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

A P P E A R A N C E S

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June 14, 2018 9:53 a.m.

P R O C E E D I N G S

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

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

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

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

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

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

THE COURT: Welcome, everybody.

MR. RANDAZZA: Thank you.

MR. CAROME: Thank you, Your Honor.

THE COURT: Interesting case.

MR. CAROME: Yes.

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

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

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

that first prong has not been established by Twitter.

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

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

Nor does the First Amendment bar that claim;

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

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

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

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

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

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

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

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

MR. PETERS: Yes, we are.

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

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

MR. CAROME: Thank you, Your Honor.

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

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

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

anti-SLAPP statute.

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

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

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

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

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

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

Secondly --

THE COURT: How?

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

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

first amended complaint is brought solely in a public interest?

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. PETERS: (Nods head).

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

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

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

MR. PETERS: (Nods head).

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

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

THE COURT: No, it isn't.

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

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

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

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

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

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

MR. PETERS: (Shakes head).

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

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

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

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

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

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

MR. PETERS: (Shakes head).

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

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

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

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

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

This is an extraordinary question, Your Honor.

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

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

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

MR. CAROME: If I --

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

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

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

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

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

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

MR. CAROME: Yes, Your Honor.

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

MR. CAROME: Yes, definitely.

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

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

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

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

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

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

MR. CAROME: Yes, I'm sorry.

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

MR. CAROME: Yes.

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

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

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

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

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

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

MR. CAROME: CRLA.

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

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

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

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

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

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

MR. PETERS: (Shakes head).

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

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

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

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

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

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

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

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

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

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

There's both procedural and substantive elements to it;

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

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

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

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

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

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

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

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

MR. PETERS: I apologize.

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

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

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

Have I stated that correctly?

MR. PETERS: Yeah; that's right.

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

THE COURT: And --

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

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

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

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

Second, I need to draw whatever reasonable inferences I

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

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

Twitter is the largest communication source in the world.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The plaintiffs here concede that *Turner* accurately

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

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

MR. PETERS: (Shakes head).

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

THE COURT: Please show me --

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

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

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

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

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

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

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

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

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

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

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

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

So if -- Twitter, in fact --

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

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

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

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

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

decision is being made well here.

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

MR. CAROME: Yes.

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

So...

(Interruption.)

(Short break taken.)

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

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

THE COURT: No problem.

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

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

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

THE COURT: Okay.

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

memorandum in support of demurrer.

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

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

THE COURT: Right.

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

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

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

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

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

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

THE COURT: Correct.

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

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

MR. CAROME: Well...

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

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

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

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

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

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

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

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

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

MR. CAROME: Certainly, Your Honor --

THE COURT: Give me a break.

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

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

THE COURT: So what is the answer?

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

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

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

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

THE COURT: What case says that?

MR. CAROME: That is --

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

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

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

account or not.

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

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

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

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

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

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

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

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

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

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

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

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

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

That's just the law. If --

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

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

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

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

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

THE COURT: Correct.

MR. CAROME: Of the Unfair Competition Law.

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

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

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

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

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

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

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

And --

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

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

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

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

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

MR. CAROME: Yeah --

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

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

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

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

THE COURT: There does.

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

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

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

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

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

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

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

MR. CAROME: As a matter of law.

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

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

Nothing about my overruling would preclude any of the

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

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

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

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

MR. CAROME: Correct.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Typically that's handled by way of

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

MR. RANDAZZA: Yes.

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

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

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

THE COURT: I'm sorry. What page?

MR. PETERS: Page 14.

THE COURT: One four.

MR. PETERS: One four, paragraph 40:

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

THE COURT: Give me a line, please.

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

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

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

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

MR. PETERS: Yes, correct, correct.

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

MR. PETERS: Correct.

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

it...

MR. PETERS: Okay.

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

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

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

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

THE COURT: I have it here.

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

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

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

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

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

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

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

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

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

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

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

MR. CAROME: Except...

THE COURT: Right.

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

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

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

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

MR. CAROME: I see.

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

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

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

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

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

I would submit.

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

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

Anything more?

Tentative ruling that I stated orally is confirmed.

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

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

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

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

Good luck to everybody.

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

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

THE COURT: Any reason why not?

MR. RANDAZZA: No.

THE COURT: Thirty days you have.

MR. CAROME: Thank you, Your Honor.

THE COURT: Please put that in the demurrer order.

Thank you.

MR. CANDEUB: Thank you, Your Honor.

(10:54 a.m.)

STATE of CALIFORNIA)
)
COUNTY of SAN FRANCISCO)

I, MARIA ANTONIA TORREANO, DO HEREBY CERTIFY:

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

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

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

DATE: June 14, 2018

Maria Torreano
Digitally signed by Maria Torreano
Date: 2018.06.14 17:32:05 -07'00'

Maria A. Torreano, CSR, CRR, RMR, CCRR
Certificate No. 8600