. Cir. May 27, 2020).[4]

Plaintiff tries to evade this precedent by advancing a novel theory of state action. Citing *Blum v. Yaretsky*, 457 U.S. 991 (1982), Plaintiff asserts that the government "provided such significant coercion and/or covert or overt encouragement" that "Defendants' silencing of Mr. Daniels' voice should be deemed 'state action.'" ¶ 15. In *Blum*, which found no state action in the decision of private nursing homes to discharge patients without notice or a hearing, the Supreme Court observed that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." 457 U.S. at 1004. More recently, the Court explained that state action can be found on this theory only "when the government *compels* the private entity to take a *particular action*." *Halleck*, 139 S. Ct. at 1928 (citing *Blum*, 457 U.S. at 1004-5) (emphases added); *accord Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 836-38 (9th Cir. 1999) (discussing *Blum*'s "government compulsion" test and holding that "a plaintiff must show 'something more' than state compulsion in order to hold a private defendant liable as a governmental actor").[5]

There is nothing like that here. Plaintiff does not allege that the government exercised any "coercive power" over YouTube's content-moderation decisions, much less that it compelled YouTube to take the "particular action" at issue here (the removal and demonetization of Daniels' videos). The Complaint identifies no law, regulation, or official government action

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[4] *See also, e.g.*, *Howard v. AOL*, 208 F.3d 741, 754 (9th Cir. 2000); *Quigley v. Yelp, Inc.*, 2018 U.S. Dist. LEXIS 230967, at *9 (N.D. Cal. Jan. 22, 2018); *Shulman v. Facebook.com*, 2017 U.S. Dist. LEXIS 183110, at *9 (D.N.J. Nov. 6, 2017); *Kinderstart.com, LLC v. Google, Inc.*, 2007 U.S. Dist. LEXIS 22637, at *39-43 (N.D. Cal. Mar. 16, 2007); *accord Tulsi Now, Inc. v. Google, LLC*, 2020 U.S. Dist. LEXIS 41673 (C.D. Cal. Mar. 3, 2020) (applying *Prager III* to dismiss First Amendment claim against Google for suspending account based on alleged viewpoint bias).

[5] Plaintiff also makes a passing reference to the alternative "joint action test" for state action (¶ 57), but the Complaint makes no effort to support such a theory with any factual allegations. That is not surprising: Plaintiff has no basis to suggest that YouTube entered into some kind of joint venture with the government to censor his content. *Accord Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002) (describing "substantial degree of cooperation" required for "joint action").

supposedly responsible for YouTube's decisions. Instead, Plaintiff's theory is based on a handful of public statements from two individual members of Congress (Adam Schiff and Nancy Pelosi) that he claims somehow "influenced" YouTube. ¶¶ 15, 21-27, 51, 56-57 & Exs. A-C. More specifically, the Complaint points to two letters and a Tweet from Representative Adam Schiff (¶¶ 20-22), along with statements that Speaker of the House Nancy Pelosi made to a journalist and at an academic forum (¶¶ 23-24). These statements generally discuss the issue of online misinformation (including medical misinformation) and the content-moderation practices of YouTube and other online platforms. *But none of the statements said anything about Plaintiff or his content.* Plaintiff admits that these statements had no actual legal force (¶ 25), and they did not purport to direct or instruct YouTube to do anything, much less in regard to Daniels.[6]

As a matter of law, these statements from individual legislators cannot transform private content-regulation into state action. Defendants' counsel has found no case basing state action on the public statements of individual legislators that supposedly encouraged private action. The closest case expressly *rejected* such a theory. In *Abu-Jamal v. Nat'l Pub. Radio*, 1997 U.S. Dist. LEXIS 13604, at *3, *17 (D.D.C. Aug. 21, 1997), the plaintiff challenged on First Amendment grounds NPR's decision not to air his political commentaries. The plaintiff argued that remarks made by then-Senator Dole (among others) had pressured NPR to cancel the program, rendering NPR's otherwise private decision as state action. *Id*. at *4-5. The court disagreed:

> Assuming that the [Fraternal Order of Police] and individual members of Congress did call NPR in attempts to pressure it not to air the program, not one of these people has any legal control over NPR's actions. At best, the entire Congress controls a small portion of federal funding NPR receives through the CPB. But this simply does not mean that NPR's "choice in law" not to air Jamal's broadcast was that of the government.

