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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JUSTIN HART,

Plaintiff,

vs.

FACEBOOK, INC., TWITTER, INC.; VIVEK MURTHY in his official capacity as United States Surgeon General; JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; the DEPARTMENT OF HEALTH AND HUMAN SERVICES, and the OFFICE OF MANAGEMENT AND BUDGET,

Defendants.

Case No. 3:22-cv-00737-CRB

TWITTER, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JONATHAN A. PATCHEN; AND [PROPOSED] ORDER

Judge: Hon. Charles R. Breyer
Date: April 21, 2022
Time: 10:00 AM
Ctrm: Courtroom 6

Action Filed: August 31, 2021
Trial Date: None

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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT, on April 21, 2022, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 6, Floor 17, of the United States District Court for the Northern District of California, San Francisco Division, Twitter, Inc. ("Twitter") will and hereby does move the Court to dismiss the complaint filed by Plaintiff Justin Hart pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Dkt. No. 1 (hereinafter "Complaint"). This Motion to Dismiss is based on this Notice of Motion, the Memorandum of Points and Authorities, Request for Judicial Notice, and the supporting declaration of Jonathan A. Patchen.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Twitter requests the Court dismiss with prejudice all of Plaintiff's claims against Twitter (Counts I, III–IV of the Complaint).

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiff brought a cognizable cause of action under the First Amendment.

2. Whether Plaintiff plausibly alleged that Twitter violated the Free Speech clause of the California Constitution.

3. Whether Plaintiff plausibly alleged a claim under promissory estoppel.

4. Whether Plaintiff's Complaint is barred by the First Amendment of the federal Constitution, Section 230 of the Communications Decency Act, and Twitter's Terms of Service.

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF ARGUMENT

Plaintiff Hart violated Twitter's policy prohibiting "misleading and potentially harmful information related to COVID-19." In response, Twitter removed the violative content and temporarily locked his account. Plaintiff filed this lawsuit seeking an order declaring Twitter's enforcement of its Terms of Service unconstitutional and forcing Twitter to re-publish the violative content, including based on the flawed premise that he is legally entitled to publish whatever content he wants on Twitter without restriction and irrespective of Twitter's own policies and rights. Plaintiff fails to allege facts sufficient to state a valid claim and his lawsuit is barred by contract, by the First Amendment of the federal Constitution, and by Section 230 of the Communications Decency Act ("Section 230"). Plaintiff's lawsuit should be dismissed in its entirety.

First, Plaintiff cannot allege a cognizable cause of action under the federal Constitution because Twitter is not a state actor and Plaintiff provides no factual allegation demonstrating that Twitter acted in concert with any of the Federal Defendants. *See* Argument § I; Compl. ¶¶ 51–65 ("Count I").[1] In fact, this Court recently rejected an identical claim when it determined that Twitter is a "private entity" and held that "one-off, one-way communication" from the government to Twitter does not "transform[] what might otherwise be private content-moderation decisions into state action." *O'Handley v. Padilla*, No. 21-cv-07063-CRB, 2022 WL 93625, at *9–10 (N.D. Cal. Jan. 10, 2022) (Breyer, J.).

Second, the Complaint fails to allege a violation of "the Free Speech clause of the California Constitution." Compl. ¶¶ 75–79 ("Count III").[2] Like the First Amendment, the California Constitution's Free Speech clause applies only to the government, not corporations, and courts in

[1] The Complaint uses paragraph numbers 1-26 twice. For clarity, citations to the second set of paragraphs numbered 1–26 in the Complaint shall be followed by "*bis*" (e.g., ¶ 3 *bis*).

[2] Presumably the Complaint is referring to Article I, Section 2 of the California Constitution, which states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press" (hereinafter, "Free Speech Clause").

California have refused to expand the narrow exception where private property "is freely and openly accessible to the public" to services similar to those offered by Twitter here. *See* Argument § II.

Third, Plaintiff fails to demonstrate or even assert any specific promise made by Twitter to Plaintiff that could potentially support his claim of Promissory Estoppel. *See* Compl. ¶¶ 80–87 ("Count IV"); Argument § III. Furthermore, even assuming some vague promise existed, Plaintiff cannot show that he reasonably relied on the alleged promise to his detriment where the purported promise directly contradicts Twitter's Terms of Service, and where Plaintiff fails to allege any facts indicating he was harmed by the alleged reliance. *See* Argument § III.

Fourth, *and finally*, all of Plaintiff's claims are barred by the First Amendment of the federal Constitution, Section 230 of the Communications Decency Act ("Section 230"), and Twitter's Terms of Service. Twitter has a federal constitutional right to assert editorial control over its platform, which would be violated if forced to publish content it deems to be harmful. *See* Argument § IV(A). Binding law also prohibits Plaintiff from filing a lawsuit against an interactive computer service, like Twitter, in connection with its decision to assert editorial control by removing content that violates its Terms of Service. *See* Argument § IV(B). Finally, Twitter's Terms of Service bar this lawsuit because by agreeing to comply with its Terms, Plaintiff consented to Twitter removing content that violated its policies. *See* Argument § IV(C).

Plaintiff cannot cure these deficiencies. Twitter's Motion should be granted without leave to amend.

BACKGROUND

A. Overview of Twitter Platform, Terms of Service, and Content Moderation Policies.

Twitter is a corporation that operates an online platform allowing people to create a personal profile on which to share content and communicate with other people—using "Tweets." Compl. ¶¶ 14, 41–42. Twitter conditions the use of its platform on compliance with its Terms of Service ("Terms" or "Terms of Service") and various rules and policies, which are posted on Twitter's website. *Id.* ¶¶ 44–46 (referring to the Terms of Service and "Twitter Rules" and citing help.twitter.com/en/rules-and-policies/twitter-rules). Twitter informs anyone interested in using its

services that they are authorized to do so "only if you agree to form a binding contract" with Twitter by agreeing to the Twitter User Agreement, which comprises the "Terms of Service, Privacy Policy, the Twitter Rules and Policies, and all incorporated policies." Declaration of Jonathan Patchen ("Patchen Decl.") Ex. 1.[3] In its Terms of Service, Twitter "reserve[s] the right to remove Content that violates the User Agreement" and directs people to its website for information "regarding specific policies and the process for reporting or appealing violations." Ex. 1 § 3.[4]

One of Twitter's policies prohibits using "Twitter's services to share false or misleading information about COVID-19 which may lead to harm." Compl. ¶ 6 *bis*; Patchen Decl. Ex. 2 ("Covid-19 Misleading Information Policy").[5] At the time relevant here, Twitter's COVID-19 Misleading Information Policy stated:

> Content that is demonstrably false or misleading and may lead to significant risk of harm (such as increased exposure to the virus, or adverse effects on public health systems) may not be shared on Twitter. This includes sharing content that may mislead people about the nature of the COVID-19 virus; the efficacy and/or safety of preventative measures, treatments, or other precautions to mitigate or treat the disease; official regulations, restrictions, or exemptions pertaining to health advisories; or the prevalence of the virus or risk of infection or death associated with COVID-19. In addition, we may label Tweets which share misleading information about COVID-19 to reduce their spread and provide additional context.

