

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

KIMBERLY CARLESTE NEWMAN, et al.,

Plaintiffs,

v.

GOOGLE LLC, et al.,

Defendants.

Case No. 20-CV-04011-LHK

**ORDER GRANTING WITH LEAVE TO  
AMEND DEFENDANTS’ MOTION TO  
DISMISS; DENYING PLAINTIFFS’  
MOTION TO STRIKE**

Plaintiffs Kimberly Carleste Newman, Lisa Cabrera, Catherine Jones, Denotra Nicole Lewis, Andrew Hepkins, Harvey Stubbs, Khalif Muhammad, Keu Reyes, and Osiris Ley (collectively, “Plaintiffs”) bring the instant case against Defendants Google LLC and YouTube, LLC (collectively, “Defendants”),<sup>1</sup> alleging claims for equitable conversion, replevin, equitable accounting of revenue, breach of contract, implied breach of covenant of good faith and fair dealing, promissory estoppel, violation of the Unruh Civil Rights Act; violation of 42 U.S.C. § 1981, unlawful, deceptive, and unfair business practices in violation of Business & Professions Code § 17200 (“UCL”), false advertising in violation of the Lanham Act, 15 U.S.C. § 1125,

<sup>1</sup> On November 2, 2020, the parties voluntarily dismissed Defendant Alphabet Inc. ECF No. 28.

1 violation of Article I, Section 2 of the California Constitution, and violation of the First  
 2 Amendment of the United States Constitution. *See* Revised Second Amended Class Action  
 3 Complaint, ECF No. 27 (“SAC”). Plaintiffs also seek a declaratory judgment that Section 230 of  
 4 the Communications Decency Act (“CDA”) either does not immunize Defendants’ alleged  
 5 misconduct or is unconstitutional. *Id.* Before the Court is Defendants’ motion to dismiss  
 6 Plaintiffs’ SAC in its entirety, ECF No. 29 (“Mot.”), and Plaintiffs’ motion to strike, or in the  
 7 alternative to convert Defendants’ motion to dismiss into a Rule 56 motion. ECF No. 39  
 8 (“MTS”). Having considered the parties’ submissions, the relevant law, and the record in this  
 9 case, the Court GRANTS with leave to amend Defendants’ motion to dismiss and DENIES  
 10 Plaintiffs’ motion to strike.

## 11 **I. BACKGROUND**

### 12 **A. Factual Background**

#### 13 **1. The Parties**

14 YouTube, LLC (“YouTube”), a subsidiary of Google LLC (“Google”), is the largest and  
 15 most popular online video hosting platform with approximately 2.3 billion users worldwide. SAC  
 16 at ¶ 27, 75. YouTube’s principle place of business is in Mountain View, California. *Id.*

17 Plaintiffs are each YouTube creators and operators of various YouTube channels. *Id.* at ¶¶  
 18 18–26. Each Plaintiff is African American or of Mexican or Puerto Rican descent. *Id.* Each  
 19 Plaintiff operates at least one channel on YouTube. *Id.* A YouTube channel allows content  
 20 creators, such as Plaintiffs, to upload videos into a centralized location that other users can follow  
 21 and be alerted when new videos are posted. Some Plaintiffs have “monetized” their videos by  
 22 participating in YouTube’s advertising program, whereby content creators are compensated for  
 23 advertisements that run on their videos. *Id.*

#### 24 **2. YouTube’s Terms of Service**

25 Content creators, including Plaintiffs, upload videos to YouTube free of charge. YouTube  
 26 users may then view, share, and comment on those videos. *Id.* at ¶ 519. Uploading a video to

1 YouTube or creating a YouTube channel requires that a user agree to YouTube’s Terms of Service  
2 (“TOS”), which in turn incorporate YouTube’s Community Guidelines. *Id.* at ¶ 7 n.2. Among  
3 other provisions, YouTube’s TOS state that YouTube has the right to remove content from its site  
4 “including, but not limited to, pornography, obscenity, or [content that is] excessive length.” *Id.* at  
5 ¶ 105. Videos may also violate YouTube’s TOS and be removed if those videos contain “hate  
6 speech, obscene, misogynistic, violent, threatening, or disparaging content.” *Id.* at ¶ 164.

### 7 **3. YouTube’s Restricted Mode**

8 YouTube offers a setting called Restricted Mode. Restricted Mode is an opt-in setting on  
9 the service that allows users or institutions to screen out content that has been flagged as age-  
10 restricted or “potentially adult.” SAC at ¶¶ 135–137. This setting allows system administrators at  
11 schools and other institutions to restrict potentially adult content from being accessed by users,  
12 including children. *Id.* Although Restricted Mode primarily affects users who turn on Restricted  
13 Mode themselves, Plaintiffs allege that users without YouTube accounts are occasionally blocked  
14 by Restricted Mode from viewing potentially adult content when those users visit YouTube. *Id.*

15 Videos can be tagged for exclusion in Restricted Mode in one of two ways. First,  
16 YouTube algorithms look for particular “signals,” such as “the video’s metadata, title, and tag  
17 words associated with the video.” *Id.* at ¶ 139. Based on those signals, YouTube’s algorithms  
18 will automatically tag a video to be excluded in Restricted Mode. *Id.* Second, videos can be  
19 flagged by YouTube users as potentially inappropriate. Flagged videos are then reviewed by a  
20 team of human reviewers and excluded in Restricted Mode if a video includes content that is age-  
21 restricted or potentially adult. *Id.*

