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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
BEFORE THE HONORABLE HAROLD E. KAHN, JUDGE PRESIDING
DEPARTMENT NO. 302

JARED TAYLOR; NEW CENTURY
FOUNDATION;

Plaintiffs,

VS.

TWITTER, INC.,

Defendant.

CERTIFIED COPY

NO. CGC-18-564460

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, JUNE 14, 2018

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1 June 14, 2018

9:53 a.m.

2 P R O C E E D I N G S

3 THE COURT: Okay. Let's go on the record, line 10, Taylor
4 versus Twitter.

5 MR. CAROME: Good morning, Your Honor. Patrick Carome for
6 defendant, Twitter, Inc.

7 MR. SPRANKLING: Good morning, Your Honor. Tom Sprankling
8 for defendant, Twitter, Inc.

9 MR. PETERS: Good morning, Your Honor. Noah Peters for
10 the plaintiff, Jared Taylor and New Century Foundation.

11 MR. CANDEUB: Adam Caneub for plaintiff, Jared Taylor and
12 New Century.

13 MR. RANDAZZA: And Marc Randazza for plaintiffs, Your
14 Honor.

15 THE COURT: Welcome, everybody.

16 MR. RANDAZZA: Thank you.

17 MR. CAROME: Thank you, Your Honor.

18 THE COURT: Interesting case.

19 MR. CAROME: Yes.

20 And I put "hearing required" because I hadn't worked my
21 way through all of the issues as of the time that I was
22 required to submit a tentative ruling.

23 I have now done that. And, actually, it seems to me, a
24 pretty simple case.

25 As to the anti-SLAPP motion, it seems to me this is a
26 classic public interest lawsuit. Hard to imagine a clearer
27 public interest lawsuit. And so I would issue a tentative
28 ruling now orally to deny the anti-SLAPP motion on the grounds

1 that first prong has not been established by Twitter.

2 Moving to the demurrer, it seems to me that the way that
3 cases have construed the... I can't remember, it's 230(c)(1) of
4 the Communications Decency Act, it covers precisely the
5 allegations in the first and second causes of actions for
6 violation of the California Constitution and the Unruh Act; and
7 I would now issue a tentative ruling to sustain, without leave
8 to amend, those two causes of action.

9 It seems to me that the Communications Decency Act does
10 not cover in any way, shape, or form the third cause of action,
11 Unfair Competition Law;

12 Nor does the First Amendment bar that claim;

13 And that the loss of the license to be on the Twitter
14 platform and have a Twitter account is a loss of money or
15 property, for purposes of UCL standing requirement, and that
16 there is well pleaded allegations of unlawful and fraudulent
17 conduct, as those terms are used, as predicates for the
18 violation of §17200.

19 As to unlawful, it's a... I don't think it was put exactly
20 this way but it didn't have to be: Unconscionable contract,
21 not just violative of CRLA, maybe not even violative of CRLA,
22 but violative of California code, Civil Code makes
23 unconscionable contracts impermissible and violating California
24 law.

25 And even if it didn't, common law does, going way back.

26 And, in addition, fairly and liberally construed, the
27 complaint, I think it's the first-amended complaint, excuse me,
28 alleges that there was a misleading statement with regard to

1 wide and free use of the Twitter platform for all types of
2 speech.

3 It seems to me that there's been a sufficient allegation
4 of generalized reliance on that, to get by whatever reliance
5 requirement the courts have now opposed on the 17200 fraudulent
6 prong claims, even though it's a pretty unclear area. And
7 that's the last of my three tentative rulings.

8 MR. PETERS: Your Honor, we are willing to accept that the
9 Court's, I thought, tentative ruling, which while it's not --
10 obviously not what we completely agreed to, we are willing to
11 accept it for purposes of --

12 THE COURT: As to both the anti-SLAPP with -- obviously
13 you're accepting as to anti-SLAPP. But as to the demurrer, the
14 first and second causes of action?

15 MR. PETERS: Yes, we are.

16 THE COURT: So then the question is, are you going to
17 accept the anti-SLAPP ruling? It appears not.

18 So now's your opportunity to argue why this is not a
19 public interest exception lawsuit.

20 MR. CAROME: Thank you, Your Honor.

21 First of all, this exception, the public interest
22 exception is to be narrowly construed under the statute. And I
23 would cite for that the *Sierra Club* case;

24 Secondly, it is the burden on the plaintiffs to bear -- to
25 establish that.

26 THE COURT: You're right. And if I said anything to the
27 contrary, I now amend it that the plaintiffs have shown that
28 their claims arise from matters that are exempt from the

1 anti-SLAPP statute.

2 MR. CAROME: The exception -- the 425.17(b) exception is a
3 very narrow exception; it requires that the entire suit be
4 brought solely in a public interest.

5 And the word *solely*, when focused on in the *Sierra Club*
6 case, it was underscored to emphasize the importance of the --
7 of that requirement.

8 Here, this is a suit in which the plaintiffs, while they
9 purport to be suing on behalf of all 300 million members or
10 more of the Twitter service, in fact have an enormous, as they
11 allege, personal stake in this matter.

12 They originally brought this suit as a suit for damages
13 solely on behalf of themselves.

14 THE COURT: But you're not seeking to strike the
15 complaint; you're seeking to strike the first amended
16 complaint.

17 MR. CAROME: That's correct, Your Honor. But I think that
18 that is relevant in indicating what is the true motivation and
19 what is really going on here.