[3] As explained in Twitter's Request for Judicial Notice filed concurrently with this Motion, Twitter's Terms of Service (Compl. ¶ 46), Covid-19 Misleading Information Policy (*id.* ¶¶ 5–6 *bis*), and rules and policies posted on its website (*id.* ¶ 44) are both incorporated by reference in the Complaint and subject to judicial notice. All "Ex." citations refer to the exhibits attached to the Patchen Declaration.

[4] By accepting the User Agreement, Plaintiff agreed to be bound by the current version of the Terms of Service. Patchen Decl. Ex. 1 § 6 ("the most current version of the Terms, which will always be at twitter.com/tos, will govern our relationship with you . . . By continuing to access or use the Service after those revisions become effective, you agree to be bound by the revised Terms").

[5] The Complaint quotes Twitter's notice to Plaintiff that explicitly references Twitter's policy prohibiting the spread of misleading information about COVID-19, while simultaneously alleging that at "no point in the terms of service or Twitter Rules does Twitter prohibit viewpoints that oppose wearing masks." *Compare* Compl. ¶ 6 *bis*, *with id.* ¶ 46. As discussed below, the Court should not credit allegations that contradict materials properly before the Court, including those based on incorporation by reference.

Ex. 3. Twitter informed accountholders that it "will label or remove false or misleading information" about *inter alia* personal protective equipment "such as claims about the efficacy and safety of face masks to reduce viral spread" and that penalties may include account locks. *Id.*

B. Plaintiff's Use Of The Twitter Platform.

According to the Complaint, Plaintiff runs a "consulting business" and an "online website, RationalGround.com, where he sells subscriptions to his articles and research on COVID-19 and the government's response to it." Compl. ¶ 48. Plaintiff alleges that he joined Twitter in 2007 and uses it "as a feeder for his other social media accounts," as a "networking tool," and to promote his website. *Id.* ¶¶ 47–48. According to the Complaint, Plaintiff published the following Tweet on or around July 18, 2021:

> So the CDC just reported that 70% of those who came down with #COvId19 symptoms had been wearing a mask. We know that masks don't protect you . . . but at some point you have to wonder if they are PART of the problem.

Id. ¶ 5 *bis* (ellipses in original) ("Violative Tweet"). The same day, Twitter locked Plaintiff's account and provided him with notice that he violated the Covid-19 Misleading Information Policy:

> **Hi Justin Hart,**
>
> **Your Account, @justin_hart has been locked for violating the Twitter Rules.**
>
> Specifically for: Violating the policy on spreading misleading and potentially harmful information related to COVID-19.

Id. ¶ 6 *bis* (emphasis in original).

C. Plaintiff Files This Lawsuit.

On August 31, 2021, Plaintiff filed this lawsuit in the United States District Court for the Southern District of California against United States President Joseph R. Biden, Jr., Surgeon General Vivek Murthy, the Department of Health and Human Services, the Office of Management and Budget (collectively, "Federal Defendants"), Facebook, Inc., and Twitter. The Complaint asserts—based solely on "information and belief"—that the Federal Defendants directed Twitter to "remove Hart's social media posts because they disagreed with the viewpoints he espoused in them

. . . ." *Id*. ¶ 20 *bis*. The sole purported factual basis alleged to link Twitter with the Federal Defendants is public statements made during White House press briefings on July 15 and 16, 2021, in a Surgeon General Advisory, and in a media report, including Dr. Murphy "asking [our technology companies] to consistently take action against misinformation super-spreaders on their platforms." *Id*. ¶¶ 8–20 *bis* (brackets in original); Patchen Decl. Exs. 4–6.[6]

On November 8, 2021, Twitter moved to transfer the case from the Southern District to this one. Dkt. Nos. 33-34. On February 2, 2022, the Honorable Thomas J. Whelan of the Southern District ordered the lawsuit transferred to this District because *inter alia* the forum-selection clause in the Terms of Service was "valid and enforceable" and applicable to all of the claims in this suit. Dkt. No. 45 at 5-7. On February 22, 2022, this Court granted a joint stipulation setting March 17, 2022 as the deadline to respond to Plaintiff's Complaint, including any motion under California Code of Civil Procedure § 425.16. Dkt. No. 64.

LEGAL STANDARDS

Federal Rule of Civil Procedure 12(b)(6) requires dismissal of a cause of action for failure to state a claim upon which relief can be granted. A cause of action may be dismissed as a matter of law when it "lacks either 'a cognizable legal theory' or 'sufficient facts alleged' under such a theory." *O'Handley*, 2022 WL 93625, at *6 (quoting *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019)). A plaintiff must plead factual allegations that "plausibly (not merely conceivably) entitle plaintiff to relief." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067–68 (9th Cir. 2011). A claim is plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (requires more than a "sheer possibility," "naked assertion" or "formulaic recitation" of the elements of a cause of action). Courts are not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable

[6] The Complaint does not attach the public statements that it cites and on which it integrally relies, and which are subject to incorporation by reference and judicial notice for the reasons discussed in Twitter's Request For Judicial Notice filed concurrently with this Motion.

inferences." *Informed Consent Action Network v. YouTube LLC*, No. 20-cv-09456-JST, 2022 WL 278386, at *3 (N.D. Cal. Jan. 31, 2022) (quoting *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)); *see Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (not required to "'assume the truth of legal conclusions merely because they are cast in the form of factual allegations'" (citation omitted)). Nor must a court "'accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.'" *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1115 (9th Cir. 2014) (citations omitted).

