UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JOHN DOE, et al.,

Plaintiffs,

v.

GOOGLE LLC, et al.,

Defendants.

Case No. 20-cv-07502-BLF

ORDER GRANTING MOTION TO DISMISS

[Re: ECF No. 40]

Before the Court is Defendants' motion to dismiss Plaintiffs' first amended complaint, which alleges a First Amendment violation and breach of contract and the duty of good faith and fair dealing based on Defendants' suspension of Plaintiffs' YouTube accounts on October 15, 2020. ECF No. 30 ("FAC") at 1. Plaintiffs are "conservative content creators" who post videos on YouTube pursuant to the YouTube Terms of Service. *Id.* at 1, ¶ 4. Defendants own and operate YouTube.

Having considered the parties' briefs, the Court GRANTS Defendants' motion to dismiss Plaintiffs' First Amendment claim WITH PREJUDICE. With Plaintiffs' only federal claim dismissed, the Court DECLINES to extend supplemental jurisdiction to Plaintiffs' state law claims.

I. BACKGROUND

The factual background and procedural history of this case is substantially set forth in the Court's November 3, 2020 order denying Plaintiffs' application for a temporary restraining order. ECF No. 27 at 1-4. On November 17, 2020, Plaintiffs filed an amended complaint. *See* FAC. On April 7, 2021, Defendants filed a motion to dismiss the first amended complaint. *See* ECF No. 40 ("Mot."). On May 19, 2021, Plaintiffs filed an opposition. *See* ECF No. 43 ("Opp."). On June 23, 2021, Defendants filed a reply. See ECF No. 44 ("Reply"). On August 26, 2021, the Court

granted the parties' stipulation to submit the motion without hearing. *See* ECF No. 46.

II. LEGAL STANDARD

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). In this inquiry, the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the Court needs not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citations omitted). While a complaint is not required to contain detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. On a motion to dismiss, the Court's review is limited to the face of the complaint and matters judicially noticeable. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983).

III. DISCUSSION

A. First Amendment

Plaintiffs assert that Defendants have deprived them of their First Amendment rights by suspending their YouTube accounts.[1] FAC ¶¶ 302-19. Defendants argue that Plaintiffs fail to plead

[1] Plaintiffs appear to bring their First Amendment claim under § 1983. FAC ¶ 45. Claims for violations of constitutional rights by federal government actors must be brought based on *Bivens*—not § 1983. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). If this were the only deficit in Plaintiffs' First Amendment claim, then the Court would

sufficient facts to plausibly allege state action, because Defendants are private companies. Mot. at 7-12. Plaintiffs argue that they have pled sufficient facts to plausibly allege state action under any of four theories: (1) public function, (2) compulsion, (3) joint action, and (4) governmental nexus. Opp. at 8-15; FAC ¶¶ 44, 302-19. Plaintiffs allege that there is state action here because of the actions of federal officials, including Rep. Adam Schiff, Speaker of the House Nancy Pelosi, the U.S. House of Representatives, the U.S. Senate, and others. FAC ¶¶ 31-43.

To plead that a private defendant is liable for deprivation of constitutional rights, a plaintiff must plead facts sufficient to plausibly allege that the conduct constituted state action.[2] *Gorenc v. Salt River Project Agr. Imp. & Power Dist.*, 869 F.2d 503, 505 (9th Cir. 1989), *cert. denied*, 493 U.S. 899 (1989). The Supreme Court has articulated four approaches to the state action question: (1) public function, (2) state compulsion, (3) governmental nexus, and (4) joint action. *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996). The Supreme Court has not indicated whether these approaches are merely factors or independent tests. *Id.*

i. Public Function

In their complaint, Plaintiffs assert state action based on a public function theory. FAC, ¶ 307. Defendants argue that the Ninth Circuit's decision in the *Prager* case "precludes constitutional scrutiny of YouTube's content moderation." Mot. at 7 (citing *Prager Univ. v. Google LLC*, 951 F.3d 991, 999 (9th Cir. 2020)). In Plaintiffs' opposition, they appear to drop any assertion of a public function theory, and instead seem to concede that this theory is foreclosed by *Prager*. Opp. at 9-11 ("Plaintiffs allege that Defendants' censorship satisfies either the **governmental nexus test** or **the joint action test**."); *id.* at 18 ("Prager was premised on a state action theory that the Ninth Circuit did not adopt – the platform as a public function theory.")

To the extent Plaintiffs are still asserting state action under a public function theory, the Court finds that this theory is indeed foreclosed by *Prager*. For there to be state action under a

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construes Plaintiffs' First Amendment claim as a *Bivens* claim throughout this order.

