TYLER BURSCH, LLP
Robert Tyler (STATE BAR NO. 179572)
rtyler@tylerbursch.com
Nada Higuera (STATE BAR NO. 299819)
nhiguera@tylerbursch.com
25026 Las Brisas Rd.
Murrieta, California 92562
Telephone: 951-600-2733
Facsimile: 951-600-4996

LIBERTY JUSTICE CENTER
Daniel Suhr, *pro hac vice*
dsuhr@libertyjusticecenter.org
M.E. Buck Dougherty III, *pro hac vice forthcoming*
bdougherty@libertyjusticecenter.org
James McQuaid, *pro hac vice*
jmcquaid@libertyjusticecenter.org
440 N. Wells St., Ste. 200
Chicago, Illinois 60654
Telephone: 312-637-2280
Facsimile: 312-263-7702

Attorneys for Plaintiff, Justin Hart

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JUSTIN HART,

Plaintiff,

v.

FACEBOOK, INC. et al.,

Defendants.

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

PLAINTIFF'S COMBINED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND TO DEFENDANT TWITTER'S MOTION TO STRIKE

Judge: Hon. Charles R. Breyer
Date: May 12, 2022
Time: 10:00 AM

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INTRODUCTION

When evaluating a motion to dismiss, the Court must accept all factual allegations pled in the complaint as true. *Godecke ex rel. United States v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1210 (9th Cir. 2019). Plaintiff, Justin Hart, pled that Defendants Facebook, Twitter, Biden, and Murthy (the "Defendants") acted jointly to remove his social media posts because they disagreed with the viewpoint those posts espoused. Defendants dispute this factual allegation, and their motions to dismiss amount to an effort to wish away the facts that were properly pled. Because those facts must be accepted as true, this strategy of denial cannot succeed on a motion to dismiss.

Furthermore, Defendants the Department of Health and Human Services and the Office of Management and Budget have actively thwarted Hart's efforts to receive further factual evidence through his Freedom of Information Act ("FOIA") claim, Count II, which they did not move to dismiss. The remaining Defendants have not responded to Hart's September 30, 2021, Rule 26(d)(2) Document Requests, which would further shed light on the nature of the legal violations he suffered. Yet they ask this Court to dismiss all his claims at the motion-to-dismiss stage. This they cannot do. At this stage, the Court must accept Hart's factual allegations as true, and Hart has ably pled that Defendants acted jointly to deprive him of his right to free speech under the U.S. and California constitutions.

Additionally, Hart has pled a viable promissory estoppel claim against Facebook and Twitter and viable claims for intentional interference with a contract and negligent interference with a prospective economic advantage against Facebook.

For these reasons, this Court should deny Defendants' motions to dismiss and motion to strike.

LEGAL STANDARD

"When ruling on a 12(b)(6) motion, the complaint must be construed in the light most favorable to the plaintiff. The court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them." *Renewable Land, Ltd. Liab. Co. v. Rising Tree Wind Farm, Ltd. Liab. Co.*, No. CV 12-0809 RT, 2013 U.S. Dist. LEXIS 17500, at *3 (E.D. Cal. Feb. 7, 2013) (quoting *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). The Court "must determine whether the Complaint contains 'sufficient factual matter' that, taken as true, 'state a claim for relief [that] is plausible on its face.'" *United States ex rel. Lee v. Corinthian Colleges,* 655 F.3d 984, 991 (9th Cir. 2011) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). Where such supporting factual allegations exist, a court "assume[s] their veracity and then determine[s] whether they plausibly give rise to an entitlement to relief." *Id.* "A claim has facial plausibility 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,* 556 U.S. at 678.

ARGUMENT

I. The federal free speech claim (Count I) should stand.

A. Twitter and Facebook are state actors when they act either as willing participants with the government or subject to government compulsion.

Twitter and Facebook (the "Social Media Defendants") argue that the First Amendment applies only to government actors (Twitter Mot. to Dismiss 7; Facebook Mot. to Dismiss 5, 7), but this is wrong as a matter of law. Private entities engage in state action when they work with government officials to deprive individuals of their constitutional rights. *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 942 (1982). The extension of liability to private parties includes actions they take with the

government to violate the First Amendment. *See, e.g., Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

Defendants Biden and Murthy (the "Federal Defendants") misstate Hart's position when they allege that "Plaintiff contends that Facebook and Twitter were 'subject to government compulsion.'" Federal Mot. to Dismiss 17 (quoting Compl. ¶ 61). The Complaint *actually* says that "Facebook and Twitter were *either* willful participants" in the censorship of Hart's speech "*or* they were subject to government compulsion." Compl. ¶ 61 (emphasis added). As Hart pled, (Compl. ¶ 55), the relevant Ninth Circuit test lists "governmental compulsion or coercion" and willing "joint action" as two of the four possible methods for proving state action. *Pasadena Republican Club v. W. Justice Ctr.*, 985 F.3d 1161, 1167 (9th Cir. 2021); *Ohno v. Yasuma*, 723 F.3d. 984, 995 (9th Cir. 2013). Hart can succeed under either theory.

Defendants argue that Hart has not made a factual allegation demonstrating government coercion. Twitter Mot. to Dismiss 8-9; Facebook Mot. to Dismiss 5; Federal Mot. to Dismiss 17. That is untrue. Hart has alleged that senior White House officials regularly contact senior corporate executives to direct them to take down what they deem to be misinformation. Compl. ¶¶ 7-20 *bis*. Hart quoted White House Press Secretary Jen Psaki as saying, "We're flagging problematic posts for Facebook that spread disinformation." Compl. ¶ 10 *bis*. Psaki further revealed that the White House effort to suppress free speech reaches all the way to the level of senior staff: "[W]e are in regular touch with these social media platforms, and those engagements typically happen through members of our senior staff . . . ." Compl. ¶ 11 *bis*. She concluded with a clear directive from the president: "Facebook needs to move more quickly to remove harmful, violative posts[.]" Compl. ¶ 16 *bis*. Hart pled that this effort amounts to more than a simple request. Specifically supporting the government compulsion test, Hart alleged that "Biden . . . threatened social media

companies who do not comply with his directives by publicly shaming and humiliating them, stating, 'They're killing people.'" Compl. ¶ 19 *bis*. Social media is a highly regulated industry with public battles over the future of Section 230 legislation and ongoing antitrust investigations, including by executive branch agencies. When the president of the United States himself shames the Social Media Defendants in public for not complying with his directives, such a statement amounts to what Hart pled is a "threat[ ]," taking place both in public and in private. *Id*. Thus, Hart has properly pled government compulsion.

The second legal theory for Hart's success in pleading state action by the Social Media Defendants is much easier to meet: joint action. A private party's actions amount to state action if "state officials and private parties have acted in concert effecting a particular deprivation of constitutional rights." *Franklin v. Fox,* 312 F.3d 423, 445 (9th Cir. 2002). "'Joint action' exists where the government affirms, authorizes, encourages, *or* facilitates unconstitutional conduct through its involvement with a private party." *Ohno,* 723 F.3d at 996 (emphasis added).

In this case, Hart pled that the government has affirmed, authorized, encouraged, *and* facilitated the removal of social media posts by the Social Media Defendants. Despite Defendants' denials (Twitter Mot. to Dismiss 11, Federal Mot. to Dismiss 12), Hart pled that the Biden Administration participated in joint action by being "in regular touch with these social media platforms" (Compl. ¶ 12 *bis*.) and by "flagging problematic posts for Facebook that spread disinformation." Compl. ¶ 10 *bis*. Such action constitutes both encouraging and facilitating the stifling of free speech, which also was publicly affirmed and authorized in the "22-page Advisory with instructions on how social media companies should remove posts with which Murthy and Biden disagree." Compl. ¶ 18 *bis*. Thus, Hart has also pled that the Social Media Defendants participated in joint action with the government.

Hart has sufficiently alleged that the Social Media Defendants are "willing participants" in the scheme. They have not refused the White House's phone calls, or publicly insisted on an internet free from government interference. Instead, they have established "dedicated reporting pathways" for government officials to identify what needs to be taken down. *O'Handley v. Padilla*, No. 21-cv-07063-CRB, 2022 U.S. Dist. LEXIS 4491, at *9 (N.D. Cal. Jan. 10, 2022). This is textbook willing participation and substantial coordination.