20 Secondly --

21 THE COURT: How?

22 MR. CAROME: I think it reflects that this is a suit about
23 these two plaintiffs with an enormous public stake in this
24 case; they say that their whole enterprise of spewing...
25 white -- you know, white racism to the world depends on
26 Twitter; that they built their enterprise around this. The --

27 THE COURT: But my question was far more narrow: How does
28 the filing of the complaint reflect on whether this -- the

1 first amended complaint is brought solely in a public interest?

2 MR. CAROME: I don't want to put a lot of weight on that,
3 Your Honor.

4 THE COURT: Okay. I don't see it at all.

5 MR. CAROME: All right. I do think that these plaintiffs
6 are seeking personal relief from personal advantage of the very
7 sort that was at issue in the *Sierra Club* case; and that they
8 are claiming that their enterprise depends on this access. And
9 I think that that renders this case not *solely* in the public
10 interest, as it must be, according to the California Supreme
11 Court.

12 THE COURT: But the statute seems to take into account the
13 very thing we just said, subdivision one of -- or subdivision
14 (b)(1) of 425.17 says:

15 "The plaintiff does not seek any relief greater
16 than or different from the relief sought for the
17 general public or class of which the plaintiff is a
18 member."

19 MR. CAROME: Two responses to that, Your Honor.

20 First of all, those are additional requirements in
21 addition to the *solely*, which also must be met, and which the
22 California Supreme Court made abundantly clear in the *Sierra*
23 *Club* case;

24 Secondly, they are in fact seeking relief. As a practical
25 matter, it goes far beyond the relief that they're seeking for
26 the 300 million or more Twitter users that they purport to be
27 representing.

28 They purport to be representing -- among a tiny, tiny,

1 tiny fraction of Twitter's users who have been excluded from
2 the platform on account of affiliation.

3 THE COURT: That's not a fair reading of the first amended
4 complaint. The first amended complaint seeks to vindicate free
5 speech, beginning and end.

6 MR. CAROME: But the relief they -- I'm sorry.

7 THE COURT: And they seek to do so by having the widest
8 array of speech on the Twitter platform. That's what this...

9 MR. PETERS: (Nods head).

10 THE COURT: That's hard to read the first amended
11 complaint in any other way. It's very eloquent; it is -- it
12 goes to the heart of free speech principles that long precede
13 our constitution.

14 MR. CAROME: Your Honor, (b)(1) --

15 THE COURT: And that's public interest; it's -- to me,
16 it's every bit as much public interest as -- and they invoke
17 this: The people who sought relief against... that you
18 couldn't hold office because you were a communist.

19 MR. PETERS: (Nods head).

20 THE COURT: Or you couldn't do certain things because you
21 were a Jehovah's witness, and so on. You know what I'm talking
22 about; I'm sure you understand this constitutional heritage as
23 well as I do.

24 MR. CAROME: The relief they are seeking, Your Honor,
25 is -- is special to them and a small number of other people.

26 THE COURT: No, it isn't.

27 MR. CAROME: Injunctive relief to be restored to the
28 platform.

1 THE COURT: That -- it's for all people to enjoy the
2 speech on the platform; that's the fair reading of the
3 complaint.

4 Now, it may be speech that you and I don't wish to enjoy,
5 but that's not germane to the determination of whether it's
6 public interest. Public interest doesn't have a flavor of
7 ideology to it; public interest is whether it benefits the
8 public.

9 MR. CAROME: Your Honor, I think you're asking a question
10 of whether their suit is partly in the interest of public
11 interest.

12 The statute says it must be solely in the interest of
13 public interest. And it also asks: Are they seeking relief
14 that is beyond or greater than the relief that they're seeking
15 for the public.

16 And they are doing so by seeking injunctive relief that
17 they get their accounts back on the platform.

18 MR. PETERS: (Shakes head).

19 THE COURT: How else could they vindicate the public's
20 interest in the widest possible speech other than to get their
21 account back and that -- other accounts that Twitter closed
22 down?

23 MR. CAROME: That's not the question that the statute
24 asks, Your Honor. The question asks -- the statute asks the
25 question: Is the action brought solely in the public interest?
26 It may be largely in the public interest even. It has to be
27 solely in the public interest.

28 And the question is: Are they seeking relief that is --

1 and this is the language of the -- of (b)(1):

2 "Greater than or different from the relief sought
3 for the general public."

4 And they are; they are seeking injunctive relief that is
5 highly specific to them, and to a --

6 MR. PETERS: (Shakes head).

7 MR. CAROME: -- few other -- a tiny fraction of other
8 users, who they've not even identified. They haven't come
9 forward and shown -- that there's really more than just a tiny
10 handful of people who are subject to this.

11 But, in any event, they are seeking relief that is
12 personal to them;

13 It's beyond what they're seeking for the public;

14 It is injunctive relief that the -- Twitter have to put
15 them back on the platform.

16 That is an extraordinary event. I don't believe anything
17 like that has happened in the history of the Internet; that
18 a -- that a privately-owned government -- privately owned
19 private sector platform has been told: You must, against your
20 judgment that these users are -- contrary to the basic ethic of
21 the whole platform, you must put them back on.

22 This is an extraordinary question, Your Honor.

23 THE COURT: I don't see the fact that it hasn't been done
24 before vitiates that it isn't within the exception under 425.17
25 for public interest.

26 I think you and I just see this lawsuit, as characterized
27 by the complaint, differently -- or the first amended complaint
28 differently.

1 Your statement of -- or implied statement that it's wrong
2 to seek to force a private entity like Twitter to include the
3 viewpoints of the plaintiffs, I've already told you
4 tentatively, and it's not been contested: That I think the --
5 you're right because of a federal statute, as construed by the
6 courts.