[6] While Plaintiff repeatedly characterizes these statements as "demands" (*e.g.*, ¶¶ 8, 20-21, 25), it is clear that none of them actually demanded anything from YouTube—and certainly not the removal or demonetization of any content. Mr. Schiff's first letter simply requested certain information about what YouTube was already independently doing to address vaccine misinformation. Compl., Ex. A. His second letter (and related Tweet) did not urge YouTube to remove content, but rather to "proactively" inform users who might have interacted with medical disinformation and "direct them to authoritative medically accurate resources." *See* Compl., Ex. B; *id.*, Ex. C; *see also* ¶ 8. None of this amounts to a request (much less a demand) that YouTube remove or demonetize content. The same is true of Ms. Pelosi's informal remarks, which did not urge the removal of *any* content. ¶¶ 23-24.

Id. at *17. The same is true here. Neither Mr. Schiff nor Ms. Pelosi has any individual legal control over YouTube or its actions. Their public statements—which again made no reference to Daniels or his content—lacked any legal force. Calling such statements "veiled threats" (¶ 22) does not change that reality or transform YouTube's actions into those of the government.

Indeed, even in the case of actual laws, it is well settled that merely "being regulated by the State does not make one a state actor" (*Halleck*, 139 S. Ct. at 1932) and that private decisions that are *authorized* but not *required* by law are not state action (*American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999) ("permission of a private choice cannot support a finding of state action")). *Accord Roberts v. AT&T Mobility*, 877 F.3d 833 (9th Cir. 2017) (private company's enforcement of arbitration provision authorized by federal statute was not state action); *Sutton*, 192 F.3d at 837-44 (private employer's refusal to hire plaintiff for refusing to provide social security number was not state action even though federal law required employer to obtain the number). It necessarily follows from these cases that allegedly acting in ways consistent with the *informal* wishes of an individual lawmaker—who possesses no independent regulatory authority—cannot amount to state action. In claiming otherwise, Plaintiff is asking the Court to apply the government-coercion test in a context in which it has never applied and does not belong.

Accepting Plaintiff's theory would have far-reaching and pernicious consequences. Plaintiff effectively asks this Court to find that, if any of the 535 members of Congress publicly states a view about how a private business should operate, that business thereby becomes a state actor when it acts consistent with the legislator's suggestion. Like the state-action theory rejected in *Halleck*, this theory "would be especially problematic in the speech context, because it could eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms." 139 S. Ct. at 1932. Under Plaintiff's logic, a single legislator—by expressing a preference for online platforms to more aggressively limit some form of objectionable content (whether pornography or hate speech or extremist propaganda)—would constitutionally disable those platforms from removing such material, even where the material violates the service's own rules for acceptable speech.

This case perfectly illustrates the problem. Plaintiff posted videos accusing Dr. Fauci of "murdering motherfuckers and causing medical illnesses since the 1980s with these vaccines," and describing George Floyd's killing as a part of a scheme to overthrow the U.S. government. White Decl., Ex. 8 at 141:21-23; *id.*, Ex. 9 at 5:24-9:22, 22:25-23:4. In these videos, Plaintiff called Freemasons "the enemy of the people," claimed that Barack Obama raped children in the White House, and asserted that HIV is a "biologically engineered, terroristic weapon." *See e.g.*, White Decl., Ex. 9 at 11:5-10, 25:19, 115:25-116:1; *id.*, Ex. 8 at 96:9-11. Yet, under Plaintiff's theory, simply because Adam Schiff and Nancy Pelosi have expressed concern about the spread of online misinformation, YouTube is legally required to continue hosting Plaintiff's videos—and is constitutionally compelled to pair those videos with ads. This is not how the First Amendment works. While the Free Speech Clause is a vital protection from actual government censorship, it "does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property" (*Halleck*, 139 S. Ct. at 1931)—even when their judgments might be supported by elected officials. In short, Plaintiff's approach threatens to do just what the Supreme Court has warned against: "Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise." *Id*. at 1934.[7]

B. Plaintiff Fails To State A Contract-Based Claim

Plaintiff next claims that YouTube's removal and demonetization of his videos, and its alleged failure to pay Plaintiff a portion of the revenue supposedly generated through his YouTube channel, violates the express and implied provisions of the YouTube Terms of Service

[7] Plaintiff purports to bring his First Amendment claim under 42 U.S.C. § 1983. ¶¶ 2, 37, 48. But such a claim fails for another reason: Section 1983 requires action taken under color of *state* law—not *federal* law. But Plaintiff's state-action theory, if viable, would make YouTube a part of the federal government. Such a claim is not cognizable under Section 1983. *See Kali v. Bowen*, 854 F.2d 329, 331 (9th Cir. 1988); *Lewis v. Google LLC*, 2020 U.S. Dist. LEXIS 150603, at *26-27 (N.D. Cal. May 20, 2020) ("even if Plaintiff's allegations were sufficient to hold [Defendants] liable for conduct by the federal and by foreign governments, such allegations do not allege conduct under color of *state* law").

agreement. ¶¶ 85-91 (breach of contract); ¶¶ 65-70 (implied covenant). Similar claims have repeatedly been rejected, and Plaintiff's contract claims here fare no better.

