SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Brian C. Walsh Presiding

JeeJee Vizconde, Courtroom Clerk
191 North First Street, San Jose, CA 95113
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LAW AND MOTION TENTATIVE RULINGS
DATE: OCTOBER 25, 2019 TIME: 9 A.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
(SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV340667	Prager University vs. Google LLC, et al	CLICK on LINE 1 for Ruling.
LINE 2	19CV341522	In Re Alphabet, Inc. Shareholder Derivative Litigation [LEAD CASE; Consolidated with Case Nos. 19CV343670, 19CV343672, 19CV344792, 19CV346737]	CLICK on LINE 2 for Ruling.
LINE 3	17CV315727	Hancock vs. Magnolia HI-Fi LLC, et al	CLICK on LINE 3 for Ruling.
LINE 4	19CV348674	In Re Cloudera, Inc. Securities Litigation (formerly Lazard vs. Cloudera Inc., et al) LEAD CASE / Consolidated Action	CLICK on LINE 4 for Ruling.
LINE 5	19CV347622	InESS Solutions, Inc. vs. Cisco Systems Inc.	OFF CALENDAR
LINE 6			
LINE 7			
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LINE 9			
LINE 10			
LINE 11			
LINE 12			

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LAW AND MOTION TENTATIVE RULINGS

LINE 13			

Calendar Line 1

Case Name: *Prager University v. Google LLC, et al.*
Case No.: 19-CV-340667

This action arises from Prager University's allegations that YouTube, LLC and its parent company Google LLC have unlawfully restricted content created by Prager on YouTube, defendants' social media and video sharing platform. Before the Court are defendants' demurrer to the operative First Amended Complaint ("FAC") and Prager's motion for a preliminary injunction. Both motions are opposed.

I. Factual and Procedural Background

As alleged in the FAC, Prager is a non-profit, 501(c)(3) tax exempt, educational organization that promotes discussion on historical, religious, and current events by disseminating educational videos intended for younger, student-based audiences between the ages of 13 and 35. (FAC, ¶ 10.) The videos depict scholars, sources, and other prominent speakers who often espouse viewpoints in the mainstream of conservative thought. (*Ibid.*)

Defendants operate YouTube as the largest and most profitable mechanism for monetizing free speech and freedom of expression in the history of the world, generating $10 to 15 billion in annual revenue by monetizing the content of users like Prager who are invited to post videos to YouTube. (FAC, ¶ 11.) Since its inception, Prager has posted more than 250 of its videos to YouTube. (*Id.* at ¶ 39.)

A. The Alleged Content Restriction Scheme

To induce users like Prager to upload video content, defendants represent that YouTube is a public place for free speech defined by "four essential freedoms" that govern the public's use of the platform:

1. **Freedom of Expression:** We believe people should be able to speak freely, share opinions, foster open dialogue, and that creative freedom leads to new voices, formats and possibilities.

2. **Freedom of Information:** We believe everyone should have easy, open access to information and that video is a powerful force for education, building understanding, and documenting world events, big and small.

3. **Freedom of Opportunity:** We believe everyone should have a chance to be discovered, build a business and succeed on their own terms, and that people—not gatekeepers—decide what's popular.

4. **Freedom to Belong:** We believe everyone should be able to find communities of support, break down barriers, transcend borders and come together around shared interests and passions.

(FAC, ¶ 12.) Defendants further promise that YouTube is governed by content-based rules and filtering which "apply equally to all," regardless of the viewpoint, identity, or source of the speaker. (*Id.* at ¶ 13.)

However, contrary to these representations, defendants censor, restrict, and restrain video content based on animus, discrimination, profit, and/or for any other reason "or no reason." (FAC, ¶ 14.) According to Prager, an internal memo and presentation entitled "The Good Censor" shows that defendants have secretly decided to " 'migrate' away from [serving as] a hosting platform …where the public is invited to engage in freedom of expression" to become a media company that profits "by promoting Defendants' own, or their preferred content through the exercise of unfettered discretion to censor and curate otherwise public content." (*Id.* at ¶¶ 56-65.) To effectuate their discriminatory practices, defendants use clandestine filtering tools, including algorithms and other machine-based and manual review tools, that are embedded with discriminatory and anti-competitive animus-based code, including code that is used to identify and restrict content based on the identity, viewpoint, or topic of the speaker. (*Id.*, ¶ 19.) They also "ensure that the YouTube employees charged with administering the content filtering and regulation scheme … operate in a dysfunctional and politically partisan workplace environment." (*Id.* at ¶ 20.)