7 MR. CAROME: If I --

8 THE COURT: But that's not the issue on the first prong of
9 anti-SLAPP; the first prong on anti-SLAPP is not a merits-based
10 analysis; it is a *how is the claim* or, in this case, three
11 claims, *pled* analysis?

12 MR. CAROME: I agree with that, Your Honor.

13 But I would say, however, though, that the -- the really
14 extraordinary personal relief that is being sought here by
15 these two plaintiffs does, I think -- it's extraordinary in
16 nature. The fact that it is very specific to these two people
17 is in fact highly indicative that this is not a lawsuit brought
18 solely in the public interest.

19 It may be, as Your Honor reads the statute, partly, even
20 largely brought in the public interest, within the meaning of
21 this exception. But it is not solely in the public interest.
22 And I would ask the Court to reconsider that aspect of its
23 ruling.

24 THE COURT: You and I are going to just agree to disagree.
25 To me, the only way you can vindicate the speech rights of
26 others is to allow the speaker to speak.

27 Okay. So let's move onto the UCL claim.

28 MR. CAROME: Yes, Your Honor.

1 THE COURT: You wish to contest the tentative ruling as to
2 that?

3 MR. CAROME: Yes, definitely.

4 THE COURT: And I recognize I may have ruled on certain
5 aspects of that claim in ways that the plaintiffs themselves
6 did not identify. But I also recognize that because of the
7 heroic effort on everybody's part to keep within page limits,
8 there was not all that much written about UCL generally.

9 And, to be blunt: I've seen a lot of UCL claims. This is
10 something I'm pretty familiar with.

11 MR. CAROME: Your Honor, yes, Twitter strongly disagrees
12 with that tentative ruling and would ask the Court to not make
13 it and to rule the other way on that point.

14 First of all, the... there would have to be a violation of
15 another law. These plaintiffs -- well, let me start in another
16 place:

17 First of all, the UCL applies to only acts or practices
18 undertaken by any person in a transaction intended to result,
19 or that results in the sale or lease of goods or services to
20 any consumer.

21 THE COURT: That's not accurate, but you're right. What
22 you just read from was from the Consumer Legal Remedies Act.

23 MR. CAROME: Yes, I'm sorry.

24 THE COURT: Which was the law that was -- or the statute
25 that was explicitly identified in the complaint --

26 MR. CAROME: Yes.

27 THE COURT: -- as the basis for the invocation of the
28 illegal prong of the UCL.

1 MR. CAROME: That's... (nods head).

2 THE COURT: But the same first amended complaint said --
3 what they were really complaining about was the
4 unconscionability of Twitter's terms of service.

5 And unconscionability has a separate legal source in
6 California law. I can't remember the provision of the Civil
7 Code, but I could find it for you pretty quickly, if you want.

8 And it also has a lot of common law origins. Let me see
9 if I could find it for you.

10 So the Plaintiff's reference to the California...

11 MR. CAROME: CRLA.

12 THE COURT: CRLA, the Legal Remedies Act was, in my
13 view... unnecessary and didn't capture the legal source that
14 they needed to capture.

15 MR. CAROME: So, just so I understand, that Your Honor is
16 agreeing with Twitter's position that the CRLA is not an
17 appropriate source of a violation of law? Am I understanding
18 that?

19 THE COURT: I didn't even reach that issue. I think
20 you're probably right, but I didn't reach the issue because I
21 know about unconscionability law, as stated in our Civil Code.

22 MR. CAROME: Well, then, let me make a couple of
23 statements about unconscionability.

24 Unfortunately, I am not -- haven't looked at that part of
25 the code, and I would in -- in the first instance, if the Court
26 is not going to, based on my other arguments on this point,
27 rule otherwise on this issue, I would request that the parties
28 be entitled to have supplemental briefing on this additional

1 unconscionability point that was not raised in the plaintiff's
2 papers.

3 MR. PETERS: (Shakes head).

4 THE COURT: And the reason I'm not going to do that, at
5 least I'm unlikely to do it, is because the illegal prong was
6 only one-of-two prongs that were asserted as the basis for UCL
7 liability; it was also the fraudulent prong was alleged as a
8 separate and independent basis. And a demurrer goes to the
9 entirety of a cause of action, not to a portion thereof.

10 MR. CAROME: Understood, Your Honor. I am going to have
11 some things to say about the fraudulent prong, as well. But if
12 we could stick with the unconscionability prong for a moment.

13 THE COURT: Would you like me to find the provision of the
14 California Civil Code on unconscionability?

15 MR. CAROME: That would be helpful, Your Honor.

16 THE COURT: Okay. I will do that. It will take me a
17 moment. I'll need to pull up Westlaw...

18 MR. RANDAZZA: Your Honor, I believe it's 1670.5.

19 THE COURT: You're quicker than I am...

20 MR. CAROME: I have that language in front of me, Your
21 Honor.

22 I would renew my request for supplemental briefing on this
23 point. This is... is very much out of the blue in terms of a
24 case that I think has some important issues and would warrant,
25 you know, careful consideration of an issue of this importance.

26 THE COURT: Why? The doctrine of unconscionability is
27 widely known, and California law on unconscionability pretty
28 much conforms to national law.

1 There's both procedural and substantive elements to it;

2 They were -- both procedural and substantive elements were
3 alleged in the first amended complaint;

4 It was a pretty pedestrian unconscionability analysis set
5 forth -- I'm not criticizing it; I'm just saying it wasn't
6 particularly novel or unique or unusual that was set forth in
7 the first amended complaint.

8 I'm not sure why you need it, but I'll revisit that in the
9 event that you're able to persuade me that the fraud prong is
10 not sufficiently alleged.