ARGUMENT

I. PLAINTIFF'S FEDERAL CONSTITUTIONAL CLAIM FAILS AS A MATTER OF LAW.

Plaintiff's claim under the First Amendment of the federal Constitution fails because there is no direct cause of action under the federal Constitution. *Infra* § I(A). And the Court should not give leave to amend because Plaintiff has not, and cannot, allege facts sufficient to show state action. *Infra* § I(B).

A. Plaintiff's Complaint Must Be Dismissed Because There Is No Direct Cause Of Action Under The Federal Constitution.

The law does not recognize a "cause of action directly under the United States Constitution." *Azul-Pacifico, Inc. v. City of L.A.*, 973 F.2d 704, 705 (9th Cir. 1992); *Tulsi Now, Inc. v. Google, LLC*, No. 2:19-cv-06444-SVW-RAO, 2020 WL 4353686, at *1 (C.D. Cal. Mar. 3, 2020). Accordingly, Count I should be dismissed because it alleges only a direct violation, rather than an action under *Bivens v. Six Unknown Named Agents of Federal Bureau Agents*, 403 U.S. 388 (1971) ("*Bivens*"),[7] which is the recognized basis to assert a violation of the federal Constitution by the

[7] It would be futile for Plaintiff to add a *Bivens* claim against Twitter because a *Bivens* action lies only as to individuals, not corporations. *Children's Health Def. v. Facebook Inc.*, 546 F. Supp. 3d 909, 933 (N.D. Cal. 2021). Plaintiff does not name an individual defendant—he has named only Twitter, which he admits is a corporation. Compl. ¶ 14. Separately, amendment is futile because the Ninth Circuit has never recognized *Bivens* as a basis for a purported First Amendment violation. *See Vega v. United States*, 881 F.3d 1146, 1153 (9th Cir. 2018).

federal Government. *Doe v. Google LLC*, No. 20-cv-07502-BLF, 2021 WL 4864418, at *1 n.1 (N.D. Cal. Oct. 19, 2021). The Court need not engage in any further analysis to dismiss Count I.[8]

B. Any Amendment Would Be Futile Because Plaintiff Cannot Allege A Constitutional Claim Against A Private Party Like Twitter.

Twitter is a private actor and Plaintiff fails to allege facts sufficient to show a compulsion or joint action theory of state action. Plaintiff concedes that Twitter is a private corporation, Compl. ¶ 54, and binding authority firmly establishes that private online service companies, like Twitter, are not governmental actors, *see Prager Univ. v. Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020); *Howard v. AOL, Inc.*, 208 F.3d 741, 754 (9th Cir. 2000); *see also O'Handley*, 2022 WL 93625, at *8 ("Twitter is a private entity."); *Fed. Agency of News, LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1308–09 (N.D. Cal. 2019); *accord Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) ("merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints"). Plaintiff's federal constitutional claim warrants dismissal because the "First Amendment of the United States Constitution ***only*** applies to government actors; it does not apply to private corporations or persons." *Redden v. Women's Ctr. of San Joaquin Cnty.*, No. C 05-03099 CRB, 2006 WL 132088, at *1 (N.D. Cal. Jan. 17, 2006) (Breyer, J.) (emphasis added); *see* Compl. ¶ 3 ("axiomatic" that the First Amendment constrains only *governmental* attempts to regulate speech (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995)); *see also Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("constitutional guarantee of free speech is a guarantee only against abridgment by government"); *Atkinson v. Meta Platforms, Inc.*, No. 20-17489, 2021 WL 5447022, at *1 (9th Cir. Nov. 22, 2021) ("First Amendment only restricts government action"); *Karas v. Access Hollywood*, No. C 12-02310 CRB, 2012 WL 3116230, at *2

[8] If the Court dismisses the first count and the claims as to the Federal Defendants, it could decline to exercise supplemental jurisdiction over the state-based claims as this Court did in *O'Handley*, 2022 WL 93625, at *22. *See also Divino Grp. LLC v. Google LLC*, No. 19-cv-04749-VKD, 2021 WL 51715, at *9 (N.D. Cal. Jan. 6, 2021). Nevertheless, Twitter respectfully suggests that because all of the claims against Twitter are clearly subject to dismissal without leave to amend, and will be fully briefed, that the Court address all of them as a matter of judicial efficiency and comity.

(N.D. Cal. July 31, 2012) (Breyer, J.) (amendments to the federal Constitution "apply to and restrict only the Federal Government and not private persons" (internal citations omitted)); *accord Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

In order to avoid the "presumption that private conduct does not constitute governmental action" (*O'Handley*, 2022 WL 93625, at *26), Plaintiff attempts to allege that Twitter's conduct fits within certain narrow exceptions that allow a private actor to be treated as a government actor. Plaintiff alleges that two exceptions apply here: that Twitter (1) was "subject to government compulsion" (the "Coercion" theory) or (2) acted as a "willful participant[]" when it "removed posts based on their viewpoint at the direction of Murthy and Biden" (the "Joint Action" theory). Compl. ¶¶ 1–2, 4, 7–20 *bis*, 53, 55–61.[9] Each theory should be rejected because they are unsupported by the law or Plaintiff's factual allegations, and because there are no facts that Plaintiff could plead that would demonstrate state action.

1. The Complaint fails to plead any factual allegation demonstrating governmental Coercion.

To demonstrate Coercion, Plaintiff must, but fails to, allege facts demonstrating that the Federal Defendants "exercised coercive power or has provided such significant encouragement, either overt or covert," that Twitter's choice to remove the Violative Tweet and lock Plaintiff's account "must in law be deemed" that of the government. *Children's Health Def. v. Facebook Inc.*, 546 F. Supp. 3d 909, 932 (N.D. Cal. 2021) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)); *see Informed Consent Action Network*, 2022 WL 278386, at *7; *accord Blum v. Yaretsky*,

[9] The Supreme Court has articulated four tests for evaluating state action: (1) public function; (2) the joint action; (3) state compulsion; and (4) the governmental nexus. *Ohno v. Yasuma*, 723 F.3d 984, 995-96 (9th Cir. 2013) (citing cases); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Marsh v. Alabama*, 326 U.S. 501 (1946); *O'Handley*, 2022 WL 93625, at *8. The Complaint appears to rely exclusively on the Coercion and Joint Action tests. However, to the extent Plaintiff's allegation that the government "accepted the benefits" of Twitter's behavior is an attempt to assert the Nexus test, this argument also must be rejected. Compl. ¶ 62. Even if the public benefits to some degree from Twitter removing misinformation about COVID-19, this benefit is not sufficient to confer state action. *See Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 507-08 (9th Cir. 1989). Twitter also reserves all rights if Plaintiff attempts to assert additional state action theories in response to this Motion.

