

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DIVINO GROUP LLC, et al.,
Plaintiffs,
v.
GOOGLE LLC, et al.,
Defendants.

Case No. 19-cv-04749-VKD

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS THIRD
AMENDED COMPLAINT WITH
LIMITED LEAVE TO AMEND**

Re: Dkt. Nos. 77, 102

Defendants Google LLC (“Google”) and YouTube LLC (“YouTube”) move to dismiss plaintiffs’ third amended class action complaint. Plaintiffs oppose the motion. Upon consideration of the moving and responding papers, including the notices and memoranda submitted by the United States and the parties’ responses thereto, as well as the oral arguments of counsel, the Court grants defendants’ motion to dismiss, with leave to amend only as to plaintiffs’ claim for breach of the implied covenant of good faith and fair dealing.¹

I. BACKGROUND

Plaintiffs Divino Group LLC, Chris Knight, Celso Dulay, Cameron Stiehl, BriaAndChrissy LLC d/b/a “BriaAndChrissy,” Bria Kam, Chrissy Chambers, Chase Ross, Brett Somers, Lindsay Amer, Stephanie Frosch, Sal Cinquemani (also known as “SalBardo”), Tamara (Sheri) Johnson, and Greg Scarnici are Lesbian, Gay, Bisexual, Transgender, Transsexual or Queer (“LGBTQ+”) content creators, viewers, users, and consumers who filed this putative class action against Google and

¹ All parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by a magistrate judge. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; Dkt. Nos. 5, 16, 17.

1 YouTube. Plaintiffs claim that despite YouTube’s purported viewpoint neutrality, defendants have
2 discriminated against them based on their sexual or gender orientation, identity, and/or viewpoints
3 by censoring, demonetizing, or otherwise interfering with certain videos that plaintiffs uploaded to
4 YouTube. Dkt. No. 67 ¶ 1; *see also id.* ¶¶ 35-44.²

5 Plaintiffs filed their original complaint on August 13, 2019 (Dkt. No. 1) and an amended
6 complaint on November 12, 2019 (Dkt. No. 7).

7 On January 6, 2020, the Court granted plaintiffs’ unopposed motion for leave to file a second
8 amended complaint (“SAC”). Dkt. No. 23. The SAC asserted claims for (1) violation of plaintiffs’
9 First Amendment rights under 42 U.S.C. § 1983; (2) violation of Article I, section 2 of the California
10 Constitution; (3) violation of the Unruh Act, California Civil Code §§ 51, *et seq.*; (4) unfair
11 competition under California Business and Professions Code §§ 17200, *et seq.*; (5) breach of the
12 implied covenant of good faith and fair dealing; and (6) false advertising and false association in
13 violation of the Lanham Act, 15 U.S.C. § 1125, *et seq.* In addition, plaintiffs sought a declaration that
14 Section 230 of the Communications Decency Act (“CDA”), 47 U.S.C. § 230(c), on which plaintiffs
15 expected defendants to rely as an affirmative defense, is unconstitutional. Plaintiffs also separately
16 sought a declaration that defendants violated the rights and obligations pled as the bases for all of
17 plaintiffs’ other claims. Dkt. No. 20.

18 Defendants moved to dismiss all of the claims in the SAC pursuant to Rule 12(b)(6) for failure
19 to state a claim and as barred by Section 230 of the CDA. Dkt. No. 25. On January 6, 2021, the Court
20 granted defendants’ motion to dismiss, with limited leave to amend. Dkt. No. 65. The Court
21 dismissed plaintiffs’ First Amendment claim without leave to amend, concluding that defendants are
22 not state actors, YouTube is not a public forum, and that the availability of protections under CDA
23 Section 230 does not amount to government endorsement of defendants’ alleged discrimination. *Id.* at
24 7-12. Plaintiffs’ Lanham Act claim for alleged false advertising³ was dismissed with leave to amend.

25 _____
26 ² The Court assumes the parties’ familiarity with the general background facts as described in its
27 prior order on defendants’ motion to dismiss plaintiffs’ second amended complaint (Dkt. No. 65 at
28 2-6) and does not repeat those facts in this order.

29 ³ Plaintiffs withdrew their Lanham Act claim to the extent it was based on false association. They

1 The Court concluded that plaintiffs’ theory—i.e., that by making plaintiffs’ videos inaccessible
2 through application of Restricted Mode, defendants falsely implied that the videos contain shocking or
3 inappropriate content—is squarely foreclosed by *Prager Univ. v. Google LLC* (“*Prager III*”), 951 F.3d
4 991 (9th Cir. 2020). *Id.* at 12-14. Having dismissed the only claims giving rise to federal jurisdiction,
5 and noting that the SAC did not expressly invoke federal jurisdiction under the Class Action Fairness
6 Act (“CAFA”), 28 U.S.C. § 1332(d), the Court declined to exercise jurisdiction over plaintiffs’ state
7 law claims and dismissed those state claims without prejudice. *Id.* at 16. The Court dismissed
8 plaintiffs’ claim for declaratory relief regarding CDA Section 230 because declaratory relief is a
9 remedy, not an independent cause of action; the claim was based on plaintiffs’ First Amendment
10 claim, which was dismissed; and because the Declaratory Judgment Act cannot be used to anticipate
11 an affirmative defense. *Id.* at 17-18. Plaintiffs’ omnibus claim for declaratory relief was dismissed as
12 improper, and because plaintiffs failed to state any federal claim over which the Court could exercise
13 jurisdiction, and because the Court declined to exercise supplemental jurisdiction over plaintiffs’ state
14 law claims. *Id.* at 18-19.