11 MR. CAROME: I'd like to address *unconscionability* a bit
12 further, if Your Honor will permit.

13 I don't think -- we have to actually have a particular
14 allegation of a potentially unconscionable contractual
15 provision here.

16 I would submit that they are relying principally on
17 extraordinarily broad, general statements that we are the --
18 Twitter back, you know, six or seven years ago described itself
19 as a free speech wing of the free speech party.

20 THE COURT: You are confusing, I believe, the fraudulent
21 prong allegations with the unlawful prong allegations --

22 I'm sorry, sir. It's disturbing to me when you're shaking
23 your head. I know you're trying to agree with me, but it's --
24 I don't need that agreement.

25 MR. PETERS: I apologize.

26 MR. CAROME: What are the *unconscionable* provisions that
27 Your Honor possibly sees here? I --

28 THE COURT: I can tell you what's alleged, and I believe

1 adequately so, something to the -- I could get the first
2 amended complaint to quote it exactly, but something to the
3 effect that Twitter can, at any time, for any reason, or no
4 reason, pull any account.

5 Have I stated that correctly?

6 MR. PETERS: Yeah; that's right.

7 MR. CAROME: There is language to that effect, Your Honor;
8 I would submit that that's not... remotely unconscionable for
9 a on-line platform, such as Twitter, which is completely free,
10 given to the world for free, that requires users -- it has a
11 gating --

12 THE COURT: And --

13 MR. CAROME: -- requirement, and let's users in under
14 certain conditions, it is absolutely permissible and, indeed,
15 subject to First Amendment rights and editorial decision that a
16 platform that is engaged in the distribution of speech may, for
17 any reason, just like a newspaper editor could, for any reason,
18 choose not to run a letter to the editor that it receives.

19 That's not unconscionable; that's not remotely
20 unconscionable; that's the way systems work. That's the way --
21 and so I would certainly --

22 THE COURT: So let me explain to you why I see differently
23 and the rules that I believe I am bound by in making my
24 determination:

25 First, I am required to liberally construe the complaint.
26 It's right there in the California Code of Civil Procedure.
27 And, if you want, I can cite that for you, as well;

28 Second, I need to draw whatever reasonable inferences I

1 can draw in favor of the pleading that is being challenged.

2 And in doing both of those things, and liberally
3 construing the complaint, and in drawing reasonable inferences
4 in its favor, I envision or I believe that the complaint
5 alleges something along the lines of:

6 Twitter is the largest communication source in the world.

7 And the way to get your word out and the way to be heard
8 in the modern era, particularly with regard to such important
9 matters as being able to petition the elected leaders and
10 others who are involved in government, for redress, is to be
11 able to be on the Twitter platform.

12 And for Twitter to know that and nonetheless impose
13 language, as it did here, an otherwise prolix document that's
14 not highlighted, and done on an adhesion contract basis, and on
15 a *take it or leave it* basis, it is procedurally unconscionable
16 in a large measure.

17 And when you have something that is procedurally
18 unconscionable in a large measure, you only need, under
19 California law, to have substantive unconscionability in a
20 small measure.

21 And it's substantively unconscionable to deprive people of
22 the most important platform to speak and to be able to seek
23 redress of their legislators.

24 Now, all of that may be wrong, but that's why we have
25 lawsuits, is so that the other side can show it's wrong.

26 But in a demurrer, it's essentially a one-sided setting.
27 I take as true not only what's alleged, but what's reasonably
28 inferable from what's alleged. And all of that I need to

1 liberally construe. And I think I have done that in the way I
2 have stated plaintiffs' position.

3 Now, you may, and others may completely disagree with it,
4 and say that there are competing concerns, but those competing
5 concerns need to be developed and put forth either by way of
6 evidence at trial, or perhaps in declarations for a summary
7 motion.

8 MR. CAROME: With all due respect, Your Honor, I'd like to
9 address two... queries as to why I submit this is wrong.

10 First of all, now that I see that the Court is focusing on
11 this reservation of a right to remove content for any reason or
12 no reason at all --

13 THE COURT: It's not what I -- that's not what I came up
14 with; it's in the first amended complaint.

15 MR. CAROME: Thank you. Now that I see that's what the
16 unconscionability is about, I -- let me just say that, of
17 course, that is a right that Twitter would have had had it not
18 said a word about that in its -- in its contractual documents.
19 A newspaper doesn't have to say that.

20 So -- but the First Amendment and §230 both override this
21 cause of action that the Court is seeing here and that the
22 plaintiffs apparently have pled.

23 The... a communications platform, such as Twitter, has a
24 First Amendment right with respect to the content that it
25 chooses or doesn't choose to distribute. That's the *Turner*
26 case, for example. There's many other cases cited in our
27 briefs.

28 The plaintiffs here concede that *Turner* accurately

1 describes Twitter. So it's a First Amendment right here. So
2 under --

3 THE COURT: I must have missed it; I didn't see a
4 concession.

5 MR. PETERS: (Shakes head).

6 MR. CAROME: I would ask the Court to go and look again at
7 the papers to that effect. We talk about it in our reply.

8 THE COURT: Please show me --

9 MR. PETERS: Your Honor, we made, I believe, no such
10 concession; we --

11 THE COURT: I think I'm -- I think I can handle this right
12 now.

13 MR. CAROME: So, Your Honor, in any event, even if they
14 didn't concede it, it's correct that a communications platform
15 has -- with respect to distribution, has First Amendment
16 editorial rights over its -- over what it does and does not
17 distribute.

18 §230 gives, as the California Supreme Court said in
19 *Barrett*, gives absolute immunity to any decision that can be
20 boiled down to deciding whether or not to publish content.