Defendants' responses amount to what should have been pled as denials of the factual allegations in an Answer. For example, Facebook claims, "Plaintiff must point to a statement from the government 'direct[ing] Facebook to adopt [a] specific standard to follow'." Facebook Mot. to Dismiss 5. Not only did Hart point to a statement from the government, but he also pointed to an "entire 22-page Advisory with instructions" on the specific standard for Facebook to follow. Compl. ¶ 18 *bis*. Facebook can deny the truth of the factual allegation, but it cannot deny that the allegation exists.

Similarly, Twitter claims Hart has "not alleged any direct communication between the Federal Defendants and Twitter." Twitter Mot. to Dismiss 10. On the contrary, Hart pled that "Murthy and Biden engaged in viewpoint discrimination when they directed Facebook and Twitter to remove social media posts . . . ." Compl. ¶ 53. Further, Twitter acknowledges that Hart pled that Biden and Murthy "'directed Defendants Facebook and Twitter to remove Hart's social media posts,'" (Twitter Mot. to Dismiss 9 (quoting Compl. ¶ 20 *bis*.)), but Twitter tries to characterize this statement as "conclusory." Twitter Mot. to Dismiss 9. On the contrary, the statement is supported by the numerous statements made by Jen Psaki and President Biden above. Twitter continues that Hart "does not allege any conspiratorial objective" for suppressing his free speech. On the contrary, Hart pled

that Twitter and Facebook acted jointly with Biden and Murthy to further the conspiratorial objective to remove posts that "contained a viewpoint on COVID-19 that did not fit with their own political narrative." *Id*. As with Facebook, Twitter may deny the truth of the factual allegations in the Complaint, but it may not deny that they were made in the Complaint.

B. Hart properly pled that Facebook and Twitter targeted him specifically.

Defendants argue that Hart must plead that Defendants Biden and Murthy called on the Social Media Defendants to take action against him *specifically*. Federal Mot. to Dismiss 16, 20-21; Facebook Mot. to Dismiss 5-6. Hart did: "On information and belief, Defendants Biden and Murthy 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*.

Furthermore, the government's own citations undermine their argument. The Federal Defendants acknowledge that a plaintiff can meet his burden by showing that the government "insist[ed] that the private party follow a 'standard that would have required'" the action they took. Federal Mot. to Dismiss 16 (quoting *Mathis v. Pac. Gas & Elec. Co.,* 75 F.3d 498, 503 (9th Cir. 1996)). This the Complaint plainly alleges. Hart pled that Murthy asked social media companies to "consistently take action against misinformation super-spreaders on their platforms." Compl. ¶ 8 *bis* (quoting Defendant Murthy).[1] The Biden Administration "increased disinformation research and tracking" and was "flagging problematic posts for Facebook that spread

[1] All direct quotations of Defendant Murthy and Press Secretary Psaki in this paragraph are from the White House Press Briefing (July 15, 2021), transcript available at https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021/ (last visited Apr. 17, 2022)

disinformation." Compl. ¶ 10 *bis* (quoting Press Secretary Psaki). "[M]embers of [the Administration's] senior staff" were "in regular touch with these social media platforms." Compl. ¶ 12 *bis* (quoting Press Secretary Psaki). The government directed social media companies to "create a robust enforcement strategy that bridges their properties and provides transparency about the rules." Compl. ¶ 15 *bis* (quoting Press Secretary Psaki). The government specifically exhorted Facebook to "move more quickly to remove harmful" posts. Compl. ¶ 16 *bis* (quoting Press Secretary Psaki). Biden publicly shamed and humiliated social media companies that did not comply with his censorship. Compl. ¶ 19 *bis*. And Defendant Murthy created and published a document instructing social media companies to remove posts with which Murthy and Biden disagree. Compl. ¶ 18 *bis*. This Advisory, referenced in the Complaint, proffers itself as "a public statement that calls the American people's attention to a public health issue and provides recommendations for how that issue should be addressed" and dictates that social media platforms "make meaningful long-term investments to address misinformation."[2] In other words, "the government called on the private party to take the *precise action* at issue"—the suppression of Hart's speech. Federal Mot. to Dismiss 16 (emphasis in original).

In the alternative, even if Hart were required to prove at this stage that the Federal Defendants conspired with the Social Media Defendants with respect to him specifically—and, again, he is not—his failure to do so is due to the actions of the Federal Defendants and Defendants HHS and OMB, and defendants may not reap a legal benefit from their own bad acts. Count II, which no party has moved to dismiss,

[2] Vivek H. Murthy, *Confronting Health Misinformation: The U.S. Surgeon General's Advisory on Building a Healthy Information Environment* (2021) 3, 12, *available at* https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf (last visited Apr. 17, 2022)

asserts that Defendants HHS and OMB have failed to respond to Hart's FOIA request within the required 20 business days after they were submitted on July 22, 2021. Compl. ¶¶ 67-73. The request specifically sought "[a]ll records of communications . . . between the White House or HHS and any social media company related to Justin Hart or his social media posts." It is attached as Exhibit A to Exhibit 1 to this Response; the OMB denial of expedited processing is attached as Exhibit B to Exhibit 1; and Hart's appeal is attached as Exhibit 1. Hart asked for similar information from Defendants Facebook, Twitter, HHS, and Biden on September 30, 2021 in his Rule 26(d)(2) Document Requests, attached as Exhibits 2-5; thus far, Defendants have not responded. Without this information that Defendants are withholding, Hart is being stymied from proving his case thus far. But at this stage, he must only plead it, and he has with sufficiency.

C. Hart properly pled that Defendants are regularly working jointly to censor speech and were doing so at the time of his free speech violation.

Defendants mistakenly make much of the timeline of events in the Complaint. They argue that the government statements Hart "relies on" were made after Facebook took down his posts or made efforts to curb COVID-19-related "misinformation." Facebook Mot. to Dismiss 4, 6; Federal Mot. to Dismiss 13. Even Twitter attempts to argue likewise (Twitter Mot. to Dismiss 9, 11), ignoring the fact that Twitter locked Hart's account three days *after* Defendant Murthy publicly announced that the government was asking social media companies to engage in censorship. Compl. ¶¶ 5, 6, 8 *bis*. Defendants ask this Court to read Defendant Murthy's statement as proof that a new policy of censorship was being inaugurated at the July 15, 2021, press conference and as proof that the Federal Defendants had not coerced or cooperated with the Social Media Defendants when Hart's Facebook account was locked on or around July 13, 2021. Not so. Press Secretary Jen Psaki

admitted at the same press conference that "we [the Biden Administration] *are* in regular touch with these social media platforms." Compl. ¶ 12 *bis* (emphasis added). This is not a prospective statement, as Defendants wish to portray it. If the Press Secretary was announcing a new policy, she would have said "we *will be* in regular touch." Instead, she described an already-existing, ongoing policy. As further proof that it was not a prospective statement, the Court can take judicial notice that the Press Secretary went further, listing a score of actions "that we *have* taken": "We've increased disinformation research and tracking. . . . We're flagging problematic posts. . . . We also created . . . the COVID Community Corps. . . . You saw an example of that yesterday."[3] Psaki continued, "There are also proposed changes that *we have made* to social media platforms . . . we *have* recommended – proposed that they create a robust enforcement strategy."[4] None of these statements support the Defendants' thesis that the timing of the press briefing is detrimental to Hart's claims.

D. Biden and Murthy's motion to dismiss fails because it asserts countless facts that this Court cannot consider at this stage.

The best evidence that the motions to dismiss should fail at this stage is the sheer number of facts asserted by Biden and Murthy to try to bolster their motion to dismiss. Instead of accepting Hart's factual allegations as true, the Federal Defendants offered their own set of countervailing facts in an effort to disprove Hart's facts. The Court cannot consider these disputed, material facts at this stage of the pleadings.

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[3] Jen Psaki, White House Press Briefing (July 15, 2021), transcript available at https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021/ (last visited April 17, 2022) (emphasis added).

[4] *Id.* (emphasis added).