457 U.S. 991 (1982). The Complaint does not plead any allegations that would warrant finding that the government coerced Twitter to take any action, generally or with respect to the Plaintiff.

The crux of Plaintiff's Coercion claim is a single allegation—based only on "information and belief"—that the Federal Defendants "directed Defendants Facebook and Twitter to remove Hart's social media posts because they disagreed with the viewpoints he espoused in them and conspired with Facebook and Twitter to do so." Compl. ¶ 20 *bis*. The Court need not accept nor draw any inference from such a "conclusory, unwarranted" allegation. *Informed Consent Action Network*, 2022 WL 278386, at *3. There is not a single factual allegation in the Complaint that would support inferring that any of the Federal Defendants knew about the existence of Plaintiff or his Twitter account, let alone that any of the Federal Defendants ever: reviewed his tweets; had any discussions with Twitter about them, including the Violative Tweet; or directed Twitter to act on the same. *Children's Health Def.,* 546 F. Supp. at 933 (no coercion where no allegation that anyone directed defendants "to take any specific reaction with regard to" plaintiff); *Daniels v. Alphabet Inc.*, No. 20-cv-04687-VKD, 2021 WL 1222166, at *6 (N.D. Cal. Mar. 31, 2021) ("speculative assertions" insufficient to plead that government "directed a particular result"); *Doe*, 2021 WL 4864418, at *3 ("generalized statements from lawmakers" that did not "mention Plaintiffs' names, their YouTube or Google accounts, their channels, or their videos" insufficient "to show that the government 'commanded' the suspension of Plaintiffs' accounts"); *see also George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1232 (9th Cir. 1996) (coercion only where government directs a "certain course of action").

Nor would it be reasonable to infer that the Federal Defendants "directed" Twitter to take any action with respect to Plaintiff or his account because the facts as pleaded contradict such a finding. The Complaint concedes that Twitter removed the Violative Tweet *prior to* any of the "direct[ives]" by the Federal Government. Compl. ¶ 7 *bis*. That timeline undermines, rather than supports, any inference that Twitter acted at the behest of the Federal Defendants when determining that Plaintiff's Twitter violated its Terms of Service and its Rules. *See Atkinson*, 2021 WL 5447022, at *1 (no plausible claim of coercion where allegations "cast Meta Platforms' decision to adopt

community standards as a self-interested business decision"); *Collins v Womancare*, 878 F.2d 1145, 1155 (9th Cir. 1989) (no coercion where "impetus" for the conduct came from private employees).

The sole remaining basis for Plaintiff's coercion claim—namely, general statements by Federal Defendants about their desire for private social media companies to stop the spread of disinformation about COVID-19—also fails. Plaintiff has not alleged any direct communication between the Federal Defendants and Twitter.[10] In fact, the Federal Defendants' statements in the Complaint and contained in the underlying materials contradict the allegation of a "directive" by reflecting that the communications from the Federal Defendants were mere requests. *Compare, e.g.*, Compl. ¶ 20 *bis*, *with* ¶¶ 8 *bis* ("'asking'"), 10 *bis* ("'flagging'"); 58 ("request").[11] A request does not constitute Coercion. *See, e.g.*, *George*, 91 F.3d at 1232. Public statements or encouragement by federal politicians "regardless of how influential – do not constitute 'action' on the part of the federal government" and therefore cannot provide a basis to assert coercion. *Informed Consent Action Network*, 2022 WL 278386, at *7 (citation omitted). Furthermore, none of the Federal Defendants' public statements reflect their having "'commanded a particular result in, or otherwise participated in" Twitter's decisions relating to Plaintiff's account. *Id*. (citation omitted). The Complaint fails to point to any "law or custom" or practice in which the Federal Defendants forced Twitter to take a "certain course of action" or exercised legal control over Twitter. *George*, 91 F.3d at 1232.

Even accepting *arguendo* that the Federal Defendants "directed" Twitter to remove the Violative Tweet or COVID-19 Misinformation more generally, this would still not amount to coercion. The Ninth Circuit requires a plaintiff to "show 'something more' than state compulsion

[10] The Advisory mentions Twitter only in reference to its COVID-19 Misleading Information Policy to support the statement that some "technology platforms have improved efforts to monitor and address misinformation by reducing the distribution of false or misleading posts and directing users to health information from credible sources." *See* Ex. 6 at 6 n.49.

[11] *See also id.* at 6, 12 ("What Technology Platforms Can Do" listing some "kinds of measures" they can take); Ex. 4 at 3 ("asking them to operate with greater transparency and accountability," "asking them to monitor," "asking them to consistently take action"); Ex. 5 at 6-7 ("making sure social media platforms are aware," "flagging or raising," "steps that everyone can take," "some of the steps that we think could be constructive for public health").

in order to hold a private defendant liable as a governmental actor," specifically "some nexus between the wrongful act and the private entity." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835, 838 & n.5, 841 (9th Cir. 1999) (describing "something more" as "proximate cause"); *see also Blum*, 457 U.S. at 1004. Here, the Complaint does not allege any facts showing proximate cause between the purported "directive" and Twitter's conduct. To the contrary, as discussed above, the Complaint concedes that Twitter removed the Violative Tweet *prior to* any of the "direct[ives]" by the Federal Government. Compl. ¶ 7 *bis*.

2. The Complaint fails to plead joint action.

Plaintiff's attempt to allege Joint Action between the Federal Defendants and Twitter fails for overlapping reasons. The Joint Action test requires that there be a "substantial degree of cooperative action" between the government and a private entity, *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002), that the former has "far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity[,]" *O'Handley*, 2022 WL 93625, at *9 (brackets in original) (quoting *Gorenc*, 869 F.2d at 507); *see also Collins*, 878 F.2d at 1154. The Complaint concedes that Twitter removed the Violative Tweet and locked his account *prior to* the alleged statements of the Federal Defendants, which alone makes it contradictory, if not impossible, to infer that Twitter acted based on those statements.