21 That is exactly what is going on here. The -- that is
22 exactly the decision that's at issue here.

23 THE COURT: You're misconstruing, in my view, what the
24 allegations are of the third claim. The third claim has
25 nothing to do with viewpoint discrimination, which is what the
26 first and second claims do.

27 The first -- the third claim says that it is
28 unconscionable for Twitter to reserve to itself the right to

1 revoke anybody's ability to be on the platform for any reason
2 at all, including a little girl who said that she wanted to be
3 on Twitter to be able to send a message to Santa Claus.

4 Any -- it doesn't matter; it doesn't have to have anything
5 to do with content; it's *any reason or no reason*.

6 MR. CAROME: That's correct, Your Honor.

7 And a book store, or a newspaper editor, or a cable
8 platform has a First Amendment right to make good, bad,
9 horrible decisions about who and who does not get to speak on
10 its platform and what content does and does not get to be on
11 its platform. That is what the First Amendment is about.

12 And newspaper editors are not called into court to explain
13 why didn't you accept that little girl's note to Santa Claus as
14 a letter to the editor? They have that right.

15 So if -- Twitter, in fact --

16 THE COURT: You are, in my view, going well beyond what a
17 demurrer can do. And, also, you're trying to import
18 Communication Decency proceedings into a matter where the
19 Communications Decency Act doesn't have any applicability.

20 But -- I understand it. I should let you speak and we'll
21 proceed.

22 MR. CAROME: All right. Thank you, Your Honor.

23 Well, I tried to persuade you. It looks like I'm not
24 going to be able to.

25 I would very much request that the Court grant
26 supplemental briefing on this unconscionability issue, which
27 was brand new, not briefed. And I think that would be a very
28 helpful thing to do in terms of assuring that an important

1 decision is being made well here.

2 THE COURT: Okay. Do you want to address the fraud prong?

3 MR. CAROME: Yes.

4 Now, this is, I guess, where I was going earlier, and you
5 steered me correctly.

6 So...

7 (*Interruption.*)

8 (*Short break taken.*)

9 THE COURT: Okay. So let's go back on the record.

10 MR. CAROME: Thank you, Your Honor. Thank you for your
11 indulgence. Appreciate it.

12 THE COURT: No problem.

13 MR. CAROME: First of all, just catching back up.

14 One, as to the -- where the plaintiffs cite *Turner* and
15 treat it as analogous to the Twitter situation, we discussed
16 that point on page 11 of our reply in support of the motion to
17 strike. And we cite to the demurrer opposition, page 8, where
18 they cite the *Turner* decision.

19 That's just -- I don't think the fact that they concede
20 that *Turner* is -- applies to Twitter is that significant. I
21 think the more important point is that *Turner* of course applies
22 to a distributor of speech, such as Twitter, and extends the
23 First Amendment to it.

24 THE COURT: Okay.

25 MR. CAROME: The second point I'd like to raise is that
26 the -- as cited in defendant's demurrer, §230 has been held to
27 apply to UCL actions. And, in particular, that's the *Perfect*
28 *10 versus CCBill* case. And -- which we cite at page 10 of our

1 memorandum in support of demurrer.

2 THE COURT: But what is the name of the Ninth Circuit
3 case? Is it *Barnes*?

4 MR. CAROME: This... there is a Ninth Circuit case named
5 *Barnes*. That's not what I'm referring to here.

6 THE COURT: Right.

7 MR. CAROME: But, yeah, *Barnes versus Yahoo!* is a Ninth
8 Circuit case.

9 THE COURT: Doesn't *Barnes* say that the Communications
10 Decency Act could not apply to a contract estoppel principle?

11 MR. CAROME: That's correct, Your Honor.

12 THE COURT: Isn't that what we really have here, is a
13 contract principle, rather than...

14 MR. CAROME: No, Your Honor; I don't think that that's
15 correct.

16 And, you know, it's very important, and *Barnes* is perhaps
17 one of the best cases on this point. And many, many §230 cases
18 have said this: The Court is not to look at how the claim is
19 labeled; the Court is to look at to what is the essence of the
20 claim; what is it asking the defendant to do.

21 THE COURT: Correct.

22 MR. CAROME: And here this claim goes directly to whether
23 or not Twitter may or may not remove, or block, particular
24 content.

25 THE COURT: No. It goes directly to whether Twitter may
26 or may not have an unconscionable provision in its terms of
27 service.

28 MR. CAROME: Well...

1 THE COURT: That's the illegal prong allegation of the
2 third claim.

3 MR. CAROME: Certainly it has got to be the case that a
4 First Amendment speaker... a First Amendment actor, such as
5 Twitter here, if anything that the First Amendment protects,
6 it's the right of that First Amendment-protected actor to make
7 a decision about what to say, whose speech to distribute, for
8 any reason whatsoever, or no reason at all.

9 And so that -- whether or not Twitter said in its terms of
10 service that it could block or remove speech for any reason at
11 all or no reason at all, is simply actually being up front with
12 the users about a right that Twitter, as a First Amendment
13 actor, already has.

14 THE COURT: That would be your position, presumably, when
15 you come up with an answer to the complaint.

16 MR. CAROME: This is a pure question of law. And there is
17 no facts to be developed to further address this point.

18 And, in fact, §230, as both California Supreme Court and
19 many, many others courts -- we cite, for example --

20 THE COURT: Sir, let me, just to be really candid with
21 you: You are way overstating the law.

22 Does Twitter have the right to take somebody off its
23 platform if -- it does so because it doesn't like the fact that
24 the person is a woman? Or gay? Or would be in violation of
25 Title 7? Or would be in violation of the age discrimination
26 laws, or the disability discrimination laws? Of course not.