First, Biden and Murthy offered two pages of facts regarding social media companies' efforts to stem COVID-19 misinformation. Federal Mot. to Dismiss 5-6. The Federal Defendants discuss at length prior efforts by the Social Media Defendants to curb COVID-19 misinformation to suggest that the Social Media Defendants were simply acting in accordance with preexisting policy. Federal Mot. to Dismiss 2, 5-6, 12-13, 18-19. But these allegations are belied by Defendant Murthy's own words at the Press Briefing referenced in Hart's Complaint: "we're saying *we expect more* from our technology companies."[5] Although the Social Media Defendants were already censoring alternative viewpoints, the Biden Administration felt that they were not going far enough. Furthermore, state action can exist "regardless of whether [the private person] was motivated by the command" of the government or would have done the same thing on his own volition. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 192 (1970) (Brennan, J., concurring) (describing the holding of *Peterson v. City of Greenville*, 373 U.S. 244 (1963)).[6]

Second, the Federal Defendants characterize the Surgeon General's Advisory as containing purely "recommendations" that do "not purport to impose any obligations on social media companies." Federal Mot. to Dismiss 8, 17. But this sleight of hand obscures the broader picture alleged by Hart: multiple statements by the White House Press Secretary as to the President's policy and admissions that senior White House officials regularly call senior corporate executives to hound them on posts.

Third, the Federal Defendants argue that the Social Media Defendants could have independently concluded it was in their best interest to censor Hart's speech.

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[5] *Id.* (emphasis added).

[6] *Adickes* and *Peterson* both arose in the context of the Civil Rights Era, and their holding makes sense. Racial discrimination by private parties undertaken at the state's behest constitutes state action even if the private parties were themselves racists who would have been discriminatory in their attitudes and actions regardless of the state's direction.

Federal Mot. to Dismiss 15, 19, 21. The Complaint belies this possibility, too, by demonstrating a pattern of the Social Media Defendants following the Biden Administration's lead on viewpoint suppression. The Complaint details how Facebook originally censored the claim that COVID-19 was man-made but reversed course after President Biden acknowledged the possibility of that theory. Compl. ¶ 40. Facebook can attempt to prove otherwise after the discovery process, but the facts that Hart has alleged suggest that Facebook is indeed following the federal government's instructions on whom to censor. And again, the Federal Defendants should not be allowed to argue that Hart has been unable, at this early stage, to *prove* that the Social Media Defendants' actions were "driven . . . by the Federal Defendants' mere suggestions" rather than by independent considerations (Federal Mot. to Dismiss 13) when the Federal Defendants themselves and their employees and departments have withheld from Hart information that would prove precisely that. Compl. ¶¶ 67-73.

E. The cases Defendants rely on do not stand for the propositions they assert.

Defendant Facebook argues that it cannot be a state actor absent a financial benefit to the government. Facebook Mot. to Dismiss 7. But the primary case Facebook relies on is inapposite. *Pasadena Republican Club v. Western Justice Center,* 985 F.3d 1161 (9th Cir. 2021), used financial benefit as one of several factors to determine a "significant degree of integration, dependency, and coordination" to establish joint action. 985 F.3d at 1169. Indeed, the other factor *Pasadena* identified as a "hallmark of a symbiotic relationship" between a public authority and a private entity was "substantial coordination," *id.* at 1168, which Hart has certainly alleged exists here. Moreover, *Pasadena* relies on the Ninth Circuit's decision in *Rawson v. Recovery Innovations,* 975 F.3d 742 (9th Cir. 2020), which found state action even

though "the record . . . [did] not indicate whether [the state actor was] in any sense financially dependent upon the business of [the private actor]." 975 F.3d at 756 (emphasis added). Facebook's other case observed that a financial "relationship *may* be sufficient to establish state action." *Kinderstart.com LLC v. Google, Inc.,* No. 06-CV-2057, 2006 U.S. Dist. LEXIS 82481 at *15 (N.D. Cal. Nov. 7, 2006). In fact, *Kinderstart* treated "significant financial benefits" (*Id.;* Facebook Mot. to Dismiss 7) as an entirely separate way of determining state action than "joint action" (2006 U.S. Dist. LEXIS 82481 at *13-14).

The Federal Defendants also seek succor in *Association of American Physicians & Surgeons v. Schiff,* 518 F. Supp. 3d 505 (D.D.C. 2021) (Federal Mot. to Dismiss, Dkt. 69 at 14), and Defendant Facebook cites *Children's Health Defense v. Facebook, Inc.,* 546 F. Supp. 3d 909 (N.D. Cal. 2021) (Facebook Mot. to Dismiss 6). Both of those cases concerned calls for censorship from a single Congressman (the same Congressman, in fact)—1/435th of one-half of the legislative branch. The court in *Schiff* found that the Congressman did "not advocate for any specific actions," and made his statements "after the technology companies took many of the actions at issue." *Schiff,* 518. F. Supp. 3d at 515-16; Dkt. 69 at 14. Likewise, the court in *Children's Health Defense* found that the Congressman's statements did not "mandate[] the particular actions that Facebook took." 546 F. Supp. 3d at 930. Rep. Adam Schiff does not have the power to effect executive action like the President of the United States. The Congressman's conduct—"sen[ding] letters and ma[king] public statements" (Federal Mot. to Dismiss 14) is also not comparable to "being in regular touch with these social media platforms" via "engagements" with "members of [the Administration's] senior staff." Compl. ¶ 12 *bis* (quoting Press Secretary Psaki). Further unlike those cases, where the Congressman "did not advocate for any specific actions," Defendants Murthy and Biden did just that. Compl. ¶¶ 14-17.

F. This Court has jurisdiction to issue the relief requested for a First Amendment violation.

The Social Media Defendants argue that Count I should be dismissed because it alleges a direct violation of the First Amendment rather than a *Bivens* action, but then they undermine that argument by asserting *Bivens* actions cannot be brought against corporations. Twitter Mot. to Dismiss 6-7 and n.7, Facebook Mot. to Dismiss 7. As Defendants know, a *Bivens* action exists as a workaround to sovereign immunity for the federal government, and it allows, instead, individual federal officials to be held liable in their official capacity. See, e.g., *FDIC v. Meyer,* 510 U.S. 471, 485-86 (1994); *Bush v. Lucas,* 462 U.S. 367, 374-75 (1983). Therefore, it was not designed to be brought against a private corporation. This "heads I win, tails you lose" argument should not be taken seriously.

Instead, Hart pled jurisdiction under *Free Enterprise Fund v. Public Co. Accounting Oversight Board,* 561 U.S. 477, 491 n.2 (2010), which held that courts may safeguard constitutional rights directly under the Constitution, even in the absence of an explicit private right of action. Compl. ¶ 20 *bis*; *see also Bell v. Hood,* 327 U.S. 678, 684 (1946) ("it is established practice" to "sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution").

The Defendants also incorrectly argue that Hart has not alleged any ongoing or future injury. Federal Mot. to Dismiss 11, Facebook Mot. to Dismiss 7-8. Hart alleged his First Amendment injury is ongoing: "Facebook and Twitter now require that Hart and other users express a government-approved viewpoint to use their platforms." Compl. ¶ 63. Additionally, Hart alleged future injury from Facebook in Count VI, in which he alleged negligent interference with a *prospective* economic advantage. Compl. ¶¶ 103-09.

Moreover, the Advisory has not been withdrawn and the Federal Defendants have not changed their policy of coercion or cooperation with the Social Media Defendants to censor opposing points of view. After this lawsuit was filed, Defendant Biden continued to exhort social media companies to "please deal with the misinformation and disinformation that's on your shows [sic]. It has to stop."[7] Contra the Federal Defendants' assertions, Hart continues to face a "'real and immediate threat' of future harm." Federal Mot. to Dismiss 11 (quoting *L.A. v. Lyons,* 461 U.S. 95, 102 (1983)).

II. Hart's California free speech count (Count III) should stand because the California Constitution is even more protective of free speech than the U.S. Constitution.

For all the reasons presented in Section I, Hart's violation of the California Constitution's free speech clause is also well pled. Indeed, the standard for applying a free speech violation to a private actor is even more liberal under the California Constitution than under the U.S. Constitution. The California Supreme Court has explicitly held that private parties violate the California Constitution's free speech clause when they prohibit individuals from speaking in their venues, when such venues are otherwise open to the public. *Robins v. Pruneyard Shopping Center,* 23 Cal. 3d 899 (1979).