Against this background, Prager's rights under California law have been violated by two unlawful content-based restrictions: (i) "Restricted Mode," a filtering protocol that defendants use to block what they deem, in their sole, unfettered discretion, to be "inappropriate" for "sensitive" audiences and (ii) "Advertising Restrictions," a content-based video advertising restriction policy that prohibits potential advertisers from accessing videos that defendants deem "inappropriate" for advertising. (FAC, ¶ 17.) Defendants use these mechanisms as a pretext to restrict and censor Prager's videos, even though the content of its videos complies with YouTube's Terms of Service, Community Guidelines, and criteria for "sensitive audiences" and advertisers, while they fail to restrict the content of other preferred users, content partners, and content produced by defendants themselves that is not compliant. (*Id.* at ¶¶ 18, 23.) Defendants have provided no rational basis for restricting Prager's content while allowing similar or noncompliant content to go unrestricted. (*Id.* at ¶ 25.)

B. Restricted Mode

According to defendants, Restricted Mode is intended "to help institutions like schools as well as people who wanted to better control the content they see on YouTube with an option to choose an intentionally limited YouTube experience." (FAC, ¶ 68.) Viewers can choose to turn Restricted Mode on from their personal accounts, but it may also be turned on by system administrators for libraries, schools, and other institutions or workplaces. (*Ibid.*) Defendants estimate that about 1.5 percent of YouTube's daily views (or approximately 75 million views per day) come from individuals using Restricted Mode. (*Id.* at ¶ 69.) When Restricted Mode is activated, a video's name, creator or subject, and content, along with any other information related to the video, are blocked, as if the video did not exist on the YouTube platform. (*Id.* at ¶ 68.)

Defendants claim to restrict content in Restricted Mode based upon their "Restricted Mode Guidelines," which identify five criteria for determining whether content warrants restriction:

1. Talking about drug use or abuse, or drinking alcohol in videos;
2. Overly detailed conversations about or depictions of sex or sexual activity;
3. Graphic descriptions of violence, violent acts, natural disasters and tragedies, or even violence in the news;
4. Videos that cover specific details about events related to terrorism, war, crime, and political conflicts that resulted in death or serious injury, even if no graphic imagery is shown;
5. Inappropriate language, including profanity; and
6. Video content that is gratuitously incendiary, inflammatory, or demeaning towards an individual or group.

(FAC, ¶ 70.) Videos are initially restricted through an automated filtering algorithm that examines certain "signals" like the video's metadata, title, and language, or following manual review if a video is "flagged" as inappropriate by public viewers. (*Id.*, ¶ 71.)

YouTube also publishes "Community Guidelines" and "Age Based Restriction" guidelines similar to its "Restricted Mode Guidelines"; however, content that complies with these guidelines may nevertheless be subject to Restricted Mode. (FAC, ¶¶ 72-73.) Prager's videos have never been age restricted or found to violate YouTube's Community Guidelines. (*Id.* at ¶ 75.)

Defendants have admitted that they make "mistakes in understanding context and nuances when [assessing] which videos to make available in Restricted Mode." (FAC, ¶ 91.) For example, on March 19, 2017, they publicly admitted that they improperly restricted videos posted or produced by members of the LGBTQ community and changed their policy, filtering algorithm, and manual review policies in response to complaints from this community. (*Id.* at ¶¶ 94-96.) However, Prager alleges that defendants have continued to improperly restrict videos by LGBTQ users, which is evidence of viewpoint animus. (*Id.* at ¶¶ 97-98.)

C. Advertising Restrictions

Defendants also restrict users like Prager "from monetizing or boosting the reach or viewer distribution of [their] videos." (FAC, ¶ 78.) Prager alleges that these restrictions are ostensibly governed by the "AdSense program policies," which it suggests are "similar[ly] vague, ambiguous, and arbitrary" to the Restricted Mode Guidelines. (*Id.* at ¶¶ 78, 80.) Prager claims that, similar to their "mistakes" in applying "Restricted Mode," defendants once "denied a reach boost or ad product" on the ground of "shocking content" based on a user's sexual or gender orientation and viewpoint. (*Id.* at ¶ 81.) It alleges that the application of such an "inappropriate" or "shocking content" designation falsely and unfairly stigmatizes Prager as well. (*Id.* at ¶ 82.) (However, while Prager alleges that certain of its videos have been demonetized, it does not allege whether defendants gave specific reasons for these actions or what those reasons were.) (See *id.* at ¶ 84.)