More critically, the Complaint's Joint Action allegations rest on insufficient recitations of law and conclusory allegations—none of which plausibly allege a "substantial degree of cooperative action" (or any degree whatsoever) between Twitter and the Federal Government. *Compare* Compl. ¶¶ 1 ("conspir[ing]"), 2 ("collusion"), 59 ("worked in concert and/or conspiracy") 61 ("willful participant"), 13–20 *bis*, 53 ("directed"), 62 (accepted "benefits"); *with Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900 (9th Cir. 2008) ("bare allegation" of "joint action will not overcome a motion to dismiss" (quoting *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000)); *George*, 91 F.3d at 1231 (affirming dismissal where no "facts to support a claim of concerted action"); *O'Handley*, 2022 WL 93625, at *10. Nor does Plaintiff include any factual allegations from which the Court could infer any sort of cooperation between Twitter and the Federal

Defendants. As discussed above, Plaintiff does not allege that Twitter and the Federal Defendants ever engaged in any direct communication, including any discussion about Plaintiff or Twitter's decision relating to his account. *See Children's Health Def.*, 546 F. Supp. 3d at 926 (must allege "facts showing personal involvement" and "specifically" in the defendant's decision to remove disinformation about COVID-19 to show joint action).

Instead, the Complaint relies entirely on public statements by government officials requesting that social media companies stem the flow of misinformation about Covid-19 to establish joint action. Compl. ¶¶ 9–19 *bis*. Legal authority makes clear these types of public statements are insufficient to establish Joint Action. *Atkinson*, 2021 WL 5447022, at *1 ("the fact that state officials responded to Meta Platforms' unsolicited inquiries does not plausibly allege such a degree of 'interdependence that the state must be recognized as a joint participant' in Meta Platforms' editorial decisions" (cleaned up)); *Informed Consent Network*, 2022 WL 278386, at *4-5 ("statements by members of Congress urging Defendants to take action" reflect "little more than a shared interest in a problem of misinformation" and are not "sufficient to show that the Government was a "joint participant in the challenged activity"); *Daniels*, 2021 WL 1222166, at *1–2, 6 ("publicly expressed views of individual members of Congress" to YouTube to remove Covid-19 misinformation "do not constitute 'action' on the part of the federal government"); *Doe*, 2021 WL 4864418, at *5 ("no allegation that government officials were in the room or somehow directly involved in the decision to suspend" account); *accord Taylor v. List*, 880 F.2d 1040, 1048 (9th Cir. 1989) ("Mere passive acquiescence in the direction of state officials generally is not sufficient"); *O'Handley*, 2022 WL 93625, at *9-10 (citing cases).[12]

This Court held in *O'Handley* that a "single message to Twitter, flagging a single O'Handley tweet" containing misinformation about an election was an insufficient basis to find Joint Action

[12] *See also Abu-Jamal v. Nat'l Pub. Radio*, No. 96-0594, 1997 WL 527349, at *1 (D.D.C. Aug. 21, 1997), *aff'd*, 159 F.3d 635 (D.C. Cir. 1998) (no joint action where Senator contacted and successfully demanded NPR cancel broadcast); *Aaron v. Aguirre*, No. 06-cv-1451-H(POR), 2006 WL 8455871, at *21 (S.D. Cal. Dec. 13, 2006) (dismissal where failed to "detail actions" connecting defendant to government); *Coleman v. Sterling*, No. 09-cv-1594-W-BGS, 2011 WL 839552, at *3 (S.D. Cal. Mar. 7, 2011) (must plead "meeting of the minds").

because the message "did not direct or even request that Twitter take any particular action in response to the tweet" and "one-off, one-way communication" in which one party is "supplying information" to another does not amount to "substantial cooperation." *Id.* (citing cases). Here, as discussed above, Plaintiff fails to even allege any direct communication between Twitter and the Federal Defendants, let alone any communication about his account. As far as allegations about public statements encouraging social media companies to prevent spreading of COVID-19 misinformation, this Court in *O'Handley rightly* held that such statements do not create Joint Action. *Id*. at *10-11 ("statements about working together do not demonstrate joint action," especially in the absence of any allegations that "Twitter consulted or conferred with the government on content decisions" (relying on *Children's Health Def.*, 546 F. Supp. 3d at 928)). Just as in *O'Handley*, Plaintiff makes no allegation demonstrating that the government played any role in any of Twitter's internal decisions regarding Plaintiff's Violated Tweet. As in *O'Handley*, the Court should find that Plaintiff has not and cannot demonstrate any Joint Action between the Federal Defendants and Twitter and dismiss the Complaint with prejudice.

The Complaint also makes vague allegations of a conspiracy throughout in an attempt to establish Joint Action (*e.g.*, ¶¶ 1, 4, 59), but those allegations similarly cannot show joint action. To plead Joint Action by conspiracy, Plaintiff has to plausibly allege that Twitter and the Federal Defendants "share the common objective of the conspiracy" to "deprive [Plaintiff] of his constitutional right." *Taylor*, 880 F.2d at 1048; *see Franklin*, 312 F.3d at 445 ("have acted in concert in effecting a particular deprivation of constitutional rights"); *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983) ("an agreement or 'meeting of the minds' to violate constitutional rights must be shown"). Here, the Complaint pleads only conclusory allegations about Twitter purportedly conspiring with the Federal Defendants and does not allege any conspiratorial objective or agreement between Twitter and the Federal Defendants to specifically violate his rights. *See generally* Compl. This does not provide a basis to infer a conspiracy sufficient to plead Joint Action. *See O'Handley*, 2022 WL 93625, at *11–12 (allegations of government "work[ing] closely with social media companies" to prevent misinformation spreading "might demonstrate a meeting of the

minds to promptly address [] misinformation, but not a meetings of the minds to 'violate constitutional rights,' let alone [Plaintiff's] constitutional rights"). Accordingly, as in *O'Handley*, the Court should reject Plaintiff's claims of conspiracy here.