In *Pruneyard*, a group of high school students set up a card table in the courtyard of a privately owned shopping center to gather signatures for a petition to the government opposing an anti-Israeli resolution at the United Nations. *Id*. at 902. Security guards informed them of the shopping center's policy against petitions and suggested they relocate to the public sidewalk at the center's perimeter. *Id*. The Court overturned a prior ruling and concluded that prior case law does not prevent

[7] *Watch: Biden delivers remarks on his administration's coronavirus response*, YouTube (Jan. 13, 2022) https://www.youtube.com/watch?v=pOowEhwlsXE, at 35:12.

California's constitution from "providing greater protection than the First Amendment . . . ." *Id*. at 910. The Court held that Article I, Secs. 2 and 3 of the state constitution protect speech even in privately owned shopping centers. *Id*. The Court found that hundreds of thousands of adults in the San Jose area visited shopping centers, *id*. at 907, and reasoned that because the "public is invited[, they] provide an essential and invaluable forum for exercising [free speech] rights." *Id*.

Hart has pled a credible claim that this same reasoning applies today to the internet. Because the public is invited and hundreds of millions of Americans visit, social media sights also "provide an essential and invaluable forum for exercising [free speech] rights" under the California Constitution even when they are privately owned. *Id*.

Although the Social Media Defendants wish to curb *Pruneyard Shopping Center* (Facebook Mot. to Dismiss, Dtk. 73 at 9; Twitter Mot. to Dismiss, Dkt. 70 at 15), the Complaint points out that the U.S. Supreme Court has held that the internet is a "quintessential forum." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Congress has said the same, describing the internet in Section 230 as "a forum for a true diversity of political discourse." 47 U.S.C. § 230(a)(3). California courts also refer to social media platforms as fora for discussion of public issues. *Daniel v. Wayans*, 8 Cal. App. 5th 367, 387, 213 Cal. Rptr. 3d 865 (Ct. App. 2017).

The Social Media Defendants insist that *Pruneyard* can apply to private companies "only if the property is freely and openly accessible to the public." Twitter Mot. to Dismiss 15; Facebook Mot. to Dismiss 9. Facebook argues that this exception never applies to "virtual spaces," *id*., while Twitter argues that its Terms of Service distinguish it from "public streets or open air malls" and it is therefore not "freely and openly accessible." Twitter Mot. to Dismiss 16. Neither argument is compelling—and certainly not at this stage of the pleadings. Facebook's contention

flies directly in the face of all the law calling social media a public forum, and Twitter's terms of service are no different from the posters at the entrance to many shopping malls setting rules for speech and other activities.

The Social Media Defendants cite *Zimmerman v. Facebook, Inc.,* No. 19-CV-4591, 2020 WL 5877863 (N.D. Cal. Oct. 2, 2020) for the assertion that they can *never* be sued under California's free speech clause, apparently regardless of whether they committed joint action with the government. Facebook Mot. to Dismiss 9; Twitter Mot. to Dismiss 16. But that was not the *Zimmerman* court's holding. In fact, it even acknowledged the possibility of joint action in a separate order. *Zimmerman,* No. 19-CV_4591, 2020 U.S. Dist. LEXIS 183323 at *6 (N.D. Cal. Oct. 2, 2020) ("These allegations of joint action between Facebook and the Trump administration . . . pertain to the privacy-related claims brought in the Facebook MDL . . . .").

Alternatively, Facebook defends its Community Standards as "precisely the kind of 'reasonable regulation' that *Pruneyard* endorsed." Facebook Mot. to Dismiss 10. But the Complaint alleges that Facebook's Community Standards are *not* reasonably applied. Compl. ¶¶ 27-28 (Facebook's Community Standards state that it "do[es] not remove false news from Facebook" and do not "prohibit viewpoints that oppose making children wear masks"), 39-40 (Facebook's standard of "false news" changes based on what the government says). Whether these standards are reasonable turns on the factual circumstances of their application to Hart, and that is yet to be determined.

III. Hart has adequately pled the elements of a promissory estoppel claim (Count IV).

The fourth count of Hart's Complaint seeks to hold the Social Media Defendants liable based on promissory estoppel by alleging that they breached a "clear and unambiguous promise" to him that he could use their services and that he engaged

in "reasonable, foreseeable and detrimental reliance" on that promise. Compl. ¶¶ 80-87 (quoting *Bushell v. JPMorgan Chase Bank, N.A.,* 163 Cal. Rptr. 3d 539, 550 (Cal. Ct. App. 2013) ("The elements of promissory estoppel are (1) a clear and unambiguous promise by the promisor, and (2) reasonable, foreseeable and detrimental reliance by the promisee.")).

First, the Social Media Defendants falsely argue that Hart has not pled a "specific representation" made "directly to" him that they would not remove his content. Facebook Mot. to Dismiss 10-11; Twitter Mot. to Dismiss 17. On the contrary, Hart pled that, through its terms of service, Facebook invited him to "connect with [other people], build communities, and grow [his] business[.]" *See* Compl. ¶ 25. Furthermore, he pled that Facebook promised him, "[W]e do not remove false news from Facebook . . . ." Compl. ¶ 26. Similarly, he pled that Twitter promised him, "Twitter's purpose is to serve the public conversation." *Id.* ¶ 44 (quoting "The Twitter Rules"). And he pled that, by its silence on the matter among other topics for removal, Twitter implicitly promised him that it does not "prohibit viewpoints that oppose wearing masks . . . ." *Id.* ¶ 46. Finally, if this were not enough, Hart pled explicitly, "Facebook and Twitter made 'a clear and unambiguous promise' to Hart that he could use their services to communicate and network with other Facebook and Twitter users." *Id.* ¶ 81 (quoting *Bushell*, 163 Cal. Rptr. 3d at 550). Also, they "did not caveat this promise by announcing that they would censor speech opposing masks." *Id.* ¶ 82; *see also id.* ¶ 27. Thus, Hart properly pled that the Social Media Defendants made a promise to him.

Moreover, as explained below in Section VI.B., the manner in which the Terms of Service were presented to Hart is a matter of factual dispute to be determined at a later stage of the proceedings.

Second, the Social Media Defendants argue that "Plaintiff's reliance on that promise to post whatever he wished would have been unreasonable." Facebook Mot. to Dismiss 11; *see also* Twitter Mot. to Dismiss 18. But Hart never interpreted their promises as invitations to post "whatever he wished." For example, he did not post "Child Sexual Exploitation," "Violent [or] Graphic Content," "Adult Nudity," "Spam," or "Inauthentic Behavior" (Compl. ¶ 27; *see also* Compl. ¶ 45), and he did not read the Social Media Defendants' promises as an invitation to post such material. Hart very reasonably relied on the promise made—the definition of objectionable material—to make posts that complied with the Social Media Defendants' terms, which did not prohibit viewpoints opposing masking. Compl. ¶¶ 28, 45. It was the Social Media Defendants' changes in policy that were unreasonable and unforeseeable—not Hart's expectation that they would remain consistent. His reliance was reasonable.

Facebook further argues that Hart's prior violations of Facebook's Terms of Service and Community Standards put him on notice as to its content moderation policy, and he cannot now claim ignorance of it. Facebook Mot. to Dismiss 11. But as Hart explained in the Complaint, Facebook's content moderation policies "are constantly shifting." Compl. ¶ 39. Hart pled that Facebook is not following its own policies. *See* Compl. ¶ 27. He pled the example of Facebook removing "posts that suggested the [COVID-19] virus was man-made" for over a year and a half before it reversed course at the direction of President Biden. *Id.* ¶ 40. Therefore, far from claiming ignorance of Facebook's content moderation policy, Hart is well-versed in its inconsistent and unreasonable application. This haphazard policy does not provide proper notice to anyone. Thus, Hart has properly pled a claim for promissory estoppel.

IV. Hart's claim of intentional interference with a contractual relationship (Count V) must stand because Facebook seeks to apply an evidentiary standard inappropriate for a motion to dismiss and because Facebook misstates the law.