22 Plaintiffs allege that there are multiple criteria that can lead to YouTube deeming a video  
23 to be inappropriate, including videos that contain the following content:

- 24 (1) talking about drug use or abuse, or drinking alcohol in videos; (2)  
25 overly detailed conversations about or depictions of sex or sexual  
26 activity; (3) graphic descriptions of violence, violent acts, natural  
27 disasters and tragedies, or even violence in the news; (4) videos that  
cover specific details about events related to terrorism, war, crime,  
and political conflicts that resulted in death or serious injury, even if

no graphic imagery is shown; (5) inappropriate language, including profanity; and (6) video content that is gratuitously incendiary, inflammatory, or demeaning towards an individual or group.

*Id.* at ¶ 139.

Videos that are blocked in Restricted Mode remain viewable to users who do not have Restricted Mode activated, as long as those videos otherwise meet YouTube’s TOS. A user whose video has been blocked in Restricted Mode may appeal to YouTube if that user believes that the video was incorrectly flagged for exclusion in Restricted Mode. *Id.* at ¶ 146.

#### 4. Advertising Policies on YouTube

YouTube content creators whose channels meet certain criteria are allowed to “monetize” their videos by allowing YouTube to run advertisements before and during videos. This allows content creators to earn revenue from their qualifying videos. *See, e.g., id.* at ¶ 18–26, 65. YouTube calls this the YouTube Partner Program. *Id.* at ¶ 7 n.2. Before content creators can run advertisements on their videos, content creators must agree to supplemental terms of service, including the Partner Program Terms of Service and the Google AdSense Terms of Service. *Id.* These terms are intended to ensure that YouTube advertisements do not appear on videos with objectionable content, and YouTube uses automated software to identify content that is inappropriate for advertising. *Id.* at ¶ 65. If a content creator believes that their video has been incorrectly flagged as inappropriate, the content creator may appeal that decision for manual review. *Id.* at ¶ 176.

#### 5. Plaintiffs’ Allegations of YouTube’s Misconduct

Plaintiffs allege that despite Defendants’ statements that YouTube’s moderation policies are race-neutral, Defendants have targeted Plaintiffs because of Plaintiffs’ race and viewpoints. *Id.* at ¶ 36. Specifically, Defendants “profile, use, and consider Plaintiffs’ race, personal identity, or viewpoints, in order to interfere with, restrict, or block video uploading, viewing, promotion, advertising, engagement, and/or monetization services because Plaintiffs are African American and/or possess personal characteristics or viewpoints that Defendants dislike.” *Id.*

Defendants allegedly discriminate against Plaintiffs in several ways. First, Defendants’

1 filtering and reviewing tools profile the racial identity of Plaintiffs and impose restrictions on  
2 Plaintiffs' videos by blocking access to those videos in Restricted Mode. *Id.* at ¶ 47–48.  
3 Plaintiffs' videos allegedly do not contain content that meets YouTube's qualification for  
4 inappropriate or potentially adult content. *Id.* at ¶¶ 65, 143. Rather, Plaintiffs' videos are  
5 allegedly included in Restricted Mode because of Plaintiffs' racial identity or viewpoint. *Id.*

6 Second, Defendants "demonetize" Plaintiffs' videos by preventing advertisements from  
7 running on those videos. *Id.* at ¶ 65. Defendants contractually reserve the right to remove  
8 advertising from users' videos, but Plaintiffs allege that Defendants remove advertising from  
9 Plaintiffs' videos on account of Plaintiffs' race or viewpoint, rather than inappropriate content. *Id.*  
10 By demonetizing Plaintiffs' videos, Defendants allegedly deprive Plaintiffs of advertising revenue  
11 that Plaintiffs would otherwise receive. *Id.* at ¶ 64.

12 Third, Defendants allegedly engage in several other practices that discriminate against  
13 Plaintiffs on the basis of their race and viewpoints. These practices include "shadow banning"  
14 videos and channels (i.e. removing videos or channels from search results); excluding Plaintiffs'  
15 videos from the "Up Next" or "Trending" feature on YouTube; interfering with Plaintiffs'  
16 livestream broadcasts by throttling, pixelating, or otherwise disrupting the broadcast; "ad  
17 bombing" Plaintiffs' videos by interrupting Plaintiffs' videos with constant streaming or banner  
18 ads; recommending hostile, irrelevant, or extraneous videos in the "Up Next" feature on Plaintiffs'  
19 videos; permitting hate speech on Plaintiffs' videos; and ignoring and obstructing Plaintiffs'  
20 internal appeals of YouTube's decisions to suspend or restrict Plaintiffs' channels and videos. *Id.*  
21 at ¶ 65. Plaintiffs allege that Defendants' conduct "creates censorship, restraint of speech, and  
22 discrimination based on the race, identity, and/or viewpoint of Plaintiffs and all other persons  
23 similarly situated." *Id.* at ¶ 121.

24 Furthermore, Plaintiffs allege that Defendants are motivated to act in an anticompetitive  
25 manner towards Plaintiffs because Defendants produce their own content and distribute it on  
26 YouTube. *Id.* at ¶ 40. Thus, Plaintiffs allege, Defendants act in ways that harm Plaintiffs' videos  
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