Plaintiff's reliance on *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013) and *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) at Compl. ¶¶ 55-57 as a basis for finding Joint Action here also is misplaced and should be rejected. In *Desert Palace*, the Ninth Circuit found state action where the Las Vegas police department actually trained, provided information to, and delegated authority to private security guards to effectuate the arrest at issue in that case. *Desert Palace, Inc.*, 698 F.3d at 1140-41. As this Court explained in *O'Handley*, *Desert Palace* "only illustrates how meager the allegations here are" as to Joint Action:

> The State did not delegate to Twitter any "authority, normally reserved to the state." Nor, in its single email sending Twitter information, did the State "exert control over how Twitter used the information it obtained." While the State might have approved of how Twitter acted in response to [Plaintiff's] tweet—and it might just as well not have—mere approval or acquiescence does not make the State responsible for Twitter's actions.

2022 WL 93625, at *10 (cleaned up and citations omitted); *accord Informed Consent Network*, 2022 WL 278386, at *4. As in *O'Handley*, Plaintiff's reliance on *Desert Palace* provides no support for a claim of Joint Action here.

Plaintiff cites *Ohno* for the general proposition that Joint Action can exist when the government "affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party." However, Plaintiff's reliance on this case ignores the fact that the Ninth Circuit rejected any claims of state action in *Ohno* and specifically found that there was no behavior fairly attributable to state actors or any meaningful receipt of benefits by the state. 723 F.3d at 996–97. The holding of that case—that enforcing a foreign judgment by a "domestic court in the United States"—is inapposite to the legal question before this Court as to whether a private company acts jointly with the federal government by taking actions that happen to be consistent

with public statements by federal politicians. *Id.* at 993–95. The Complaint warrants dismissal without leave to amend because it does not, and cannot, allege any facts that demonstrate Joint Action.

II. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE CALIFORNIA CONSTITUTION.

Plaintiff attempts to assert that Twitter's enforcement action against his Violative Tweet also violates the California Constitution. This claim is without merit because Twitter is not a state actor, and the limited exception California courts have recognized for companies that offer private property "freely and openly" to the general public is not applicable here. Like its federal counterpart, the Free Speech Clause of the California Constitution requires a plaintiff to allege state action to plead a cognizable constitutional violation. *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 26 Cal. 4th 1013, 1021, 1023 (2001) (plurality) ("California's free speech clause contains a state action limitation").[13] Plaintiff admits that Twitter is not a state actor but nevertheless argues that *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979) mandates that the "Free Speech clause of the California Constitution" bars Twitter from removing content because it is a "modern-day town square" that provides "an essential and invaluable forum" for Plaintiff's exercise of the Free Speech Clause. Compl. ¶¶ 76–78. Plaintiff's expansive theory has been widely rejected by California courts, and this Court should not break new ground.

Applying *Pruneyard*, California courts have interpreted the California Free Speech Clause to apply to private companies "***only if the property is freely and openly accessible to the public***." *See Golden Gateway Ctr.*, 26 Cal. 4th at 1021, 1031–33 (emphasis added) (acknowledging "ambiguities" and a "notable gap" in the reasoning of *Pruneyard*); *accord Ralphs Grocery Co. v. United Food & Com. Workers Union Loc. 8*, 55 Cal. 4th 1083, 1118 (2012). But private companies

[13] The Ninth Circuit has concluded that "the California Supreme Court would impose a state action requirement on Article I, section 2(a), along the lines suggested in the *Golden Gateway* plurality opinion" in light of the absence of controlling precedent from the California Supreme Court on the question. *Bolbol v. Feld Ent., Inc.*, 613 F. App'x 623, 625 (9th Cir. 2015) (relying *on Yu v. Univ. of La Verne*, 196 Cal. App. 4th 779 (2011)).

that limit the provision of services only to individuals who expressly agree *ex ante* to abide by the terms of service do not make their "property . . . freely and openly accessible to the public." *Golden Gateway Ctr.*, 26 Cal. 4th at 1021. Instead, Twitter's requirement that *all* people who use its services agree to a binding Terms of Service limits entry to only those individuals who have entered into an enforceable legal agreement with Twitter. Unlike public streets or open-air malls, Twitter restricts access by requiring agreement with its Terms of Service before entering and this distinguishes Twitter from any property that has been recognized as a public forum under California law. *See Fashion Valley Mall, LLC v. NLRB*, 42 Cal. 4th 850, 858 (2007) (public forum "if it is open to the public in a manner similar to that of public streets and sidewalks"); *San Diego Branch of Nat'l Ass'n for the Advancement of Colored People v. Cnty. of San Diego*, No. 16-cv-2575-JLS (BGS), 2017 WL 2445541, at *6 (S.D. Cal. June 6, 2017) (parking lot behind company not public forum); *see also Campbell v. Feld Ent. Inc.*, No. 12-cv-4233-LHK, 2014 WL 1366581, at *8 (N.D. Cal. Apr. 7, 2014).

Plaintiff has not provided and Twitter is not aware of any authority extending *Pruneyard* outside of the context of real property, let alone any holding that privately owned websites, like Twitter, become state actors by offering a platform where people who agree to a platform's terms of service are allowed to post on the website. To the contrary, courts in this District and others have rejected identical arguments and declined to extend *Pruneyard* to online service providers. *See Zimmerman v. Facebook, Inc.*, No. 19-cv-04591-VC, 2020 WL 5877863, at *2 (N.D. Cal. Oct. 2, 2020) (rejecting argument that YouTube is a state actor for purposes of Free Speech Clause as an operator of a "digital town square"); *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1115-16 (N.D. Cal. 2017), *aff'd and remanded*, 938 F.3d 985 (9th Cir. 2019), *cert. granted, judgment vacated on other grounds*, 141 S. Ct. 2752 (2021) (rejecting argument that LinkedIn is a "'modern-day equivalent of the shopping mall or town square,'" including because no court has "expressly extended *Pruneyard* to the Internet generally" and the "Court has doubts" about whether it could be so applied and the "potentially sweeping consequences"); *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 607 (S.D.N.Y. 2020), *aff'd,* 991 F.3d 66 (2d Cir. 2021), *reh'g granted and opinion vacated*,