To properly plead a claim of intentional interference with a contractual relationship, Hart must allege (1) a valid contract between a claimant and a third party (Compl. ¶¶ 91-92); (2) defendant's knowledge of this contract (Compl. ¶ 93); (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship (Compl. ¶¶ 94-95); (4) an actual breach or disruption of the contractual relationship (Compl. ¶ 96); and (5) resulting damage (Compl. ¶ 97). Compl. ¶ 89 (citing *Davis v. Nadrich*, 94 Cal. Rptr. 3d 414, 421 (Cal. Ct. App. 2009)). Of the five elements, Facebook takes issue with three: the existence of a valid contract; the defendant's knowledge of the same; and its intent to induce a breach of the contract.

First, Facebook argues that Hart has failed to "allege" the existence of the contract (Facebook Mot. to Dismiss 12), but this is plainly false. Hart alleged that he "maintains a valid employment contract with Donorbureau, LLC" ("Donorbureau") and that he serves "as an Administrator on the Donorbureau Facebook account, so he can post content to the site . . . ." Compl. ¶ 91-92. Thus, Hart properly pled the existence of the contract.

Second, Facebook jumps the gun in expecting Hart to *prove* facts about knowledge of the contract at the motion-to-dismiss stage. Facebook argues that Count V fails because Hart "has not shown" that Facebook had knowledge of his contract with Donorbureau. Facebook Mot. to Dismiss 12. But the correct standard for evaluating a motion to dismiss is not whether the plaintiff has *shown* the defendant's knowledge of the contract but whether he has *alleged* it. In evaluating a motion to dismiss, "[w]hen there are well-pleaded factual allegations, a court should

assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft,* 556 U.S. at 679 (2009). In this case, Hart alleged knowledge of the contract, and that is sufficient. Specifically, Hart alleged that Facebook has actual knowledge of the existence of a contractual relationship between Hart and Donorbureau because it knows that Hart serves as an Administrator for the Donorbureau Facebook account. Compl. ¶ 93.

The cases Facebook cites to argue that Hart has insufficiently alleged the tort are inapposite. Facebook selectively quotes out-of-context language from *United National Maintenance, Inc. v. San Diego Convention Ctr., Inc.* 766 F.3d 1002, 1009 (9th Cir. 2014). Facebook Mot. to Dismiss 12, 9-11. *United National Maintenance* concerned facts established at a jury trial, not the sufficiency of facts alleged in a complaint. *Id.* ("For *the jury* to understand whether [plaintiff]'s performance was disrupted required the district court to determine what contractual rights [the plaintiff] possessed.") (emphasis added). Facebook's other case, an unpublished decision, is likewise unavailing, concerning the insufficiency of a record on appeal and not the allegations in a complaint. *See Bechard v. Broidy,* No. B293997, 2020 Cal. App. Unpub. LEXIS 3969, *15 (Cal. Ct. App. June 24, 2020). At the motion-to-dismiss stage, the Court may weed out only complaints with factual allegations that, *even if they are all true,* do not amount to a cause of action. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). In this case, Hart has pled sufficient factual allegations to establish the cause of action.

Third and finally, Facebook argues that Count V fails because Facebook did not have the specific intent to interfere. Facebook Mot. to Dismiss 13. That is irrelevant. As Hart pled, California law does not require that the defendant act with specific intent to interfere. Compl. ¶ 90 (citing *Davis,* 94 Cal. Rptr. at 421; *Quelimane Co. v. Stewart Title Guaranty Co.,* 19 Cal. 4th 26, 56 (1988)). Hart need only show that the

defendant knew "that the interference [was] certain or substantially certain to occur as a result of his action." *Quelimane Co.,* 19 Cal. 4th at 56 (cleaned up). This Hart has done. Compl. ¶¶ 94-95 ("Facebook . . . intended that such action would prevent Hart from doing his work as an Administrator on the Donorbureau account. . . . Facebook intentionally interfered with Hart's contract with Donorbureau . . . ."). Thus, Hart's claim should survive.

V. Hart's negligent interference claim (Count VI) should stand because he has alleged a prospective economic advantage.

Facebook self-servingly attempts to transform the Complaint's final count into a tort that does not exist: negligent interference with a contract. Facebook Mot. to Dismiss 13-14. But negligent interference with a prospective economic advantage, which is what Hart pled, does exist under California law. *Nelson v. Tucker Ellis, LLP,* 262 Cal. Rptr. 3d 250, 264 n.5 (Cal. App. Ct. 2020). As Hart pled, *Nelson* requires a plaintiff to allege "the existence of a valid contractual relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff." Compl. ¶ 100 (quoting *Nelson* at 264 n.5). Facebook argues that Hart has not pled a "prospective economic advantage" outside of his contract with Donorbureau. Facebook Mot. to Dismiss 13. But Hart alleged in his Complaint that he has a probability of future economic benefit if he successfully fulfills the terms of his Donorbureau contract. Thus, he has alleged the necessary facts sustaining the elements of the claim.

VI. Defendants' catchall defenses fail.

A. Section 230 is not a defense to Hart's claims.

First, Facebook and Twitter fallaciously argue that Section 230 of the Communications Decency Act, 47 U.S.C. § 230 et seq., bars all the claims against them. Facebook Mot. to Dismiss 14-17; Twitter Mot. to Dismiss 20-21. But Section

230 is a defense only against Hart's state-law claims, not against Hart's First Amendment claim, for the First Amendment trumps federal statutes. *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1116 (N.D. Cal. 2020) ("the Ninth Circuit has not interpreted Section 230 to grant immunity for causes of action alleging constitutional violations.") (citing *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008)); *id.* at 1119 ("the Court does not broach Count I, Plaintiffs' *Bivens* claim for violation of the First Amendment, because as discussed above, Section 230 does not immunize a defendant from constitutional claims."). Thus, Section 230 does not bar Hart's First Amendment claims as to any Defendants.

Second, Section 230 provides a liability shield only for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . " § 230(c)(2). Hart has alleged that this action was not taken voluntarily, in good faith, or upon consideration by Twitter and Facebook but rather was taken at the behest of the Federal Defendants.

This action was not taken voluntarily by the platforms but under pressure from the government. As the Ninth Circuit has recognized in another context, "The psychological atmosphere in which the consent is obtained is a critical factor in the determination of voluntariness." *United States v. Rothman*, 492 F.2d 1260, 1265 (9th Cir. 1973). "Where the consent is obtained through a misrepresentation by the government, or under inherently coercive pressure and the color of the badge, such consent is not voluntary." *Id.*

That is the situation in which Twitter and Facebook found themselves in this case. According to the White House Press Secretary, as alleged in the Complaint, senior officials of the White House were calling and telling the platforms to take

down posts like Mr. Hart's. Compl. ¶ 12. Even if the particular post in question was identified by a lower-level censor in the Surgeon General's office, the top-level direction was made at the highest levels of corporate and governmental leadership. In such a case, for a highly regulated entity like the platforms, such "inherently coercive pressure" renders their decision no longer voluntary. *Rothman*, 492 F.2d at 1265. Similarly, when platforms act jointly with the government, they do not act "in good faith." That is not to say they are acting in "bad faith" but that they are acting out of no faith at all. They are neither benevolent or malevolent but rather are acting as tools of their governmental puppeteers. Alternatively, if the platforms have a consistent pattern of suppressing similar information from political viewpoints with which they disagree, such censorship is not undertaken in good faith.

Or, put differently, this was not material "the *provider* or user considers to be" objectionable, but rather material the *government* considers to be objectionable. § 230(c)(2) (emphasis added). Section 230 protects against "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Here, the Complaint alleges it was not the platform but the government that made the determination in the first instance that the material was objectionable. Compl. ¶¶ 7-20. Facebook and Twitter did not exercise the publisher's editorial discretion; they implemented the government's editorial discretion.