27 And this provision says, "for any reason or no reason." I
28 mean --

1 MR. CAROME: Certainly, Your Honor --

2 THE COURT: Give me a break.

3 Your position -- your absolutist position doesn't fly, at
4 least in a setting such as a demurrer.

5 MR. CAROME: Your Honor, I -- I think this is a question
6 of law; it's not a question of fact.

7 THE COURT: So what is the answer?

8 MR. CAROME: And, in fact, as to Your Honor's question
9 about could a First Amendment speaker choose by gender, or age,
10 or something like that, in fact -- I mean Twitter would never,
11 ever, ever do that; it's totally contrary to everything it
12 does.

13 But, in fact, the First Amendment would give Twitter the
14 right, just like it would give a newspaper the right, to choose
15 not to run an op-ed page from someone because she happens to be
16 a woman.

17 Would Twitter ever do that? Absolutely not, not in a
18 million years.

19 Does the First Amendment provide that protection?
20 Absolutely it does.

21 THE COURT: What case says that?

22 MR. CAROME: That is --

23 THE COURT: What case says that an entity like Twitter can
24 discriminate on the basis of religion, or gender, or sexual
25 preference, or physical disability, or mental disability?

26 MR. CAROME: With respect to the content that it
27 distributes?

28 THE COURT: With respect to whether the person can have an

1 account or not.

2 MR. CAROME: This is a question about -- this is not a
3 business relationship; this is a question about whose speech am
4 I required to distribute?

5 THE COURT: Again, mistaken. It is -- the allegation is
6 as to a relationship with a licensee that can be terminated
7 pursuant to the terms of service, *for any reason or no reason*.
8 That's the allegation.

9 I don't know whether it's true or not. I'm required to
10 accept it as true.

11 MR. CAROME: Well, it's true that that provision is in the
12 toss.

13 THE COURT: So is -- your position is absolutist; that
14 Twitter has an absolute First Amendment right to remove anybody
15 from its platform, even if doing so would be discriminatory on
16 the basis of religion, gender...

17 MR. CAROME: Yes, Your Honor. Let me cite the *Hurley*
18 case, for example. That's the parade case.

19 The -- a parade sponsor did not want to include gay people
20 as part of its large St. Patrick's Day parade.

21 Totally hateful, obnoxious discrimination by that parade
22 operator, didn't want to support gays, didn't want to have gays
23 be part of its -- its multi-faceted platform of this parade.

24 The Supreme Court said of course the -- the parade sponsor
25 can do that.

26 So that would be one case that comes to mind, as to why
27 First Amendment actors can make what seem like hateful choices.

28 Now, the -- Twitter doesn't do that, but that is what the

1 First Amendment guarantees to First Amendment actors. And
2 Twitter, as the *Turner* case shows, is exactly that.

3 A book store could not be required to carry books that it
4 doesn't want to show, for any reason, and no one gets to ask.
5 And they don't have to say in their contracts with the people
6 they buy the books from that, you know, we have a right to turn
7 away any book at all and not sell any book at all.

8 That's just the law. If --

9 THE COURT: I think you are mistaken. I think it is a
10 poor analogy to analogize Twitter, which is alleged in the
11 complaint, in the first amended complaint to be the largest
12 communication platform in the world, to a book store.

13 I think we have things that -- we have a different
14 situation. I understand your position. I'm going to just
15 respectfully disagree with it.

16 So I'm going to ask you to move on.

17 MR. CAROME: All right. Thank you, Your Honor.

18 So just... I guess what's left, then, is the fraudulent
19 prong.

20 THE COURT: Correct.

21 MR. CAROME: Of the Unfair Competition Law.

22 THE COURT: And, in effect, I really don't need to get
23 there because I've already determined that the illegal prong
24 has been sufficiently alleged with standard demurrer. But if
25 you do want to discuss the fraudulent prong, I'm happy to have
26 you do so.

27 MR. CAROME: Yes, certainly. I mean to establish -- you
28 know, to plead to overcome a demurrer for a claim of -- of a

1 fraudulent claim, they would -- plaintiffs would have to
2 identify particular statements that are potentially fraudulent.

3 THE COURT: Misleading to the public. Deceptive to the
4 public.

5 MR. CAROME: Yes. And I don't think that the very
6 highly-general statements that are discussed in the complaint,
7 things like Twitter -- a Twitter executive saying, "Twitter is
8 the free speech wing of the free speech party." That is not a
9 factual statement at all; it's not a promise that we'll never
10 take down your account.

11 The statement -- you know, they point to a statement made
12 in the Twitter rules some six or seven years ago, which is no
13 longer there, it hasn't been there for years, that Twitter
14 would not censor user content except in specified
15 circumstances.

16 And then there's a long, long list of circumstances,
17 including -- that's in this document that, you know -- that's
18 in the rules that were presented to the users. That was not a
19 promise that Twitter would never take down content.

20 And --

21 THE COURT: The UCL fraud prong is not -- doesn't require
22 a promise; it requires a statement that misleads or deceives
23 the public.

24 MR. CAROME: That was not a misleading or deceptive
25 statement, as a matter of law, for Twitter to have said that
26 six years ago in rules, that it said it could change, right --
27 you know, right in that same paragraph, it said these rules can
28 change.

1 And that was not a promise that, for a -- six, seven,
2 eight years, everybody who's come onto the platform, no matter
3 what they do, no matter whether they're white supremacist or
4 not, contrary to the Twitter's, you know, evolved standards,
5 that was not a promise that we never can take your account
6 down.

7 It wasn't -- and that is not sufficient to be, as a matter
8 of law, a misleading statement within the meaning of the
9 statute.