Plaintiff's contract claims are ungrounded in—if not contrary to—the actual terms of the parties' agreement. In articulating the breach of contract claim, the Complaint cites four things that the Terms of Service allegedly promised and that YouTube supposedly failed to do: "(1) inform Plaintiff when one of his videos was flagged, stricken, or taken down; (2) provide an appeals process; (3) permit the posting of Plaintiff's videos unless they violated YouTube's Community Guidelines; and (4) pay Plaintiff based on, among other things, views and donations." ¶¶ 85, 87. It is clear from the Terms of Service themselves, and from Plaintiff's own allegations, that none of these give rise to a viable claim.

First, the Terms of Service make no promise that YouTube will "inform Plaintiff when one of his videos was flagged, stricken, or taken down." ¶ 85. The relevant provision of the agreement simply says that, in the event that YouTube removes content, "[w]e will notify you with the reason for our action" unless certain exceptional circumstances are present. White Decl., Ex. 1. In any event, Plaintiff's allegations make clear that YouTube *did* notify him of the reason that it removed the two videos that he alleges were removed. ¶ 9 ("Google and YouTube indicated that the video was taken down because 'it violates our Community Guidelines.'"), ¶ 10 ("This video has been removed for violating YouTube's policy on harassment and bullying.").[8]

Second, Plaintiff's allegation that YouTube failed to "provide an appeals process" is equally meritless. ¶ 85. With respect to decisions to remove content, all the Terms of Service say is that "You can learn more about reporting and enforcement, including how to appeal on the Troubleshooting page of our Help Center." White Decl., Ex. 1. Even considering this to be some kind of promise, Plaintiff's own allegations make clear that YouTube provided—and Plaintiff availed himself of—the opportunity to appeal YouTube's decision to remove the two videos

[8] Insofar as Plaintiff's complaint is that YouTube did not provide the level of specificity he desired (¶ 9), YouTube made no such guarantees. In any event, Plaintiff does not (and cannot) explain how he suffered any damage from a supposedly insufficiently detailed explanation of the *reason* for the removal of his videos.

identified in the complaint. *See* ¶ 9 ("Mr. Daniels contacted Google Support to appeal the [removal] decision"), ¶ 10 ("Mr. Daniels had . . . submitted an appeal").

Third, Plaintiff points to nothing in the Terms of Service that promises to "permit the posting of Plaintiff's videos unless they violated YouTube's Community Guidelines." ¶ 85. This claim defies the express provisions of that agreement, which make clear, first, that "YouTube is under no obligation to host or serve Content" and, on top of that, that YouTube's authority to remove content is *not* confined to videos that violate its Community Guidelines: "If we reasonably believe that any Content is in breach of this Agreement *or may cause harm to YouTube, our users, or third parties, we may remove or take down that Content in our discretion*." White Decl., Ex. 1 (emphasis added). YouTube was squarely within its contractual rights in exercising its discretion to remove Plaintiff's videos. Plaintiff cannot premise a breach claim on an action specifically permitted by the agreement. *See Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44, 56-57 (2002); *Mishiyev v. Alphabet, Inc.*, 2020 U.S. Dist. LEXIS 44734, at *9-13 (N.D. Cal. Mar. 13, 2020); *accord Lewis*, 2020 U.S. Dist. LEXIS 150603, at *44 ("YouTube's terms and guidelines explicitly authorize YouTube to remove or demonetize content that violate its policies, including 'Hateful content.' Therefore, Defendants' removal or demonetization of Plaintiff's videos with 'Hateful content' or hate speech was authorized by the parties' agreements and cannot support a claim for breach of the implied covenant of good faith and fair dealing."); *Ebeid v. Facebook, Inc.*, 2019 U.S. Dist. LEXIS 78876, at *21-22 (N.D. Cal. May 9, 2019) (Facebook did not breach the implied covenant by removing plaintiff's posts where "Facebook had the contractual right to remove or disapprove any post or ad at Facebook's sole discretion"); *Prager University v. Google LLC*, 2019 Cal. Super. LEXIS 2034, at *31-32 (Cal. Super. Ct. Nov. 19, 2019) ("*Prager II*") (YouTube did not breach implied covenant by demonetizing and limiting access to plaintiff's videos, "in light of the express provisions of YouTube's [2019] Terms of Service, which provide that 'YouTube reserves the right to remove Content without prior notice' and which also allow YouTube to 'discontinue any aspect of the Service at any time.'").