One way this is seen is by asking whether the platforms would have taken the material down of their own accord but for the governmental pressure. The Defendants say in their submissions that they would have (Federal Mot. to Dismiss 12; Facebook Mot. to Dismiss 5-6; Twitter Mot. to Dismiss 9-10), but those factual allegations are outside the record for this motion. However, there is good reason to

believe that they would not have done so, given recent decisions from Meta's Oversight Board.[8] In one of its first cases, the Oversight Board considered an instance in which "Facebook [had] removed the content for violating its misinformation and imminent harm rule, . . . finding the post contributed to the risk of imminent physical harm during a global pandemic." *In re French user*, 2020-006-FB-FBR (Meta Oversight Bd. Jan. 28, 2021).[9] The Oversight Board instructed Facebook to restore the post, reasoning, "In this case, a user is questioning a government policy and promoting a widely known though minority opinion of a medical doctor. The post is geared towards pressuring a governmental agency to change its policy; the post does not appear to encourage people to buy or take certain drugs without a medical prescription. Serious questions remain about how the post would result in imminent harm." *Id.* at 8.1. Hart stands in a similar stead: he was questioning governmental policy on masking children and citing numerous peer-reviewed studies on the topic; he was not urging people to undertake actions that would lead to "imminent harm." *Id.*

In its second case dealing with COVID-19, the Oversight Board upheld Facebook's decision to leave in place "a post by a state-level medical council in Brazil which claimed that lockdowns are ineffective and had been condemned by the World Health Organization." *In re Brazilian Medical Council*, 2021-008-FB-FBR (Meta

[8] The Meta (Facebook) Oversight Board is "an independent body often described as a kind of Supreme Court for Facebook." "The board is an independent, court-like entity for appealing content decisions on Facebook-owned platforms. It's made up of 20 experts in areas like free expression, human rights, and journalism. Content moderation decisions made by Facebook and Instagram—for instance, removing or not removing a particular post—can be appealed to the board once users have gone all the way through the company's internal review process." Donie O'Sullivan, "What you need to know about the board deciding Trump's fate on Facebook," CNN.com (May 4, 2021), https://www.cnn.com/2021/05/04/tech/what-is-facebook-oversight-board/index.html.

[9] https://www.oversightboard.com/decision/FB-XWJQBU9A.

Oversight Bd. Aug. 19, 2021).[10] Though the Oversight Board found that "the content contained some inaccurate information," it nonetheless concluded that the post "did not create a risk of imminent harm and should, therefore, stay on the platform." *Id.* Additionally, the Oversight Board emphasized that when Facebook encounters health misinformation, its response should be to provide a fact-check or contextual information alongside a post rather than to take down the post or suspend the user. *Id.* at 8.3.III ("Facebook should consider less intrusive measures than removals for misinformation that may lead to forms of physical harm that are not imminent," such as "referring content that comes to its attention to its fact-checking partners where a public position on debated health policy issues (in particular in the context of a pandemic) is presented . . . ."). The Oversight Board's two decisions specific to medical disinformation both provide good reason to believe that the platforms were not acting voluntarily or in good faith when they suspended Hart because a fair application of their existing standards would not have compelled his suspension. It was the U.S. Government's pressure that tipped the scales from free speech to censorship.

In sum, far from posing "the classic kinds of claims that have been found to be preempted by section 230," (Facebook Mot. to Dismiss 24 (cleaned up)), this is a unique case with a novel circumstance where the U.S. Government has leaned on platforms to censor content. This makes all the difference because, while normally broad immunity serves the purposes of Section 230 to protect publishers, *see Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007), here narrow immunity serves the purposes of Section 230 to stop governmental interference with the internet: "Section 230 was enacted, in part, to maintain the robust nature of Internet communication, and accordingly, to keep government interference in the

[10] https://www.oversightboard.com/decision/FB-B6NGYREK/.

medium to a minimum." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). In other words, "Section 230 is designed to keep the federal government removed from the editorial decision-making process of internet companies like YouTube and Google." *Newman v. Google LLC*, No. 20-CV-04011-LHK, 2021 U.S. Dist. LEXIS 119101, at *30 (N.D. Cal. June 25, 2021). Here we have the exact opposite: internet companies are making editorial decisions at the behest of the federal government. This undercuts the very purpose of Section 230, which Congress said was to see the internet "flourish[], to the benefit of all Americans," "unfettered by Federal or State regulation." 47 U.S.C. § 230(a)(4) & (b)(2). Thus, a narrow reading of the immunity, and not a broad one, promotes one of "the [two] primary purpose[s] of Section 230": "'the free exchange of information and ideas over the Internet.'" *Kifle v. YouTube LLC*, No. 21-cv-01752-CRB, 2021 U.S. Dist. LEXIS 193604, at *8 (N.D. Cal. Oct. 5, 2021) (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003)). This Court must honor Congress's aim and the Ninth Circuit's instruction by not allowing the Social Media Defendants to misuse Section 230 as a shield for their tortious and unconstitutional cooperation in governmental censorship of the internet.

B. Facebook and Twitter's defenses based on their terms of service require the introduction of factual evidence not allowed at this stage of the pleadings.

Facebook claims its terms of service bar the promissory estoppel claim (Facebook Mot. to Dismiss 10-11), and Twitter claims its terms of service bar all Hart's claims (Twitter Mot. to Dismiss 21-22), but this defense fails at this stage because it requires the Court to consider factual evidence not in the record. When reviewing a motion to dismiss a complaint, a Court may consider only the facts contained in the complaint and any matters properly subject to judicial notice. *Bozzio v. EMI Grp. Ltd.*, 811 F.3d 1144, 1154 n.2 (9th Cir. 2016).

The terms of service asserted by Facebook and Twitter are adhesion contracts, and their validity is determined by a factual inquiry into how they were presented to the user. "California law treats contracts of adhesion, or at least terms over which a party of lesser bargaining power had no opportunity to negotiate, as procedurally unconscionable to at least some degree." *In re Juul Labs, Inc.*, No. 20-cv-02345-WHO, 2021 U.S. Dist. LEXIS 157126, at *39-40 (N.D. Cal. Aug. 19, 2021) (quoting *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004 (9th Cir. 2010), superseded by statute on other grounds). The degree to which adhesion contracts are procedurally unconscionable is determined by their presentation; for example, "*Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454, 466-67 (S.D.N.Y. 2017) . . . reject[ed] enforcement of [an] arbitration agreement where the "'I agree to Lyft's Terms of Service" is in the smallest font on the screen, dwarfed by the jumbo-sized pink "Next" bar at the bottom of the screen and the bold header "Add Phone Number" at the top,' all of which would mislead[ ] consumers even if the hyperlinked Terms of Service was easier to identify . . . ." *In re Juul Labs, Inc.*, 2021 U.S. Dist. LEXIS 157126, at *38. Therefore, before this Court may rule on this defense, a factual inquiry is required not only into the words used in the terms of service but also into how they were presented to Hart. Because such a factual inquiry has not yet occurred, the Court should deny the motions to dismiss at this stage.

Twitter asks this Court to take judicial notice of its terms of service, as they currently exist. Twitter Req. for Jud. Notice 1-2. But at this stage, the Court may not take Twitter's word that its current terms of service represent the terms of service *as they existed at times relevant to the complaint*. *See Gardner v. CafePress Inc.*, No. 3:14-cv-0792-GPC-JLB, 2014 U.S. Dist. LEXIS 173726, at *5-6 (S.D. Cal. Dec. 16, 2014) (refusing to take notice of the terms of service, stating "Documents on CafePress's website are not public documents and thus can be changed at any

moment by CafePress."). Because they can be—and are—changed on a regular basis, there must be a factual inquiry into which particular version of the terms of service were in effect at the time of Hart's relevant actions, including joining Twitter and Facebook, purchasing specific advertisements, and having specific posts removed. This factual dispute distinguishes this case from others in which courts took judicial notice of terms of service and plaintiffs did not dispute which version was in effect at a particular time. *See, e.g., O'Handley*, 2022 U.S. Dist. LEXIS 4491, at *4 n.3; *Coffee v. Google, LLC*, No. 20-cv-03901-BLF, 2021 U.S. Dist. LEXIS 26750, at *11 (N.D. Cal. Feb. 10, 2021).

Furthermore, Twitter and Facebook argue that Hart incorporated the terms of service into his Complaint by citing them. Twitter Req. for Jud. Notice 2; Facebook Mot. to Dismiss 3. But Hart disputes which version of them applies to each illegal act that Defendants took, and there is no evidence in the record of how they were presented to this specific plaintiff. For these reasons, the terms of service as noticed by Twitter are of no value in determining a motion to dismiss based on the sufficiency of the pleadings.