D. The Parties' Dispute

In July of 2016, Prager discovered that defendants were restricting user access to its videos through Restricted Mode. (FAC, ¶ 101.) It raised the issue with defendants, but they have failed to offer any reasonable or consistent explanation for why Prager's videos are being restricted. (*Id.* at ¶¶ 101-117.) In 2016, at least 16 Prager videos were restricted; by 2017, a

total of 21 were. (*Ibid.*) By the time the FAC was filed in May of 2019, the total had risen to 80. (*Id.* at ¶ 127.) Prager's videos were either "restricted as to content, demonetized, or both." (*Id.* at ¶ 116.) Defendants also discontinued Prager's "ad grants" account for more than six days in October of 2017. (*Id.* at ¶ 118.) On pages 9-17 of the FAC, Prager provides a chart listing its restricted videos by title, along with videos from defendants' "preferred content providers" with similar titles that are unrestricted. (*Id.* at ¶ 23.)

On October 23, 2017, Prager sued defendants in federal court, asserting claims for (1) violation of Article I, section 2 of the California Constitution; (2) violation of the First Amendment of the United States Constitution; (3) violation of the California Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code. § 51 *et seq.*; (4) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; (5) breach of the implied covenant of good faith and fair dealing; (6) violation of the Lanham Act, 15 U.S.C. § 1125 *et seq.*; and (7) declaratory relief. (*Prager University v. Google LLC* (N.D. Cal., Mar. 26, 2018, No. 17-CV-06064-LHK) 2018 WL 1471939, at *2.) It filed a motion for a preliminary injunction in the federal action on December 29, 2017. (*Id.* at *3.) On March 26, 2018, the federal court granted defendants' motion to dismiss Prager's federal claims and denied Prager's motion for a preliminary injunction, finding that Prager had failed to state a claim for violation of the First Amendment because it did not allege state action, and had also failed to state a claim under the Lanham Act. (*Id.* at *5-13.) Having dismissed all of Prager's federal claims, the court declined to exercise supplemental jurisdiction over its state law claims, explaining:

> Here, the factors of economy, convenience, fairness, and comity support dismissal of Plaintiff's remaining state law claims. This case is still at the pleading stage, and no discovery has taken place. Federal judicial resources are conserved by dismissing the state law theories of relief at this stage. Further, the Court finds that dismissal promotes comity as it enables California courts to interpret questions of state law. This is an especially important consideration in the instant case because Plaintiff asserts a claim that demands an analysis of the reach of Article I, section 2 of the California Constitution in the age of social media and the Internet.

(*Prager University v. Google LLC*, *supra,* 2018 WL 1471939, at *13.) Prager has appealed the federal court's ruling to the Court of Appeal for the Ninth Circuit, which heard argument in the matter on August 27, 2019.

Prager filed this action on January 8, 2019, reasserting its state law claims for (1) violation of Article I, section 2 of the California Constitution; (2) violation of the Unruh Act; (3) violation of the UCL; and (4) breach of the implied covenant of good faith and fair dealing. On May 13, the Court entered a stipulated order establishing a briefing schedule for Prager's anticipated motion for a preliminary injunction and defendants' anticipated demurrer and/or special motion to strike. On May 20, pursuant to that order, Prager moved for a preliminary injunction and filed the FAC, which asserts the same four causes of action as its original complaint. Defendants filed their demurrer on June 28. Both matters are now fully briefed and have come on for hearing by the Court.

II. Demurrer to the FAC

Defendants demur to each cause of action in the FAC for failure to state a claim. (Code Civ. Proc., § 430.10, subd. (e).) They contend that Prager's claims are barred by two provisions of section 230 of the Communications Decency Act (the "CDA") and by the First Amendment, and otherwise fail to state a cause of action.