[2] While a *Bivens* claim is based on actions of the federal government, the Court will refer to "state

public function theory, a private entity must exercise "powers traditionally exclusively reserved to the State." *Manhattan Community Access Corp. v. Halleck*, 139 S.Ct. 1921, 1924 (2019) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (2019)). Plaintiffs assert that "YouTube performs an exclusively and traditionally public function by regulating free speech within a public forum." FAC ¶ 307. In *Prager*, the Ninth Circuit ruled that "YouTube…does not conduct a quintessential public function through regulation of speech on a public forum." 951 F.3d at 998. Accordingly, Plaintiffs have not pled sufficient facts to support state action under a plausible public function theory.

ii. Compulsion

Plaintiffs argue that they have adequately pled that Defendants' alleged conduct was state action under a compulsion theory. Opp. at 8-10. Plaintiffs' First Amended Complaint cites statements by U.S. Rep. Adam Schiff and Speaker of the House Nancy Pelosi and an October 2020 House Resolution, which "have pressed Big Tech" into censoring political speech with threats of limiting Section 230 of the Communications Decency Act ("CDA") and other penalties. Opp. at 8-10, 15; FAC at 31-43. Defendants argue that Plaintiffs have failed to allege sufficient facts to plausibly plead compulsion, because they have failed to plead that government actors commanded a particular result in Plaintiffs' specific cases or point to statements with any actual legal force. Mot. at 8-12. Further, Defendants argue that Plaintiffs' compulsion theory is foreclosed by the Ninth Circuit's decision in *Sutton v. Providence St. Joseph Medical Center*, which held that "something more" is required for a compulsion claim against a private party. 192 F.3d 826, 838-39 (9th Cir. 1999); Mot. at 7-12. In response, Plaintiffs argue that they have adequately pled the "something more" element required by *Sutton* by alleging that Defendants and the state were jointly pursuing an unconstitutional end. Opp. at 10. Specifically, Plaintiffs point to public statements regarding a "partnership" between Defendants and federal lawmakers. *Id.*

For a private party's conduct to constitute state action under a compulsion theory, it must involve "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982). To plead such a claim, a party must allege that the government "commanded a particular result in, or otherwise

participated in, his specific case." *Heineke v. Santa Clara Univ.*, 965 F.3d 1009, 1014 (9th Cir. 2020). Plaintiffs must point to a "state regulation or custom having the force of law that compelled, coerced, or encouraged" the alleged private conduct. *Johnson v. Knowles*, 113 F.3d 1114, 1120 (9th Cir. 1997). Further, a compulsion claim against a private party requires pleading "some additional nexus that [makes] it fair to deem the private entity a governmental actor in the circumstances." *Sutton*, 192 F.3d at 839.

The Court finds that the statements by federal lawmakers Plaintiffs point to are insufficient to plead that the government "commanded a particular result in, or otherwise participated in, [Plaintiffs'] specific case." *Heineke*, 965 F.3d at 1014; *see also Daniels v. Alphabet*, No. 20-cv-04687-VKD, 2021 WL 1222166, at *6 (N.D. Cal. Mar. 31, 2021). Plaintiffs point to generalized statements from lawmakers pertaining to "coronavirus-related misinformation," "disinformation proliferating online," "QAnon-related speech," and "conspiracy theories." FAC, ¶¶ 31-43; *id.*, Ex. F. None of the statements mention Plaintiffs' names, their YouTube or Google accounts, their channels, or their videos. Plaintiffs argue that state actors "commanded a particular result" in their case because "Plaintiffs have alleged that Congress demanded that the unpopular speech dubbed 'misinformation,' and QAnon-related speech be limited and erased, which is precisely what Plaintiffs allege Defendants did." Opp. at 11. The Court disagrees that broad lawmaker proclamations regarding "misinformation" or "QAnon-related speech," for example, are sufficient to show that the government "commanded" the suspension of Plaintiffs' accounts. Even if Defendants had complied with these lawmaker statements to the letter, they would still have had the ultimate discretion on what videos or accounts fit into buckets like "misinformation" or "QAnon-related speech."

The Court also disagrees with Plaintiffs that they have alleged sufficient facts about the content of their videos to link their removal to the broad categories of online content mentioned in the lawmakers' statements. For example, Plaintiffs plead no facts to indicate that their videos pertained to COVID-19, so none of the statements from members of Congress relating to COVID-19 misinformation have any relevance to Defendants' alleged conduct. *See, e.g.*, FAC ¶ 8. Further, Plaintiffs plead only vague facts about other subjects that leave open the question as to whether all

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