Finally, even if the terms of service were relevant at this stage, the motions to dismiss would still fail because the adhesion contracts are unconscionable. Unconscionability has two components, procedural and substantive. As mentioned, all adhesions contracts are "procedurally unconscionable to at least some degree." *In re Juul Labs, Inc.*, 2021 U.S. Dist. LEXIS 157126, at *39-40. In deciding the existence of procedural unconscionability, "the Ninth Circuit has 'consistently followed the [California] courts that reject the notion that the existence of "marketplace alternatives" bars a finding of procedural unconscionability.'" *In re: Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1137 (N.D. Cal. 2018) (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 985 (9th

Cir. 2007)). Therefore, without factual evidence that the terms of service were presented to Hart in a fair way, the Twitter and Facebook motions to dismiss fail to disprove allegations of procedural unconscionability.

The second part of the inquiry is into the substantive unconscionability: "The substantive unconscionability inquiry looks to whether the *actual terms* of the agreement create overly harsh or one-sided results." *In re: Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1137 (N.D. Cal. 2018) (emphasis in original) (citing *Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 808, 49 Cal. Rptr. 3d 555, 564 (2006)). In this instance, the terms of the agreement led to a violation of Hart's First Amendment rights; therefore, they are substantively unconscionable, as well.

C. California's anti-SLAPP statute is inapplicable in federal court and in this case.

Under the Supreme Court's test in *Shady Grove*, California's anti-SLAPP statute is inapplicable in federal court. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (reaffirming *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) ("When a situation is covered by one of the Federal Rules," a federal court must apply the Federal Rule, notwithstanding the existence of a conflicting state statute.). Under *Shady Grove*, if a federal rule of civil procedure "answers the question in dispute," then it governs—notwithstanding a state-law procedure to the contrary. *Id.* In this instance, the question in dispute is whether the Social Media Defendants may dismiss or strike Hart's claims by motion. Because Federal Rule of Civil Procedure 12 allows them to do so and they have not challenged the applicability or validity of Rule 12, it trumps California's anti-SLAPP statute. Therefore, the Social Media Defendants' anti-SLAPP claim is inapplicable in this Court. *See* Twitter Mot. To Strike; Facebook Mot. to Dismiss 17-19.

1. The Second Circuit applied the *Shady Grove* test in *La Liberte v. Reid* and held that California's anti-SLAPP statute conflicts with Rule 12 and is inapplicable in federal court.

The Second Circuit applied the *Shady Grove* test in a case of first impression recently and held that "California's anti-SLAPP statute is inapplicable in federal court because it increases a plaintiff's burden to overcome pretrial dismissal, and thus conflicts with Federal Rules of Civil Procedure 12 and 56." *La Liberte v. Reid*, 966 F. 3d 79, 83 (2nd Cir. 2020).[11] The court's persuasive analysis and rejection of California's anti-SLAPP statute's application in federal court is instructive here.

In *La Liberte*, the plaintiff, Roslyn La Liberte, sued MSNBC personality Joy Reid for defamation. *Id*. Reid mistakenly tweeted that La Liberte had called a 14-year-old boy an invective and screamed at him that he was going to be deported. *Id*. at 84. The tweet was false, but it went viral, and La Liberte received physical and emotional threats as a result. *Id*. In defense, Reid filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and a motion to strike under California's anti-SLAPP law. *Id*. at 83.

The Second Circuit acknowledged a circuit split as to whether anti-SLAPP statutes apply in federal courts, with the Fifth, Eleventh, and D.C. Circuits holding them inapplicable, *id*. at 86 (citing *Klocke v. Watson*, 936 F. 3d 240, 242 (5th Cir. 2019) (Texas statute); *Carbone v. Cable News Network, Inc*., 910 F. 3d 1345, 1350 (11th Cir. 2018) (Georgia statute); *Abbas v. Foreign Policy Grp*., *LLC*, 783 F. 3d 1328, 1335 (D.C. Cir. 2015) (D.C. statute), and the First Circuit applying them. *Id*. (citing *Godin v. Schencks,* 629 F. 3d 79, 86-7 (1st Cir. 2010) (Maine statute)). The Second Circuit noted that the Ninth Circuit decision *United States ex rel. Newsham v. Lockheed Missiles & Space Co*., 190 F. 3d 963, 972 (9th Cir. 1999) (California

[11] Additionally, the court rejected defendant's argument that she enjoyed Section 230 immunity, a defense the Social Media Defendants have also asserted in this case, to which Hart responds, *supra,* Section VI.A. *See La Liberte*, 966 F. 3d at 89.

statute), which had applied the California anti-SLAPP law, predated *Shady Grove* and was no longer controlling law. *Id.* at 87 (citing *Makaeff v. Trump Univ., LLC*, 736 F. 3d 1180, 1188 (9th Cir. 2013) (Watford, J., joined by Kozinski Ch. J., Paez J., and Bea, J., dissenting from denial of rehearing en banc) ("Just as the New York statute in *Shady Grove* impermissibly barred class actions when Rule 23 would permit them, so too California's anti-SLAPP statute bars claims at the pleading stage when Rule 12 would allow them to proceed.").[12]

The Second Circuit explained that under Rule 12, "'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). In contrast, the California anti-SLAPP statute "require[es] the plaintiff to establish that success is not merely plausible but probable." *Id.* (cleaned up). The court found that the California anti-SLAPP statute "establishes the circumstances under which a court must dismiss a plaintiff's claim before trial, a question that is already answered (differently) by Federal Rules 12 and 56." *Id.* Thus, it concluded "federal courts must apply Rule 12 and 56 instead of California's special motion to strike." *Id.* at 88.

This Court should follow the reasoning of *Shady Grove* and *La Liberte* to deny the Social Media Defendants' motions to strike under the California anti-SLAPP law. In addition, it should deny their requested relief of attorneys' fees because California's anti-SLAPP statute "does not purport to make attorney's fees available to parties who obtain dismissal by other means, such as under Federal Rule 12(b)(6)." *La Liberte*, 966 F. 3d at 88; *Abbas*, 783 F. 3d at 1337 n.5; *see also Klocke*, 936 F. 3d at 247 n.6.

[12] In the underlying opinion, the Ninth Circuit panel reversed the denial of the anti-SLAPP motion and held the nonmoving party was a limited public figure. The panel remanded to the district court for a determination of whether the nonmoving party could prevail on the merits of its defamation claim when it was a limited public figure. *Makaeff v. Trump Univ.*, LLC, 715 F. 3d 254, 271-72 (9th Cir. 2013).

2. In the alternative, if this Court applies *Planned Parenthood Federation of America*, it should still deny the anti-SLAPP motions because Hart has pled plausible claims under Rule 12.

In the alternative, the Rule 12 plausibility pleading standard applies even to an anti-SLAPP motion when the SLAPP proponent challenges the legal sufficiency of a claim. *See Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress*, 890 F. 3d 828, 834 (9th Cir. 2018).

In *Planned Parenthood*, the Ninth Circuit adopted a compromise framework in which federal courts review anti-SLAPP motions to strike under different standards, depending on the motion's basis. If the proponent of the anti-SLAPP motion makes a legal challenge to the sufficiency of a claim, Rule 12 governs. And if the party asserting the anti-SLAPP motion makes a factual challenge to the sufficiency of the claim, Rule 56 governs, and the party opposing the anti-SLAPP motion is entitled to conduct discovery. *Id.* at 833-34. The *Planned Parenthood* court did not address nor cite *Shady Grove*, leaving the applicability of that decision an open question in the Ninth Circuit.

Here, the Social Media Defendants rely on *Planned Parenthood* and acknowledge that their anti-SLAPP motions "must be treated in the same manner as a motion under Rule 12(b)(6)." Facebook Mot. to Dismiss 26; *see also* Twitter Mot. to Strike 5-6. Thus, they abandon the "probability" and burden-shifting regime under California's anti-SLAPP statute. Facebook Mot. to Dismiss 26; Twitter Mot. to Strike 6. Therefore, even under *Planned Parenthood*, the anti-SLAPP regime does not apply, and the Court should deny the motions to strike under Rule 12 because Hart has stated a plausible claim on which relief can be granted.

3. If this Court does reach the merits of the anti-SLAPP motions, it should still deny them because they attempt to turn the statute on its head.