Defendants' request for judicial notice, which is unopposed, is GRANTED as to public web pages displaying the terms of the various YouTube policies at issue in this action (Exhibits 1-9). (Evid. Code § 452, subd. (h); see *Pacific Employers Ins. Co. v. State of Cal.* (1970) 3 Cal.3d 573, 575, fn.1 [where portions of agreement were attached to plaintiff's complaint, the balance of that agreement was properly a subject of judicial notice]; *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285 [judicial notice of letter and media release was proper where, although they were not attached to the complaint, they formed a basis for the claims, and the complaint excerpted quotes and summarized parts in detail, thus "it is essential that we evaluate the complaint by reference to these documents"].) Defendants' request is also GRANTED as to a transcript of a case management conference held in the federal action, although the Court is not bound by the court's comments or rulings in that case. (Evid. Code § 452, subd. (d).)

A. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, "[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations and quotations omitted; see also Code Civ. Proc., § 430.30, subd. (a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. … Thus, … the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal citations and quotations omitted.)

In ruling on a demurrer, the allegations of the complaint must be liberally construed, with a view to substantial justice between the parties. (*Glennen v. Allergan, Inc.* (2016) 247 Cal.App.4th 1, 6.) Nevertheless, while "[a] demurrer admits all facts properly pleaded, [it does] not [admit] contentions, deductions or conclusions of law or fact." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.) A demurrer will lie where the allegations and matters subject to judicial notice clearly disclose some defense or bar to recovery, including a statutory immunity. (*Casterson v. Superior Court (Cardoso)* (2002) 101 Cal.App.4th 177, 183.)

B. Violation of the California Constitution

Because concepts related to the parties' speech rights under the First Amendment and California Constitution are important to other aspects of its analysis, the Court will first examine whether Prager states a claim for violation of Article I, section 2 of the California Constitution.

As urged by defendants, "California's free speech clause"—like the First Amendment—"contains a state action limitation." (*Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1023.) However, the California Constitution's protection of speech has been interpreted more broadly in this regard. (See *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 862-863.) Most notably, in the "groundbreaking" decision of *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, the Supreme Court of California "departed from the First Amendment jurisprudence of the United States Supreme Court and extended the reach of the free speech clause of the California Constitution to privately owned shopping centers." (*Golden Gateway Center v. Golden Gateway Tenants Assn.*, *supra,* 26 Cal.4th at p. 1016.)

More than 20 years after *Robins v. Pruneyard*, *Golden Gateway Center* confirmed and began to define the scope of the state action limitation under the California Constitution, finding the requirement was not satisfied where a tenants' association sought to distribute leaflets in a private apartment complex that was "not freely open to the public." (*Golden Gateway Center v. Golden Gateway Tenants Assn.*, *supra,* 26 Cal.4th at p. 1031.) *Golden Gateway Center* looked to the reasoning of *Robins* for guidance, noting that "*Robins* relied heavily on the functional equivalence of the shopping center to a traditional public forum-the downtown or central business district," and relied on "the public character of the property," emphasizing "the public's unrestricted access." (*Id.* at pp. 1032-1033, internal citations and quotations omitted.) *Golden Gateway Center* held that this unrestricted access is a "threshold requirement for establishing state action": without it, private property "is not the functional equivalent of a traditional public forum." (*Id.* at p. 1033.) In announcing this requirement, the opinion confirmed that it "largely follow[ed] the Court of Appeal decisions construing *Robins*," including *Planned Parenthood v. Wilson* (1991) 234 Cal.App.3d 1662. (*Id.* at p. 1033.) Those decisions also emphasized *Robins*'s focus on "the unique character of the modern shopping center and … the public role such centers have assumed in contemporary society" by effectively replacing "the traditional town center business block, where historically the public's First Amendment activity was exercised and its right to do so scrupulously guarded." (*Planned Parenthood v. Wilson*, *supra,* 234 Cal.App.3d at pp. 1669-1670.) This concept was again emphasized by the California Supreme Court in *Fashion Valley*, which repeatedly referenced "[t]he idea that private property can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks …." (*Fashion Valley Mall, LLC v. National Labor Relations Bd.*, *supra,* 42 Cal.4th at p. 858; see also *id.* at p. 859.)