2 F.4th 1002 (2d Cir. 2021), and *amended and superseded on reh'g*, 6 F.4th 245 (2d Cir. 2021), and *aff'd*, 6 F.4th 245 (2d Cir. 2021) (same); *see also Kinderstart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2006 WL 3246596, at *7 (N.D. Cal. July 13, 2006) (rejecting argument that Google is a state actor by being the "'functional equivalent of a traditional public forum'"). Similarly, in the context of federal constitutional claims, the Ninth Circuit refused to treat a private Internet company as a public forum simply because it offered a public-facing platform used with "ubiquity." *Prager Univ.*, 951 F.3d at 995 ("Despite YouTube's ubiquity and its role as a public-facing platform, it remains a private forum" under the First Amendment); *Zimmerman*, 2020 WL 5877863, at *2 (apply reasoning of *Prager* as "equally applicable" to "exact argument" that YouTube is a state actor for purposes of the Free Speech Clause because it operates as a "'digital town square'").[14] This Court should similarly reject Plaintiff's attempt to improperly expand *Pruneyard*.

III. PLAINTIFF FAILS TO STATE A CLAIM FOR PROMISSORY ESTOPPEL.

The Complaint also fails to state a claim for promissory estoppel, which requires: "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance." *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 38 (2021).

The Complaint does not plausibly allege any promise Twitter made to Plaintiff. Instead, it only recites the legal element of a "'clear and unambiguous promise' to Hart that he could use their services to communicate and network with" other people on Twitter. Compl. ¶¶ 41–50, 80–87. This conclusory allegation is insufficient. *Murphy*, 60 Cal. App. 5th at 39 ("No plausible reading of the six contract terms and general statements Murphy identifies promises users that they will not have their content removed nor lose access to their account based on what they post online."); *see*

[14] Even if the Court permits Count II to stand, which it should not, it should dismiss Plaintiff's attempt to recover financial damages because the Supreme Court of California has declined "to recognize a constitutional tort action for damages to remedy the asserted violation of article I, section 2(a)" of the California Constitution. *Degrassi v. Cook*, 29 Cal. 4th 333, 335 (2002); *Katzberg v. Regents of the Univ. of Cal.*, 29 Cal. 4th 300, 311 (2002); *accord Madrid v. H. Anglea*, No. 1:19-cv-01456-JLT (PC), 2020 WL 1689709, at *5 (E.D. Cal. Apr. 7, 2020); *Minkley v. Eureka City Schs.*, No. 17-cv-3241-PJH, 2017 WL 4355049, at *16 (N.D. Cal. Sept. 29, 2017).

also Glen Holly Ent., Inc. v. Tektronix Inc., 343 F.3d 1000, 1017 (9th Cir.), *opinion amended on denial of reh'g*, 352 F.3d 367 (9th Cir. 2003) (upholding dismissal where alleged promise was "not definite enough to be enforceable"); *Ryan v. Sandia Corp.*, No. C 15-4102 CRB, 2016 WL 1697946, at *4 (N.D. Cal. Apr. 28, 2016) (Breyer, J.) (dismissal of promissory estoppel for failure to specify "who made which promises to her, when the promises were made, or what the specifics of any promises might have been").

Nor would it be possible for Plaintiff to "reasonably rely on promises that Twitter would not restrict access" to his account because that "promise" is directly contrary to the Twitter Terms of Service. *Murphy*, 60 Cal. App. 5th at 38; Ex. 1 § 4 (Twitter "may suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no reason, including, but not limited to, if" Twitter reasonably believes he has "violated these Terms or the Twitter Rules and Policies"); Ex. 2 (consequences for violating Covid-19 Misleading Information Policy includes deleting the tweets, locking the account, or permanently suspending it).[15] The Complaint also fails to plead any facts showing that Plaintiff changed his position, i.e., decided to publish the Violative Tweet, based on Twitter's alleged promise not to suspend his use of its services. *Ngo v. Green Tree Servicing LLC*, No. 13-cv-2929 W (RBB), 2014 WL 1028885, at *4 (S.D. Cal. Mar. 13, 2014) (failure to state a claim for promissory estoppel where "only reasonable inference is that Plaintiff stopped making payments because of her financial hardship, and not because of anything Defendant did or did not do"); *Lemon v. Bear Stearns Residential Mortg. Corp.*, No. 2:11-cv-03677-ODW, 2012 WL 2395169, at *10 (C.D. Cal. June 25, 2012) (dismissal where "allege no facts demonstrating that they changed their position in reliance").

In sum, Plaintiff may disagree with Twitter's policies regarding the spread of Covid-19 misinformation, but that disagreement is an insufficient basis to allege that Twitter made a promise that it did not and which contradicts written contractual terms to which he expressly agreed. *See*

[15] The Court should reject the Complaint's assertion that at "no point in the terms of service or Twitter Rules does Twitter prohibit viewpoints that oppose wearing masks" (Compl. ¶ 46) as directly contradictory to other allegations of the Complaint and materials cited therein. *Supra* at Background § B (citing *inter alia* Compl. ¶ 6 *bis*).

Distance Learning Co. v. Silly Monkey Studios, LLC, No. 16-cv-06943-SK, 2017 WL 9613958, at *1–2 (N.D. Cal. Feb. 14, 2017).

IV. ALL OF PLAINTIFF'S CLAIMS AGAINST TWITTER ARE BARRED.

A. The First Amendment Bars All Of Plaintiff's Claims As To Twitter.

Beyond Plaintiff's failure to state any legal cognizable claim, his claims are also barred by the First Amendment. The relief sought by Plaintiff—including permanently enjoining Twitter "from monitoring, flagging, and deleting social media posts based on the viewpoints the posts espouse" (Compl. ¶¶ 5, 50, 64–65, 79, 86–87)—falls squarely within the First Amendment's protections for Twitter's own speech and editorial judgment. Because Plaintiff's suit "directly targets the way a content provider chooses to deliver, present, or publish news content on matters of public interest," it "is based on conduct in furtherance of free speech rights[.]" *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 424–25 (9th Cir. 2014).