10 THE COURT: So maybe I misrecollect the third cause of
11 action but, in substance, my recollection is that plaintiffs
12 attribute to Twitter statements to the effect that a Twitter
13 platform is open to everybody of all viewpoints except those
14 who... I can't remember the exceptions but they --

15 MR. CAROME: Yeah --

16 THE COURT: Trademark violation, incite violence. And
17 that Twitter... that's misleading because that's not true;
18 Twitter is not open to everybody who -- regardless of
19 viewpoint; it's not a complete free speech platform; it is
20 something else.

21 That's the allegation. I'm not -- I don't know whether
22 they're true or not.

23 At this point I have to assume they're true.

24 MR. CAROME: There has to be a specific statement to --

25 THE COURT: There does.

26 MR. CAROME: And if you look -- either these statements
27 are these vastly generalized statements like, "Twitter is the
28 free speech wing of the free speech party," or there are

1 particular statements in the rule, such as Twitter -- you know,
2 six years ago, Twitter would not censor user content except in
3 specified circumstances. And then it talked about the rules
4 and it talked about Twitter's free to change the rules.

5 Think about this, Your Honor: The notion -- Congress in
6 230, which I'll return to, because I think it bears on this.
7 The main point of 230 was to encourage platforms, exactly such
8 as Twitter, to engage in self-regulation of the content on
9 their...

10 THE COURT: There's nothing in 230 that gives license to
11 mislead.

12 MR. CAROME: Your Honor, you're suggesting that a general
13 statement six years ago somehow binds Twitter -- when does that
14 stop? When does that -- when does that stop?

15 Twitter can't evolve, as the world changes vastly, and
16 sees that white supremacy is having a major problem on its
17 platform, it can't act to control that?

18 THE COURT: You're seeking -- I didn't say it couldn't; I
19 just --

20 MR. CAROME: As a matter of law.

21 THE COURT: You're recording all kinds of fact that I
22 don't have in the first amended complaint. And I'm only
23 allowed to look at the first amended complaint.

24 That's why, once the pleadings -- a demurrer is overruled,
25 as I'm inclined to do with the third cause of action here, the
26 defense gets to put its own position up, such as the various
27 things that you're saying now.

28 Nothing about my overruling would preclude any of the

1 arguments that you're making, if you wish to -- to make them,
2 based on evidence or... whatever material you want to put
3 forth.

4 But that's not what a demurrer is; a demurrer looks solely
5 at the complaint and anything that is judicially noticeable.

6 But you do raise a good point, and that point I need to
7 address.

8 You're saying that -- these are my words, not yours, but
9 and I'm trying to help you out here a little bit, that all we
10 have in the third amended -- in the third cause of action are
11 either statements of opinion that are -- couldn't possibly be
12 actionable as misleading.

13 MR. CAROME: Correct.

14 THE COURT: Or such generalized, vague statements that no
15 reasonable person could possibly be misled by.

16 That's -- I'm going to construe your argument that way,
17 which it does conform to both demurrer law and UCL fraudulent
18 prong law, and then ask the plaintiffs to turn to their
19 pleading, which is being challenged, and tell me where there
20 are non-opinion statements or non-generalized statements that
21 couldn't possibly deceive anybody.

22 MR. CAROME: Your Honor, I would ask you to have them
23 indicate, you know, exactly where that is. And are there other
24 statements in that same document that they're going to point
25 you to that also say Twitter can remove content for any reason?

26 And can that -- does that eliminate any possibility of
27 that being a misleading statement when the document is looked
28 at as a whole?

1 THE COURT: I understood the reference in the first
2 amended complaint to Twitter can remove any account *for any*
3 *reason or no reason* to be in support of the illegal prong, not
4 the fraudulent prong.

5 MR. CAROME: But I think it also undoes the *any possible*
6 *fraudulent* -- if it is stated, in black and white, to the user
7 from the get-go that any content can be removed, and that
8 Twitter has the right to do that from the get-go, I would
9 submit that you have to read whatever statements they're
10 pointing to as making a contrary statement, in light of the
11 full document.

12 THE COURT: No, sir. That would be something that you
13 would bring to bear in part of your defense -- or affirmative
14 defense.

15 I take the statements, as identified by the pleader, and
16 determine whether that satisfies the misleading requirement for
17 the... fraudulent prong.

18 But so let me ask plaintiffs. Where is there, in the
19 first amended complaint, allegations of statements attributable
20 to Twitter that are, other than opinion, and other than
21 generalized statements that no person could -- no reasonable
22 person could be misled by?

23 MR. RANDAZZA: Your Honor, just prior to that, my
24 colleagues here have not yet been admitted pro hac vice. We
25 have moved for that. The defense have stipulated to it.

26 I just don't want to pollute the proceedings here without
27 handling that formality.

28 THE COURT: Typically that's handled by way of

1 application. You are telling me there is a pending application
2 for which there will be no objection?

3 MR. RANDAZZA: Yes.

4 THE COURT: I will not grant the application today,
5 because I don't have it before me, but I will, in anticipation
6 of granting it, allow the pro hacs to speak.

7 MR. PETERS: Okay. Thank you, Your Honor.

8 In paragraph 40 of the first amended complaint on page 14,
9 we plead --

10 THE COURT: I'm sorry. What page?

11 MR. PETERS: Page 14.

12 THE COURT: One four.

13 MR. PETERS: One four, paragraph 40:

14 "The Twitter rules as they existed when
15 Mr. Taylor...