With this fundamental principle in mind, it is apparent that Prager does not state a claim under the California Constitution. Prager contends that "YouTube is the cyber equivalent of a town square where citizens exchange ideas on matters of public interest" and that defendants have opened their platform to the public by advertising its use for this purpose. However, Prager does not allege that it has been denied access to the core YouTube service. Rather, it urges that its access to "Restricted Mode" and YouTube's advertising service has been restricted. Prager does not persuade the Court that these services are freely open to the public or are the functional equivalent of a traditional public forum like a town square or a central business district.[1] Considering "the nature, purpose, and primary use of the property; the

[1] Prager cites no authority that supports its position that a court can never determine the applicability of *Robins* on demurrer, and this position is incorrect. (See *Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1577,

extent and nature of the public invitation to use the property; and the relationship between the ideas sought to be presented and the purpose of the property's occupants" (*Albertson's, Inc. v. Young* (2003) 107 Cal.App.4th at p. 119), it is clear that these services are nothing like a traditional public forum. "Restricted Mode" is an optional service that enables users to limit the content that they (or their children, patrons, or employees) view in order to avoid mature content. Limiting content is the very purpose of this service, and defendants do not give content creators unrestricted access to it or suggest that they will do so. The service exists to permit users to avoid the more open experience of the core YouTube service. Similarly, the use of YouTube's advertising service is restricted to meet the preferences of advertisers. (See FAC, ¶ 80 [stated purpose of advertising restrictions "is to keep Google's content and search networks safe and clean for our advertisers …"]; Declaration of Brian M. Willen, Exs. 7-9.)

Defendants correctly urge that even to recognize the core YouTube platform as a public forum would be a dramatic expansion of *Robins*. As one federal court observed, "[t]he analogy between a shopping mall and the Internet is imperfect, and there are a host of potential 'slippery slope' problems that are likely to surface were [*Robins*] to apply to the Internet." (*hiQ Labs, Inc. v. LinkedIn Corporation* (N.D. Cal. 2017) 273 F.Supp.3d 1099, 1116 [observing that "[n]o court has expressly extended [*Robins*] to the Internet generally"], *aff'd and remanded* (9th Cir. 2019) 938 F.3d 985.) However the courts of this state ultimately view that analogy with regard to a dominant, widely-used site like the core YouTube service, the analogy falls apart completely on the facts alleged here. "Restricted Mode" and YouTube's advertising service are new, inherently selective platforms that do not resemble a traditional public forum. As discussed below, even more than the core YouTube service, these platforms necessarily reflect the exercise of editorial discretion rather than serving as an open "town square."

Finally, Prager contends that cases that have deemed web sites to be "public forums" for purposes of California's "anti-SLAPP" statute require this Court to extend *Robins* to its claim. However, the anti-SLAPP statute encompasses speech "***in a place open to the public or*** a public forum in connection with an issue of public interest" (Code Civ. Proc., § 425.16, subd. (e)(3), emphasis added), and has been applied to locations that clearly do not meet the standard described in *Golden Gateway Center*. (See, e.g., *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807 [anti-SLAPP statute applied to comments made during on-air discussion on talk radio].) "[T]he protections afforded by the anti-SLAPP statute are not coextensive with the categories of conduct or speech protected by the First Amendment or its California counterparts (Cal. Const., art. I, §§ 2–4)." (*Industrial Waste & Debris Box Service, Inc. v. Murphy* (2016) 4 Cal.App.5th 1135, 1152.) "As our high court recently reaffirmed, 'courts determining whether conduct is protected under the anti-SLAPP statute look not to First Amendment law, but to the statutory definitions in section 425.16, subdivision (e).' " (*Ibid.*, quoting *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 422.)

Defendants' demurrer to the first cause of action will accordingly be sustained without leave to amend. In addition to failing to state a claim under *Robins v. Pruneyard*, this cause of action is barred by section 230 of the CDA for the reasons discussed below. (See *In re Garcia* (2014) 58 Cal.4th 440, 452 [supremacy clause of the federal Constitution requires that any conflicting state law give way to federal statute], citing U.S. Const., art. VI, cl. 2 ["This

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fn. 4 [stating that scope of *Robins* can be addressed on demurrer in appropriate circumstances].) Here, the necessary facts are alleged in the FAC and/or subject to judicial notice.

Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding"].)

B. CDA Immunity

Section 230(c)(1) of the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." "§ 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." (*Hassell v. Bird* (2018) 5 Cal.5th 522, 536, quoting *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330.)