Fourth, insofar as Plaintiff seeks to base his claim on allegations that YouTube did not "pay Plaintiff based on, among other things, views and donations" (¶ 85; *see also* ¶¶ 13-14, 68, 98), the Terms of Service contain no promises or provisions regarding monetization (White Decl. Ex. 1). To be sure, and as Plaintiff acknowledges (¶ 13), YouTube's monetization programs are governed by contract, but the Complaint does not identify those agreements or seek to premise a contract claim on them. *See* ¶¶ 65, 85. Even if he had, such a claim would fail. *See, e.g.*, *Sweet v. Google*, 2018 U.S. Dist. LEXIS 37591, at *12, *24-27 (N.D. Cal. Mar. 7, 2018) (dismissing claim for breach of implied covenant based on YouTube's demonetization of plaintiff's channel, in light of "the provision of the Partner Program Terms conferring upon YouTube complete control over decisions regarding advertisements").[9] But the Court need not address hypotheticals: the one contract Plaintiff has invoked (the Terms of Service) clearly does not give him the right to monetize or earn revenue from the videos he uploaded to YouTube.

Plaintiff's invocation of the implied covenant (¶¶ 64-68) fails for an additional reason. The implied covenant "is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract." *Pasadena Live v. City of Pasadena*, 114 Cal. App. 4th 1089, 1094 (2004). Here, however, as "in most cases," Plaintiff's implied covenant claim "add[s] nothing to [his] claim for breach of contract." *Lewis*, 2020 U.S. Dist. LEXIS 150603, at *41. Insofar as Plaintiff seeks to impose limits "beyond those to which the parties actually agreed, the [implied covenant] claim is invalid. To the extent the

[9] While YouTube's monetization agreements set formulas for sharing advertising and certain other revenues earned in connection with a participating user's videos, they expressly disclaim any guarantee that YouTube is required to allow users to monetize their content, and they expressly allow YouTube to demonetize a user's videos or channel. *See* White Decl., Ex. 10 ("YouTube is not obligated to display any advertisements alongside your videos and may determine the type and format of ads available on theYouTube Service."); *id.*, Ex. 11 (reserving "the right to refuse or limit your access to [AdSense] Services"). Moreover, all of these monetization agreements incorporate YouTube's monetization policies, including the Community Guidelines and Advertiser-friendly content guidelines. *See* White Decl., Ex. 13. And YouTube explains that videos that do not comply with YouTube's policies are not eligible to earn money on YouTube. White Decl., Ex. 12.

implied covenant claim seeks simply to invoke terms to which the parties *did* agree, it is superfluous." *Id.* at *40-41. Either way, the claim should be dismissed.

C. Plaintiff's Quasi-Contract Claims Fail As A Matter Of Law

Plaintiff next asserts three quasi-contract claims—for money had and received (¶ 93), conversion (¶ 72), and unjust enrichment (¶ 81)—that all appear to be based on the same theory: that YouTube supposedly failed to share certain unspecified monies that Plaintiff claims were meant as "donations" from followers of his channel (¶ 13). These claims fail as a matter of law.

Money Had And Received. It is black-letter law that this cause of action "does not lie when an enforceable, binding agreement exists defining the rights of the parties." *Haskins v. Symantec Corp.*, 2013 U.S. Dist. LEXIS 169865, at *34 (N.D. Cal. Dec. 1, 2013); *accord Shvarts v. Budget Grp., Inc.*, 81 Cal. App. 4th 1153, 1160 (2000). Here, however, Plaintiff expressly premises his claim that YouTube withheld donations on the theory that "YouTube has retained those monies *despite its contractual agreement* that it would share them with Mr. Daniels." ¶ 13 (emphasis added). The existence of a contract that Plaintiff himself says entitles him to the money at issue precludes any quasi-contract claim for money had and received. *See, e.g., Mar Partners 1, LLC v. Am. Home Mortg. Servicing, Inc.*, 2011 U.S. Dist. LEXIS 336, at *11 (N.D. Cal. Jan. 4, 2011) (dismissing claim for money had and received when "complaint indicates that there is an enforceable, binding agreement that exists to define the rights of the parties."); *Rasmussen v. Dublin Rarities*, 2015 U.S. Dist. LEXIS 24260, at *32 (N.D. Cal. Jan. 22, 2015) (same); *Willamette Green Innovation Ctr., LLC v. Quartis Capital*, 2014 U.S. Dist. LEXIS 148665, at *24 (N.D. Cal. Jan. 21, 2014) (same).