16 THE COURT: Give me a line, please.

17 MR. PETERS: Sure, 40 -- it's page 14, line 12.

18 THE COURT: So there is quoted material from line 13 to
19 line 17?

20 MR. PETERS: From -- this is page 14, I think it's line 19
21 to line...

22 MR. RANDAZZA: You're right, Your Honor; yes.

23 MR. PETERS: Yes, correct, correct.

24 THE COURT: So that's where -- that's your first
25 identification of a actionable statement, assertedly actionable
26 statement under the fraudulent prong of UCL?

27 MR. PETERS: Correct.

28 THE COURT: So let's stop there and let's everybody read

1 it...

2 MR. PETERS: Okay.

3 THE COURT: It seems to me that is more than sufficient to
4 be a non-opinion and non-generalized statement.

5 MR. PETERS: Correct, Your Honor. It is --

6 THE COURT: When you're ahead in this courtroom, it's
7 generally a good idea to allow the other side to talk.

8 MR. CAROME: Your Honor, and that statement is a quote
9 from exhibit D to the fact, which I would -- if possible, I
10 would ask the Court to turn to.

11 THE COURT: I have it here.

12 MR. CAROME: Okay. So I mean that -- just below, you
13 know, in the very next paragraph of the statement -- and I -- I
14 submit, Your Honor, that... you know, this is part of the
15 record, this is part of the complaint. They say that
16 Twitter -- in the bottom of the next paragraph:

17 "We may need to change these rules from time to
18 time and reserve the right to do so."

19 And we also... if you look to the third page of exhibit D,
20 it says, in bold:

21 "Twitter reserves the right to immediately
22 terminate your account, without further notice, in
23 the event that, in its judgment, you violate these
24 rules or the terms of service."

25 And so that's all in this very short set of rules. It's
26 part of the record.

27 I would submit that, as a matter of law, that this
28 statement was not misleading to any reasonable reader, and that

1 the reader of this would say, yes, there are -- we may remove
2 things in accordance with rules;

3 We may change those rules, as things evolve. And, boy,
4 have things evolved over the past five or six years;

5 And that Twitter has, in bold, said that we reserve the
6 right to immediately terminate your account, without further
7 notice, in the event that, in its judgment, you violate these
8 rules or the terms of service.

9 I would submit that, as a matter of law, nothing
10 misleading was stated there, and that the Court should rule to
11 that effect now.

12 THE COURT: I disagree. It says: "Will not censor."

13 MR. CAROME: Except...

14 THE COURT: Right.

15 MR. CAROME: "Except in circumstances..." And those
16 circumstances are described.

17 THE COURT: And none of those circumstances cover
18 viewpoint discrimination except in the way in which the
19 plaintiffs are pleading it.

20 MR. CAROME: Well, that's not true; there are many
21 viewpoint discriminations that would not stand up under First
22 Amendment law that are stated just on the face of this
23 document.

24 THE COURT: In the way that the plaintiffs are stating --

25 MR. CAROME: I see.

26 THE COURT: -- that this is misleading, I agree that
27 there's viewpoint discrimination, violence -- to discriminate
28 based on violence, or threats of violence is viewpoint

1 discrimination. But I said in the way in which plaintiffs are
2 saying that this is misleading.

3 MR. CAROME: Yes. But, also, Your Honor, it's made very
4 clear that these rules can change, and they're in the control
5 of Twitter.

6 Twitter has since -- and it announced it in advance, that
7 it came up with an additional rule against violent extremist
8 groups, whether you're... spewing their content, or you're
9 affiliated with them. A totally permissible, honorable rule
10 for it to make, in its judgment. It did that.

11 That was completely in conformity with this statement and
12 what users were told. There's nothing that -- as a matter of
13 law, that could be misleading here.

14 I would submit.

15 THE COURT: Okay. Again, I think you and I are going to
16 have to agree to disagree.

17 We're only on a demurrer. I have to accept the well-pled
18 allegations.

19 Anything more?

20 Tentative ruling that I stated orally is confirmed.

21 I'm going to ask that counsel for the plaintiffs submit an
22 order on the anti-SLAPP motion;

23 I'm going to ask that counsel for Twitter submit an order
24 on the demurrer, because I think, fairly construed, the parties
25 to whom I've directed to prepare the orders are the prevailing
26 parties on those two motions.

27 Please work together to make sure, if you can, that
28 there's no disagreement. If not, submit competing orders, and

1 I will sign the one -- or edit the one that I think is the more
2 faithful to my rulings.

3 Good luck to everybody.

4 How long -- oh, no. There's no leave to amend here; so
5 how long does Twitter need to file an answer?

6 MR. CAROME: I would request 30 days, Your Honor.

7 THE COURT: Any reason why not?

8 MR. RANDAZZA: No.

9 THE COURT: Thirty days you have.

10 MR. CAROME: Thank you, Your Honor.

11 THE COURT: Please put that in the demurrer order.

12 Thank you.

13 MR. CANDEUB: Thank you, Your Honor.

14 (10:54 a.m.)
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1 STATE of CALIFORNIA)
2 COUNTY of SAN FRANCISCO)


3
4
5 I, MARIA ANTONIA TORREANO, DO HEREBY CERTIFY:

6
7
8 That the foregoing is a full, true and correct transcript
9 of the testimony given and proceedings hereinbefore entitled;

10
11 That it is a full, true and correct transcript of the
12 evidence offered and received, acts and statements of the
13 court, also all objections of counsel and all matters to which
14 the same relate;

15
16 That I reported the same in stenotype to the best of my
17 ability, being the duly-appointed, qualified and official
18 stenographic reporter of said court, and thereafter had the
19 same transcribed by computer-aided transcription, as herein
20 appears.

21 DATE: June 14, 2018

22
23
24 
25 _____
26 Maria A. Torrealano, CSR, CRR, RMR, CCRR
27 Certificate No. 8600
28