"The CDA—of which section 230 is a part—was enacted in 1996." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 802.) "Its 'primary goal ... was to control the exposure of minors to indecent material' over the Internet." (*Ibid.*, quoting *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1026, superseded by statute on another point as stated in *Breazeale v. Victim Services, Inc.* (9th Cir. 2017) 878 F.3d 759, 766.) "Thus, an 'important purpose of [the CDA] was to encourage [Internet] service providers to self-regulate the dissemination of offensive materials over their services.' " (*Ibid.*, quoting *Zeran v. America Online, Inc., supra,* 129 F.3d at p. 331.) Section 230(c)(2) consequently immunizes service providers[2] who endeavor to restrict access to material deemed objectionable, providing that

> [n]o provider or user of an interactive computer service shall be held liable on account of--
>
> **(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> **(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[3]

(47 U.S.C. § 230(c)(2).)

A second, but related, objective of the CDA "was to avoid the chilling effect upon Internet free speech that would be occasioned by the imposition of tort liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery." (*Delfino v. Agilent Technologies, Inc.*, *supra,* 145 Cal.App.4th at pp. 802-803.)

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[2] There is no dispute that defendants are providers of "an interactive computer service" under section 230.

[3] It is widely agreed that section 230(c)(2)(B)'s reference to "paragraph (1)" is an error, and the provision should be interpreted to refer to section 230(c)(2)(A) or "paragraph (A)." (See, e.g., *Enigma Software Group USA, LLC v. Malwarebytes, Inc.* (9th Cir. 2019) 938 F.3d 1026, 1031, fn. 1.)

The legislative history reflects that Congress was responding to a New York trial court case where "a service provider was held liable for defamatory comments posted on one of its bulletin boards, based on a finding that the provider had adopted the role of 'publisher' by actively screening and editing postings." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 44.) " 'Fearing that the specter of liability would ... deter service providers from blocking and screening offensive material,' " Congress forbid " 'the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.' " (*Id.*, quoting *Zeran v. America Online, Inc., supra,* 129 F.3d at p. 331.) Thus, section 230(c)(1) " 'confer[s] broad immunity on Internet intermediaries' " in " 'a strong demonstration of legislative commitment to the value of maintaining a free market for online expression.' " (*Hassell v. Bird*, *supra,* 5 Cal.5th at p. 539, quoting *Barrett v. Rosenthal*, *supra,* 40 Cal.4th at p. 56.)

Of the two provisions, section 230(c)(1) has been applied more frequently and broadly, including by courts in the Northern District of California to conduct indistinguishable from that alleged in this action. Notably, in *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1090, *aff'd sub nom. Sikhs for Justice, Inc. v. Facebook, Inc.* (9th Cir. 2017) 697 Fed.App'x. 526, a human rights organization alleged that Facebook blocked access to its page in India "on its own or on the behest of the Government of India," because of discrimination on the grounds of race, religion, ancestry, and national origin. Quoting *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096 and *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157, the court reasoned that

> [p]ublication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content. Thus, a publisher decides whether to publish material submitted for publication. It is immaterial whether this decision comes in the form of deciding what to publish in the first place or what to remove among the published material. ***In other words, any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.***

(*Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, *supra,* 144 F.Supp.3d at p. 1094, emphasis added, internal citations and quotations omitted.) This approach has been endorsed by the Ninth Circuit. (See *Riggs v. MySpace, Inc.* (9th Cir. 2011) 444 Fed.App'x. 986, 987 [district court properly dismissed claims "arising from MySpace's decisions to delete Riggs's user profiles on its social networking website yet not delete other profiles Riggs alleged were created by celebrity imposters," citing *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, *supra,* 521 F.3d at pp. 1170-1171 for the proposition that "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230"].) California opinions have similarly reasoned that the "type of activity" at issue here—"to restrict or make available certain material"—"is expressly covered by section 230." (*Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 572-573 [describing "the general consensus to interpret section 230 immunity broadly, extending from *Zeran* …"]; see also *Hassell v. Bird, supra,* 5 Cal.5th at p. 537 [California "courts have followed *Zeran* in adopting a broad view of section 230's immunity provisions"].) This interpretation was recently applied again by the Northern District in *Federal Agency of News LLC v. Facebook, Inc.* (N.D. Cal., July 20, 2019, No. 18-CV-07041-LHK) --- F.Sup.3d ---, 2019 WL 3254208, where it was held that section 230(c)(1) immunized Facebook from claims

arising from its removal of a Russian company's account and page due to its alleged control by an entity found to have interfered in the 2016 United States presidential election.[4]