Conversion. The same problem dooms Plaintiff's conversion claim. Under California law, "a mere contractual right of payment, without more, does not entitle the obligee to the immediate possession necessary to establish a cause of action for the tort of conversion." *Del Bino v. Bailey (In re Bailey)*, 197 F. 3d 997, 1000 (9th Cir. 1999); *accord Farmers Ins. Exchange v. Zerin*, 53 Cal. App. 4th 445, 451 (1997). But such a "contractual right of payment" is precisely what Plaintiff alleges: as discussed, his claim to the supposedly withheld donations (¶ 72) stems solely from his assertion that YouTube violated its "contractual agreement" to share them (¶ 13).

This does not work: "the simple failure to pay money owed does not constitute conversion." *Voris v. Lampert*, 7 Cal. 5th 1141, 1151-52 (2019).

Plaintiff's conversion claim also fails for an additional reason. Money "cannot be the subject of a conversion action unless a specific sum capable of identification is involved." *Software Design & Application, Ltd. v. Hoefer & Arnett*, 49 Cal. App. 4th 472, 485 (1996). Plaintiff refers to "donations that were made to him through his YouTube channel" (¶ 72), but he points to no specific donations that he claims were withheld. The Complaint does nothing to identify any actual sum of money that YouTube allegedly converted, nor does it provide any information that would make it possible to determine or even estimate the amount he purportedly is owed. Without that, YouTube lacks sufficient notice of the nature of this claim. *See, e.g.*, *Software Design*, 49 Cal. App. 4th at 485 (affirming dismissal of conversion claim because allegations of "varying amounts" of money distributed "over time" was not an identifiable sum of money); *cf. Vu v. California Commerce Club, Inc.*, 58 Cal. App. 4th 229 (1997) (allegations of funds lost while betting did not adequately specify an identifiable sum of money).

Unjust Enrichment. "[T]here is no cause of action in California for unjust enrichment." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010); *see also Melchior v. New Line Prod., Inc.*, 106 Cal. App. 4th 779, 793 (2003).

D. Plaintiff Fails To State A Fraud Claim

Finally, Plaintiff asserts three claims sounding in fraud: fraud in the inducement, wire fraud, and fraud under California's Unfair Competition Law (UCL). The first two are based on the same premise: that YouTube supposedly represented "that in exchange for Plaintiff's content, YouTube would make Plaintiff's content available and monetizable" and "that YouTube would direct a portion of any donations received from fans and followers of Plaintiff to Plaintiff." ¶¶ 103-105, 114. The UCL claim is even more vague, but the essence of it seems similar. ¶ 98.[10] Each of these claims fails.

[10] The UCL establishes three varieties of unfair competition—unlawful, unfair, or fraudulent. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). In addition to his claim under the fraud prong, Plaintiff gestures at a claim under the "unlawful" prong. ¶ 97. But (continued...)

Rule 9(b). To begin, Plaintiff fails to plead any of his fraud claims with particularity, as he must to satisfy Rule 9(b). *Accord Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). Under this Rule, "a pleading must identify 'the who, what, when, where, and how of the misconduct charged,' as well as 'what is false or misleading about [the purportedly fraudulent] statement, and why it is false.'" *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1055 (9th Cir. 2011). This requires "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations," *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007), in addition to "particularized allegations" as to "why the statements were false or misleading *at the time they were made*." *In re Rigel Pharms., Inc. Secs. Litig.*, 697 F.3d 869, 876 (9th Cir. 2012) (emphasis added).