The First Amendment "*protects* private entities" from requirements that they "open their property for speech by others." *Halleck*, 139 S. Ct. at 1931 n.2 (emphasis in original); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality) ("State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (First Amendment protects "exercise of editorial control and judgment"). This Court has recognized that, like "a newspaper or a news network, Twitter makes decisions about what content to include, exclude, moderate, filter, label, restrict, or promote." *O'Handley*, 2022 WL 93625, at *14. Accordingly, Twitter's decisions are protected by the First Amendment. Indeed, Federal district courts have held that the First Amendment protects decisions made by online platforms to decide what content to publish and not to publish. *See NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1090-93 (N.D. Fla. 2021), *appeal filed* (July 13, 2021); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007). All of the remedies sought by Plaintiff—damages and injunctive relief—are all premised on the idea that Twitter should be

punished for, and forbidden from, deciding what content to publish. The First Amendment precludes this outcome and requires dismissing Plaintiff's Twitter-related claims. *O'Handley*, 2022 WL 93625, at *15 ("Twitter has important First Amendment rights that would be jeopardized by a Court order telling Twitter what content-moderation policies to adopt and how to enforce those policies. The Court will issue no such order").

B. Section 230(c) Bars All Of Plaintiff's Claims Against Twitter.

Plaintiff's claims also are subject to dismissal under Section 230 of the Communications Decency Act, which provides "robust" immunity to internet service providers, like Twitter, in order to encourage them to "self-regulate the dissemination of offensive material over their services." 47 U.S.C. § 230(c); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 43–44 (2006) (quoting *Zeran v. AOL, Inc.*, 129 F.3d 327, 331–33 (4th Cir. 1997)); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); *Hassell v. Bird*, 5 Cal. 5th 522, 534–35 (2018). Section 230(c)(1) bars attempts to treat an interactive computer service as "the publisher or speaker" of information provided by "another information content provider." *Id.*[16] Accordingly, this lawsuit is barred in its entirety because all of Plaintiff's claims would require the Court to treat Twitter "as the 'publisher or speaker' of content" because "removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher." *Kifle v. YouTube LLC*, No. 21-cv-01752-CRB, ECF No. 71 at 5-6 (N.D. Cal. Oct. 5, 2021) (Breyer, J.) (citing cases) (holding Section 230(c)(1) barred contract claims that "center on YouTube's ability to terminate" a user's account and remove posted content)); *see Barnes v. Yahoo!, Inc.*, 570 F.3d 1100, 1102 (9th Cir. 2000); *Sikhs for Just. "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088,

[16] There can be no dispute that Twitter is an "interactive computer service." *See* Compl. ¶¶ 41–43; Section 230(f)(2) (defining interactive service provider as entity that "provides or enables computer access by multiple users to a computer service"); *Brittain v. Twitter, Inc.*, No. 19-cv-00114-YGR, 2019 WL 2423375, at *2 (N.D. Cal. June 10, 2019), *appeal dismissed*, No. 19-16622, 2020 WL 4877527 (9th Cir. Mar. 6, 2020); *Murphy*, 60 Cal. App. 5th at 17, 25. Plaintiff effectively admits to being an "information content provider" by pleading that he created content provided via Twitter. *See* 47 U.S.C. § 230(f)(3); Compl. ¶¶ 5–6 *bis*.

1092–93 (N.D. Cal. 2015); *Barrett*, 40 Cal. 4th at 22; *Murphy*, 60 Cal. App. 5th at 26; *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 207 (2017).[17]

Likewise, Section 230(c)(2) requires dismissal of Plaintiff's claims because it prohibits liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider considers to be obscene or otherwise objectionable," irrespective of whether "such material is constitutionally protected," and the Complaint does not allege any bad faith. *Barnes*, 570 F.3d at 1105 (alterations omitted) (noting that Section 230(c)(2) is additive to 230(c)(1)); *Goddard v. Google, Inc.*, No. C 08-2738JF (PVT), 2008 WL 5245490, at *6 (N.D. Cal. Dec. 17, 2008) ("The intent of Congress in enacting § 230(c)(2) was to encourage efforts by Internet service providers to eliminate such material by immunizing them from liability where those efforts failed.").[18]

C. The Terms of Service Bar The Complaint.

Plaintiff's claims against Twitter also fail because by agreeing to Twitter's Terms of Service, he understood that Twitter may—without incurring any liability to the people who use its services—"refuse to distribute" any user-generated content for "any or no reason," including but not limited to if Twitter believes that users have "violated these Terms or the Twitter Rules and Policies." Patchen Decl. Ex. 1 § 4. Those provisions, to which Plaintiff agreed as a condition of using Twitter and from which his claims arise, prevent him from seeking to hold Twitter liable for doing exactly what he alleges it did: refuse to distribute a Tweet for violation of Twitter's policies. *See, e.g.*,

[17] *See* Compl. Count I ("violated the Free Speech Clause of the First Amendment when they acted jointly to ***remove*** Hart's social media posts"), Count III ("violated the Free Speech clause of the California Constitution when they ***blocked*** Hart"), ¶ 85 (Count IV: alleging "***removal*** and ***flagging*** of Hart's posts and suspension of his account" contravened promise to "use" Twitter's "services to communicate and network") (all emphases added).

[18] *Barnes'* denial of Section 230(c)(1) to a claim of promissory estoppel does not dictate a different result because unlike in that case, the alleged promise that Plaintiff "could use their services to communicate and network" is not derived from any contract or specific promise by Twitter but rather from the exercise of its editorial decision to limit the spread of disinformation. *Barnes*, 570 F.3d at 1102.

Caraccioli v. Facebook, Inc., 700 F. App'x 588, 590 (9th Cir. 2017) (affirming district court's dismissal under Facebook's terms of service).

V. DISMISSAL WITHOUT LEAVE TO AMEND IS WARRANTED.

A court may deny leave to amend where amendment would be futile because the claim is barred as a matter of law. *Sikhs for Just.*, 144 F. Supp. 3d at 1096 (quoting *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)); *accord Daniels*, 2021 WL 1222166, at *13. For all the reasons discussed above, Plaintiff cannot plead any set of facts that would overcome the legal hurdles to all of his claims. *O'Handley*, 2022 WL 93625, at *28 (dismissing analogous claims with prejudice). Dismissal with prejudice is warranted here.

CONCLUSION

For the foregoing reasons, Twitter respectfully requests that this Court grant this Motion, without leave to amend, and dismiss Plaintiff's Complaint as to Twitter with prejudice.

Dated: March 17, 2022

Respectfully submitted,

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