Consistent with the language of section 230(c)(1), these cases do not question the service provider's motive in deciding to remove content from its service. While Prager contends that section 230(c)(1) immunity should not be applied where a plaintiff alleges a service provider acted in bad faith or to stifle competition, it cites no persuasive authority adopting this interpretation.[5]

Courts have expressed greater concern with the issue of motive when interpreting section 230(c)(2), perhaps because paragraph (A) of that provision expressly includes a "good faith" requirement. Here, defendants rely on paragraph (B) of that provision, which they urge—like section 230(c)(1)—does not require good faith. In *Zango, Inc. v. Kaspersky Lab, Inc.* (9th Cir. 2009) 568 F.3d 1169, 1176-1177, the Ninth Circuit applied section 230(c)(2)(B) to a provider of Internet security software that deemed the plaintiff's software to be "malware," noting that the plaintiff had waived the issue of "whether subparagraph (B), which has no good faith language, should be construed implicitly to have a good faith component like

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[4] See also *Langdon v. Google, Inc.* (D. Del. 2007) 474 F.Supp.2d 622, 630-631 (applying immunity under section 230(c)(1) and/or (2) where plaintiff alleged defendants refused to display ads on his web pages criticizing the North Carolina and Chinese governments based on political viewpoint discrimination); *Levitt v. Yelp! Inc.* (N.D. Cal., Oct. 26, 2011, No. C-10-1321 EMC) 2011 WL 5079526, at *7-9, *aff'd* (9th Cir. 2014) 765 F.3d 1123 (section 230(c)(1) immunity applied to allegations that Yelp manipulated plaintiffs' user reviews in order to induce them to pay for advertising); *Lancaster v. Alphabet Inc.* (N.D. Cal., July 8, 2016, No. 15-CV-05299-HSG) 2016 WL 3648608, at *2-3 ("§ 230[(c)(1) of the CDA prohibits any claim arising from Defendants' removal of Plaintiffs' videos"); *Green v. YouTube, LLC* (D.N.H., Mar. 13, 2019, No. 18-CV-203-PB) 2019 WL 1428890, at *6, *report and recommendation adopted sub nom. Green v. YouTube, Inc.* (D.N.H., Mar. 29, 2019, No. 18-CV-203-PB) 2019 WL 1428311 (applying immunity under section 230(c)(1) where plaintiff alleged his accounts were improperly shut down); *Brittain v. Twitter, Inc.* (N.D. Cal., June 10, 2019, No. 19-CV-00114-YGR) 2019 WL 2423375, at *3 (section 230(c)(1) immunity applied where plaintiff alleged improper suspension of his Twitter accounts and that Twitter "limit[ed] users who reference new/competing networks and/or utilize Third Party API services"); *King v. Facebook, Inc.* (N.D. Cal., Sept. 5, 2019, No. 19-CV-01987-WHO) 2019 WL 4221768 (section 230(c)(1) immunity applied to theory that "Facebook has violated its (Terms of Service] in removing [plaintiff's] posts and suspending his account, and that Facebook treats black activists and their posts differently than it does other groups, particularly white supremacists and certain 'hate groups' ").

[5] To the extent *e-ventures Worldwide, LLC v. Google, Inc.* (M.D. Fla. 2016) 188 F.Supp.3d 1265 adopts Prager's view, it does so by conflating section 230(c)(1) and section 230(c)(2) with no analysis. The Court does not find this persuasive. While a subsequent, unpublished opinion in that action, *e-ventures Worldwide, LLC v. Google, Inc.* (M.D. Fla., Feb. 8, 2017, No. 214CV646FTMPAMCM) 2017 WL 2210029, *3-4 reasoned that applying section 230(c)(1) to service providers' editorial decisions regarding a plaintiff's own content would swallow "the more specific immunity in (c)(2)" with its good faith requirement, the opinion went on to grant summary judgment based on the First Amendment's protection of editorial judgments, "no matter the motive." This case does not persuade the Court to part ways with the courts that apply section 230(c)(1) to the same end based on the same reasoning.