The Complaint does not come close to meeting this standard. Plaintiff fails to identify a single purportedly false statement with particularity. Instead, Plaintiff alludes in the most general and cryptic terms to unspecified "representations" made by "YouTube" (¶¶ 103-04, 114-15), without providing any supporting detail about those supposed representations, including when, where, or by whom they were made. *See also* ¶¶ 96, 98. Nor does the Complaint offer anything beyond conclusory boilerplate (¶¶ 105, 116) to suggest that the statements at issue were false at the time they were made. A plaintiff cannot simply point to allegations "noting that the content of the statement 'conflicts with the current state of facts,' and concluding that 'the charged statement must have been false' at the time it was made." *Richardson v. Reliance Nat'l Indem. Co.*, 2000 U.S. Dist. LEXIS 2838, at *12 (N.D. Cal. Mar. 9, 2000). Plaintiff has barely even done that, and Rule 9(b) requires far more. *See, e.g.*, *Canard v. Bricker*, 2015 U.S. Dist. LEXIS 22909, at *17-21 (N.D. Cal. Feb. 24, 2015) ("[A]ccepting such a conclusory allegation that the contract was a 'mere sham' from the standard would likewise eviscerate Rule 9(b)'s particularity requirement, as any plaintiff alleging breach of contract could simply add an allegation that the contract itself was a sham from the start to bring a claim for fraud.").

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because he fails to state a claim on any of his causes of action, Plaintiff fails to allege any predicate unlawful act that could support such a theory. *Accord Oracle Am., Inc. v. CedarCrestone, Inc.*, 938 F. Supp. 2d 895, 908 (N.D. Cal. 2013).

This blatant disregard for Rule 9(b) is especially problematic insofar as Plaintiff's claims are based on the idea that he was somehow misled into believing that "YouTube would make Plaintiff's content available and monetizable" (¶¶ 103, 114)—given that, as discussed above, the Terms of Service that Plaintiff identifies do not contain any promises regarding monetization and expressly *disclaim* any notion that YouTube promised to display Plaintiff's videos. *See supra* pp.13-14; *see also* White Decl., Exs. 1-2. Not only that, the actual agreements that govern Plaintiff's ability to monetize as a YouTube Partner make clear that YouTube is not obligated to monetize videos that do not comply with its standards. *See* White Decl., Exs. 10, 12-13. Plaintiff cannot proceed on a fraud claim by vaguely gesturing at purported misrepresentations that are belied by YouTube's actual statements.

Fraud In The Inducement. Plaintiff's fraud in the inducement claim suffers from additional defects. "Fraud in the inducement is a subset of fraud that 'occurs when the promisor knows what he is signing but his consent is *induced* by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is *voidable*.'" *Hernandez v. TLC of the Bay Area, Inc.*, 263 F. Supp. 3d 849, 853 (N.D. Cal. 2017) (citing *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal.4th 394 (1996)). Plaintiff does not even try to plead anything like that. He does not claim that his assent to any agreement entered into with YouTube was procured by fraud, nor does he seek to void any such agreement. ¶¶ 103-112; *accord* ¶ 85 (alleging that a "valid contract … exists between the parties").

Instead, Plaintiff's theory seems to be that he was generally induced to use YouTube by YouTube's "initial representations" that it would make Plaintiff's content "available and monetizable" and would "direct a portion of any donations received" to him. ¶¶ 103, 109. Even assuming that this could amount to fraud in the inducement, Plaintiff's allegations fail to establish such a claim here because he fails to allege that YouTube "did not intend to perform the promises *at the time they were made*." *Miron v. Herbalife Int'l, Inc.*, 11 F. App'x 927, 930 (9th Cir. 2001) (emphasis added). A plaintiff cannot manufacture a fraud in the inducement claim by adding "to his complaint a general allegation that the defendant never intended to keep her promise." *Richardson*, 2000 U.S. Dist. LEXIS 2838, at *14; *accord Muse Brands, LLC v. Gentil*,

2015 U.S. Dist. LEXIS 99143, at *16 (N.D. Cal. July 28, 2015) (alleged breach of contract cannot be converted into action for fraud "based on the mere fact of the eventual alleged breach"); *Guebara v. Allstate Ins. Co.*, 1997 U.S. Dist. LEXIS 23907, at *22 (S.D. Cal. June 4, 1997) (same).

But that is exactly what Plaintiff seeks to do here. Other than a bare recital (¶ 105), Plaintiff makes no allegation that YouTube did not intend to honor the parties' agreement at the time it was made. There is not a single fact alleged in the Complaint that remotely suggests that before Plaintiff entered into a contract with YouTube, YouTube intended to remove and demonetize Plaintiff's videos or wrongfully withhold revenue from him. And any such claim would be totally implausible, given that Daniels does not allege any issues with YouTube's performance of the agreement until 2020—years after Plaintiff started posting content on YouTube and using YouTube's monetization services (*see* ¶ 6). *See, e.g.*, *Crowley v. Epicept Corp.*, 547 F. App'x 844, 847 (9th Cir. 2013) (affirming dismissal of fraud in the inducement claim "because Plaintiffs present no evidence of material misrepresentations by Defendant before the signing of the contract."); *Jewelers Mut. Ins. Co. v. ADT Sec. Servs.*, 2009 U.S. Dist. LEXIS 58691, at *11-12 (N.D. Cal. July 9, 2009) (dismissing fraud in the inducement claim when plaintiff failed to allege "that, before the Services Agreement was entered into, [d]efendant knew that it did not intend" to perform).