15 Plaintiffs were given leave to amend their Lanham Act false advertising claim, and to reassert
16 their state law claims for relief. They were also given leave to attempt to plead CAFA jurisdiction. *Id.*
17 at 16, 19.

18 Plaintiffs’ operative third amended class action complaint (“TAC”) asserts a Lanham Act
19 claim (claim 6), as well as several state law claims for violation of Article I, section 2 of the California
20 Constitution (claim 2); violation of the Unruh Act (claim 3); unfair competition under California
21 Business and Professions Code § 17200, *et seq.* (claim 4); and breach of the implied covenant of good
22 faith and fair dealing (claim 5). Additionally, plaintiffs again seek a declaration that CDA Section
23 230, which defendants have raised as a defense, is unconstitutional (claim 1). Plaintiffs assert that
24 federal question jurisdiction exists by virtue of the Lanham Act claim. They also contend that their
25 declaratory relief claim provides an additional independent basis for federal question jurisdiction under
26 28 U.S.C. § 1331. The TAC further asserts that federal jurisdiction also exists under CAFA, 28 U.S.C.

27 _____
28 YouTube as a viewpoint-neutral community that values freedom of expression. *See* Dkt. No. 65 at

1 § 1332(d). Plaintiffs assert that the Court has supplemental jurisdiction over their state law claims, 28
 2 U.S.C. § 1367. Dkt. No. 67 ¶¶ 61-62.

3 Defendants move pursuant to Rule 12(b)(6) to dismiss all claims in the TAC without
 4 further leave to amend, arguing that plaintiffs still fail to assert facts supporting a cognizable claim
 5 for false advertising under the Lanham Act. Defendants further contend that the TAC fails to state
 6 sufficient facts to support any of plaintiffs' state law claims for relief, and that all such claims are
 7 barred by CDA Section 230.

8 **II. LEGAL STANDARD**

9 "A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
 10 claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation*
 11 *Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d
 12 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts
 13 as true all well-pled factual allegations and construes them in the light most favorable to the
 14 plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). While a
 15 complaint need not contain detailed factual allegations, it "must contain sufficient factual matter,
 16 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556
 17 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is
 18 facially plausible when it "pleads factual content that allows the court to draw the reasonable
 19 inference that the defendant is liable for the misconduct alleged." *Id.*

20 The Court is not required to "assume the truth of legal conclusions merely because they
 21 are cast in the form of factual allegations." *Prager Univ. v. Google LLC* ("*Prager P*"), No. 17-
 22 CV-06064-LHK, 2018 WL 1471939, at *3 (N.D. Cal. Mar. 26, 2018) (quoting *Fayer v. Vaughn*,
 23 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam)). Nor does the Court accept allegations that
 24 contradict documents attached to the complaint or incorporated by reference, *Gonzalez v. Planned*
 25 *Parenthood of L.A.*, 759 F.3d 1112, 1115 (9th Cir. 2014), or that rest on "allegations that are
 26 merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *In re Gilead Scis.*
 27 *Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

1 Rule 12(b)(6) motion. If matters outside the pleadings are considered, “the motion must be treated
 2 as one for summary judgment under Rule 56.” Fed. R. Civ. P. 12(d). However, documents
 3 appended to the complaint, incorporated by reference in the complaint, or which properly are the
 4 subject of judicial notice may be considered along with the complaint when deciding a Rule
 5 12(b)(6) motion. *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 998 (9th Cir. 2018); *see also Hal*
 6 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).
 7 Likewise, a court may consider matters that are “capable of accurate and ready determination by
 8 resort to sources whose accuracy cannot reasonably be questioned.” *Roca v. Wells Fargo Bank,*
 9 *N.A.*, No. 15-cv-02147-KAW, 2016 WL 368153, at *3 (N.D. Cal. Feb. 1, 2016) (quoting Fed. R.
 10 Evid. 201(b)).

11 **III. DISCUSSION**

12 **A. Federal Jurisdiction**

13 The Court first examines the claims plaintiffs assert in support of federal jurisdiction. As
 14 discussed above, the TAC alleges federal question jurisdiction, 28 U.S.C. § 1331, based on
 15 plaintiffs’ Lanham Act claim and on their claim for declaratory judgment. The TAC also alleges
 16 CAFA jurisdiction under 28 U.S.C. § 1332(d).

17 **1. Lanham Act Claim**

18 The Court previously dismissed plaintiffs’ Lanham Act false advertising claim⁴ as
 19 foreclosed by *Prager III*, in which the Ninth Circuit held that statements about videos being
 20 unavailable in Restricted Mode are simply accurate explanations of the application of defendants’
 21 content review and monitoring procedures, and are not actionable as commercial advertising or
 22 promotion. *See Prager III*, 951 F.3d at 999-1000; *see also* Dkt. No. 65 at 12-14. This Court
 23 further noted that plaintiffs “do not explain how the purported competition between plaintiffs and
 24 defendants transforms defendants’ explanatory statements into commercial advertising and
 25

26 _____
 27 ⁴ Although the TAC appears to reassert allegations that defendants violate the Lanham Act
 28 through false association and defendants’ alleged “promotion of their service as a neutral public
 29 forum” (*see, e.g.*, Dkt. No. 67 ¶¶ 344, 350, 351, 355), as discussed above, plaintiffs were given
 30 leave to amend their Lanham Act claim only to the extent it was based on false advertising. *See*

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.