Even if this Court were to conclude that it had to apply the SLAPP standard proposed by Defendants instead of the standard under the Federal Rules, this Court should still conclude SLAPP does not apply on its own merits. "Analysis of an anti-SLAPP motion is a two-step process. In the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. At this stage, the defendant must make a threshold showing that the challenged claims arise from protected activity, which is defined in Code of Civil Procedure section 425.16, subdivision (e)." *Dae v. Traver*, 69 Cal. App. 5th 447, 455, 284 Cal. Rptr. 3d 495 (2021) (cleaned up). In the second stage, "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." *Id.*

The Social Media Defendants' motions do not succeed at either stage. First, the moving defendants have not shown their activity of removing Hart's posts is protected activity under the anti-SLAPP statute. The anti-SLAPP statute covers four types of activity: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e).

Here, it is Hart who made the written or oral statement in a public forum, not Facebook or Twitter, so prongs 1-3 clearly do not apply. Thus, Twitter and Facebook must argue that removing Hart's speech is "other conduct in furtherance of the exercise of . . . the constitutional right of free speech." § 425.16(e)(4). This fails. First, in the most obvious of ways, removing Hart's post is *not* an act in furtherance of free speech, but an act to censor free speech.

Second, content moderation is not "any other conduct" as contemplated in the Act. "Any other conduct" is conduct similar to an oral or written statement. *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 144, 246 Cal. Rptr. 3d 591, 597, 439 P.3d 1156, 1161 (2019) ("this provision encompasses conduct and speech similar to what is referenced in section 425.16, subdivision (e)(1) through (3)."). The California Supreme Court has cautioned that "courts should engage in a relatively careful analysis of whether a particular statement falls within the ambit of 'other conduct' encompassed by subdivision (e)(4)." *Id*. at *145.

The term "any other conduct" was primarily intended to "shield[] expressive conduct—the burning of flags, the wearing of armbands, and the like—that, although not a 'written or oral statement or writing' (§ 425.16, subd. (e)(1)–(3)), may similarly communicate views regarding 'matters of public significance.'" *Wilson v. Cable News Network, Inc.*, 7 Cal. 5th 871, 893 (2019). "[T]he legislative history suggests expressive conduct was foremost in the Legislature's thinking when subdivision (e)(4) was added." *Id*.

However, the California Supreme Court has subsequently said that it may also cover "ancillary acts alleged to facilitate a defendant's speech or petitioning rights." *Id*. The question, then, is whether content censorship is an "ancillary act that facilitates a defendant's speech rights." This Court should conclude that it is not.

That answer is evident by looking to two recent California Supreme Court cases: *Wilson v. CNN* (2019) and *Bonni v. St. Joseph's Health System* (2021).

In *Wilson*, CNN asserted an anti-SLAPP motion against an employee who alleged he'd been wrongfully terminated because of discrimination. CNN filed an anti-SLAPP motion on the grounds that its termination decision was "other conduct in furtherance of" its free speech rights. The California Supreme Court recognized that news organizations like CNN have free speech rights to report the news with their editorial judgment and that this reporting and judgment are exercised through employees, such that "the decision to hire or fire an employee who is vested with ultimate authority to determine a news organization's message" may rise to other conduct that facilitates CNN's speech. *Wilson*, 7 Cal. 5th at 896. Because CNN did not show that Wilson was such an employee, the anti-SLAPP motion failed.

Wilson teaches that organizations can discipline the individual bearers of their corporate message. But no one here thinks Hart is bearing Facebook or Twitter's organizational message. Facebook and Twitter are public fora that host a variety of viewpoints, including many viewpoints in direct conflict with one another. In this instance, they are not organizational speakers who are entitled to rely on employees to effectively communicate their institutional message like a corporation, government, or religious institution. Instead, they are open public fora, and no one would attribute Hart's speech to Facebook or Twitter as the platforms'; they would see only him as the speaker. *See Price v. City of N.Y.*, 2018 U.S. Dist. LEXIS 105815, at *35-36 (S.D.N.Y. June 25, 2018) (noting people attribute speech to the account of the commentator, not the social media account of the person whose original post is being commented upon).

In *Bonni*, the California Supreme Court rejected a hospital's anti-SLAPP motion against a doctor challenging a disciplinary decision. "[D]isciplining a doctor based on

the view that the doctor's skills are deficient is not the same thing as making a public statement to that effect. The latter is, or may be, speech on a matter of public concern. The former is not speech at all." *Bonni v. St. Joseph Health Sys.*, 11 Cal. 5th 995, 1021 (2021). The court rejected the idea "that if stating a given viewpoint would warrant constitutional and anti-SLAPP protection as an exercise of free speech rights, the same protection should extend equally to any actions motivated by that viewpoint." *Id*. The court declined the suggestion that "the suspensions advanced the Hospitals' ability to speak or to petition on matters of public concern in any substantial way." *Id*. at 2022.

That is precisely what happened here. The Social Media Defendants are arguing that Hart's stating a given viewpoint means any action taken in response to that viewpoint, here removing the content, is entitled to equal protection. Put differently, the platforms must argue that their free speech was facilitated by removing Hart's speech. These are exactly the propositions rejected in *Bonni*.

Third, granting Twitter and Facebook's motions would turn the anti-SLAPP law on its head, undermining instead of advancing its original purpose. "The anti-SLAPP law was enacted to protect nonprofit corporations and common citizens from large corporate entities and trade associations in petitioning government." *FilmOn.com Inc.*, 7 Cal. 5th at 143. Here, two large corporate entities are trying to punish a common citizen who questioned the conventional wisdom of the medical and governmental establishments in a social media post. In adopting the anti-SLAPP law, the Legislature sought "to encourage continued participation in matters of public significance." Cal. Civ. Proc. Code § 425.16(a). Permitting the platforms to impose tens of thousands of dollars of legal costs on a common citizen for his speech in a generally accessible public forum is the exact opposite of what the California Legislature intended in enacting the anti-SLAPP law.

Finally, even if content censorship is itself protected speech activity, Hart has demonstrated in this motion that "each challenged claim based on protected activity is legally sufficient and factually substantiated." *Dae*, 69 Cal. App. 5th at 455. "In this step, a plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP." *Id.* (cleaned up). "A plaintiff prevails in the second step by demonstrating that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Id.*

Hart has clearly passed the threshold of "minimal merit," as demonstrated in this response. Hart has shown the Complaint is legally sufficient and has provided sufficient facts from the public record to sustain his Complaint. Hart will not repeat his entire response brief here but incorporates it to show the sufficiency of his claims to avoid being stricken as a SLAPP.

The anti-SLAPP law's purpose is in its name: to stop strategic litigation against public participation. Hart did not bring this lawsuit to stop Facebook or Twitter's participation in the public sphere. On the contrary, the Social Media Defendants brought this anti-SLAPP motion as strategic litigation against *Hart's* public participation. Under Hart's Complaint, Facebook and Twitter will be just as free after this case as before to say whatever they wish about COVID-19, masking, or Hart. He brought this case to encourage and protect public participation against government censorship applied to him through corporate joint actors. For that reason, the Court should deny the anti-SLAPP motions.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motions to Dismiss and to Strike.[13]

Dated: April 18, 2022

Respectfully submitted,

/s/ Daniel Suhr
Daniel Suhr (*pro hac vice*)
dsuhr@libertyjusticecenter.org
James McQuaid (*pro hac vice*)
jmcquaid@libertyjusticecenter.org
M.E. Buck Dougherty III (*pro hac vice forthcoming*)
bdougherty@libertyjusticecenter.org
LIBERTY JUSTICE CENTER
440 N. Wells St., Ste. 200
Chicago, Illinois 60654
Telephone: 312-637-2280
Facsimile: 312-263-7702

TYLER BURSCH, LLP
Robert Tyler (STATE BAR NO. 179572)
rtyler@tylerbursch.com
Nada Higuera (STATE BAR NO. 299819)
nhiguera@tylerbursch.com
25026 Las Brisas Rd.
Murrieta, California 92562
Telephone: 951-600-2733
Facsimile: 951-600-4996

Attorneys for Plaintiff

[13] In the alternative, the Court should grant Hart leave to amend his Complaint. If a Rule 12(b)(6) motion prevails, a district court should freely grant a plaintiff leave to amend the complaint "when justice so requires." Fed. R. Civ. P. 15(a). In general, leave to amend should be given with "extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990)). When granting a Rule 12(b)(6) motion, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).