Wire Fraud. Finally, as a matter of law, Plaintiff cannot bring a claim for wire fraud. While the Complaint does not say, this claim appears to be based on the federal wire fraud statute, 18 U.S.C. § 1343. But it is well established that this criminal statute does not afford a private right of action. *See Ateser v. Bopp*, 1994 U.S. App. LEXIS 18014, at *6-7 (9th Cir. Jul. 19, 1994) ("Courts have consistently found that the mail and wire fraud statutes do not confer private rights of action.") (collecting appellate decisions); *see also Bennett-Wofford v. Bayview Loan Servicing, LLC*, 2015 U.S. Dist. LEXIS 166521, at *26 (N.D. Cal. Dec. 11, 2015); *Reynolds v. Wilkerson*, 2014 U.S. Dist. LEXIS 113798, at *10 (N.D. Cal. Aug. 14, 2014).

III. SECTION 230 AND THE FIRST AMENDMENT INDEPENDENTLY BAR PLAINTIFF'S CONTENT MODERATION CLAIMS

While the Court need go no further, insofar as Plaintiff's claims are based on YouTube's decision to remove, demonetize, or restrict access to his videos, all of those claims are separately barred by both Section 230 and the First Amendment.

A. Section 230 Protects Defendants From Claims Based On The Removal, Demotion, Or Demonetization Of Plaintiff's Content

Section 230 provides an immunity that protects online platforms against claims seeking to hold them liable for publishing decisions with respect to third-party content on their services. *See* 47 U.S.C. §§ 230(c),(e)(3). It is intended to "protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008). Courts routinely dismiss claims on the pleadings where, as here, the defendant's entitlement to Section 230 immunity "is evident from the face of the complaint." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014)).

Two separate provisions of Section 230 are relevant here. *First*, Section 230(c)(1) bars lawsuits "seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *accord Batzel v. Smith*, 333 F.3d 1018, 1031 n.18 (9th Cir. 2003). As the Ninth Circuit has explained, "publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). It follows that "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Id.* (quoting *Roommates*, 521 F.3d at 1170-71). Courts in this Circuit (and elsewhere) routinely hold that Section 230(c)(1) provides immunity for exactly the kinds of claims at issue here: attacks on a service provider's "decision to block access to—or, in other words, to refuse to publish"—user content, including user-uploaded videos and advertisements. *See, e.g.*, *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*,

144 F. Supp. 3d 1088, 1094-95 (N.D. Cal. 2015) (blocking of plaintiff's page), *aff'd*, 697 F. App'x 526 (9th Cir. 2017); *see also, e.g.*, *Fyk v. Facebook, Inc.*, 808 F. App'x 597, 597-98 (9th Cir. 2020) (depublication of user's pages).[11]

Second, Section 230(c)(2) provides an additional protection to interactive service providers for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2)(A). This section "does not require that the material actually be objectionable; rather, it affords protection for blocking material 'that the provider or user *considers to be*' objectionable." *Zango, Inc. v. Kaspersky Lab, Inc.*, 2007 U.S. Dist. LEXIS 97332, at *11 (W.D. Wash. Aug. 28, 2007) (emphasis added), *aff'd*, 568 F.3d 1169 (9th Cir. 2009).[12] It is clear from the Complaint that this protection applies here. YouTube removed two of Plaintiff's videos from its platform on the ground that they violated its Community Guidelines, which prohibit, among other things, harassment, hate speech, and other harmful or dangerous content. ¶¶ 9, 85. The content of those videos speaks for itself, *see* White Decl., Exs. 8-9, and even Plaintiff acknowledges that YouTube removed content that "may be offensive to some." ¶ 10 n.3. Plaintiff further alleges that YouTube removed these videos under pressure from two members of Congress, to address their concerns about the spread of misinformation online (including that relating to the COVID-19 pandemic). *E.g.*, ¶¶ 15, 20-28. Even if that were true, nothing about it would amount to "bad faith." *Accord Domen*, 433 F. Supp. 3d at 603-04

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[11] *See also Lewis*, 2020 U.S. Dist. LEXIS 150603, at *20-25 (demonetizing, restricting, and removing user's videos); *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 602-3 (S.D.N.Y. 2020), *appeal docketed*, No. 20-616 (2d Cir. Feb. 18, 2020) (removal of videos and termination of accounts); *King v. Facebook, Inc.*, 2019 U.S. Dist. LEXIS 151582, at *8-10 (N.D. Cal. Sept. 5, 2019) ("removing [plaintiff's] posts, blocking his content, or suspending his accounts"); *Lancaster v. Alphabet Inc.*, 2016 U.S. Dist. LEXIS 88908, at *6 (N.D. Cal. Jul. 8, 2016) (removal of YouTube videos); *Prager II*, 2019 Cal. Super. LEXIS 2034, at *26–27 (restriction and demonetization of YouTube videos); *Mezey v. Twitter, Inc.*, 2018 U.S. Dist. LEXIS 121775, at *3 (S.D. Fla. Jul. 19, 2018) (suspension of Twitter account).

[12] While Plaintiff contends that his videos were not "objectionable" within the meaning of the statute (¶¶ 32, 58), whether he considered them so is immaterial. *See Domen,* 433 F. Supp. 3d at 603 (explaining that "Section 230(c)(2) is focused upon the provider's subjective intent").

(applying Section 230(c)(2)(A) to dismiss claims based on service provider's removal of plaintiffs' videos).

B. The First Amendment Protects YouTube's Editorial Decisionmaking

Reinforcing the immunities afforded by Section 230, the First Amendment independently precludes Plaintiff's effort to hold YouTube liable for its editorial decisions to remove, demote, or demonetize content on its platform. The Supreme Court has repeatedly held that the First Amendment protects the rights of private parties to make editorial judgments about how to present and arrange third-party speech, including how to select and pair content with advertising. *See, e.g.*, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (First Amendment protects a newspaper's "exercise of editorial control and judgment"); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569-70 (1995) (First Amendment protects parade organizer's choice of which groups to include in a parade); *accord Wash. Post v. McManus*, 944 F.3d 506, 518 (4th Cir. 2019) ("'[T]he simple selection of a paid noncommercial advertisement for inclusion in a daily paper' falls 'squarely within the core of First Amendment security' just as much as any other piece of content."). This protection readily extends to "online publishers," which "have a First Amendment right to distribute others' speech and exercise editorial control on their platforms." *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991-92 (S.D. Tex. 2017) (citing *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014)); *accord Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) (First Amendment barred attempt to force search engine to place ads more prominently); *Zhang*, 10 F. Supp. 3d at 440-41 (First Amendment barred claims seeking to require search engine to include material on political subjects it had chosen to exclude).

Thus, just as "the courts … should [not] dictate the contents of a newspaper," *Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971), the First Amendment does not allow Plaintiff to use the courts to direct the contents of YouTube's service. *Accord Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality opinion) ("the editorial function itself is an aspect of 'speech,' and a court's decision that a private party, say, the station owner, is a 'censor,' could itself interfere with that private

'censor's' freedom to speak as an editor"). That is exactly what Plaintiff seeks to do. He asserts that YouTube should face legal liability for its editorial decisions to "drown out" or remove from its platform (or stop supporting financially) videos that claim George Floyd's death was "staged," that accuse Hillary Clinton and Barack Obama of raping or murdering children, and that describe HIV as "a biologically engineered, terroristic weapon." ¶¶ 9, 10, 27-30; White Decl., Ex. 9 at 11:8-10, 22:25-23:1, 115:25-116:1; *id.*, Ex. 8 at 96:9-11. Not only that, Plaintiff seeks a court order compelling YouTube to publish, promote, and monetize those videos on its service, notwithstanding YouTube's own judgment that they violated YouTube's rules for acceptable content. ¶¶ 34-35, 63. This directly contravenes YouTube's First Amendment rights. *Accord Zhang*, 10 F. Supp. 3d at 440 (to hold a search engine liable for "a conscious decision to design its search-engine algorithms to favor certain expression on core political subjects over other expression on those same political subjects … would plainly 'violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message'"); *Washington League for Increased Transparency & Ethics v. Fox Corp.*, No. 20-2-07428-4 SEA (Wash. Superior Ct. May 27, 2020) (First Amendment bars claims attacking cable programmer's decision to publish alleged misinformation regarding COVID-19).

CONCLUSION

For these reasons, Plaintiff's Complaint should be dismissed.

Respectfully submitted,

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