Similarly, *Levitt v. Yelp! Inc.* (N.D. Cal., Mar. 22, 2011, No. C 10-1321 MHP) 2011 WL 13153230, at *9 deemed it "a[] close[] question … whether Yelp may be held liable for its removal of positive reviews for the alleged purpose of coercing businesses to purchase advertising," considering that this theory implicated bad faith. The court ultimately did not resolve the issue as it found the complaint otherwise failed to state a cause of action. A subsequent opinion in that case, *Levitt v. Yelp! Inc.* (N.D. Cal., Oct. 26, 2011, No. C-10-1321 EMC) 2011 WL 5079526, *9 held that section 230(c)(1) does not include a good faith requirement, and applied "even assuming Plaintiffs have adequately pled allegations stating a claim of an extortionate threat with respect to Yelp's alleged manipulation of user reviews." The Court finds the reasoning of the subsequent opinion more persuasive.

subparagraph (A)." The concurring opinion expressed concern with extending immunity beyond the facts present in that case:

> Congress plainly intended to give computer users the tools to filter the Internet's deluge of material *users* would find objectionable, in part by immunizing the providers of blocking software from liability. *See* § 230(b)(3). But under the generous coverage of § 230(c)(2)(B)'s immunity language, a blocking software provider might abuse that immunity to block content for anticompetitive purposes or merely at its malicious whim, under the cover of considering such material "otherwise objectionable."

(*Zango, Inc. v. Kaspersky Lab, Inc.*, *supra,* 568 F.3d at p. 1178 (conc. opn. of Fisher, J.).) Noting that "[d]istrict courts nationwide have grappled with the issues discussed in *Zango*'s majority and concurring opinions, and have reached differing results," the Ninth Circuit recently held that a service provider's intent may be relevant under section 230(c)(2)(B): specifically, where a plaintiff alleges blocking by a direct competitor for anticompetitive purposes, its claims survive dismissal. (*Enigma Software Group USA, LLC v. Malwarebytes, Inc.* (9th Cir. 2019) 938 F.3d 1026.)

Here, defendants' creation of a "Restricted Mode" to allow sensitive users to voluntarily choose a more limited experience of the YouTube service is exactly the type of self-regulation that Congress sought to encourage in enacting section 230, and fits within section 230(c)(2)(B)'s immunity for "any action taken to enable or make available to … others," namely, YouTube users, "the technical means to restrict access to" material "that the provider or user considers to be obscene, … excessively violent, … or otherwise objectionable." Rather than unilaterally restricting access to material on its core platform as contemplated by section 230(c)(2)(A)—which contains a "good faith" requirement—defendants allow users to voluntarily restrict access to material that defendants deem objectionable for the stated reason that, like the categories of material enumerated by the statute, it may be inappropriate for young or sensitive viewers.[6] The Court views this as a critical difference between the two provisions and disagrees with the majority in *Enigma*,[7] who ignore the plain language of the statute by reading a good faith limitation into section 230(c)(2)(B). (See *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, *supra,* 938 F.3d at p. 1040 (dis. opn. of Rawlinson, J.) ["The majority's policy arguments are in conflict with our recognition in *Zango* that the broad language of the Act is consistent with 'the Congressional goals for immunity' as expressed in the language of the statute. [Citation.] As the district court cogently noted, we 'must presume that a legislature says in a statute what it means and means in a statute what it says there.' "].)

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[6] Consistent with these circumstances, a page discussing options for administrators employing "Restricted Mode," which was submitted by Prager in connection with its motion for preliminary injunction, indicates that "[a]dministrators and designated approvers can now whitelist entire channels," in addition to individual videos, to ensure a channel is "watchable by your users." (Declaration of Peter Obstler, Ex. L.) Thus, it appears that users can specifically override defendants' decisions to disable certain videos or channels in "Restricted Mode," confirming that "Restricted Mode" is a tool made available to users rather than a unilateral ban.

[7] See *People v. Williams* (1997) 16 Cal.4th 153, 190 ("Decisions of lower federal courts interpreting federal law are not binding on state courts."); *Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034 (although at times entitled to great weight, the decisions of the lower federal courts on federal questions are merely persuasive).

Finding CDA immunity here is also consistent with cases that apply it in indistinguishable circumstances based on section 230(c)(1), and with their reasoning, which recognizes that challenges to a service provider's editorial discretion "treat[]" the provider "as a publisher." (See *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, *supra,* 144 F.Supp.3d 1088 [applying section 230(c)(1) to claim under Title II of the Civil Rights Act of 1964]; *Federal Agency of News LLC v. Facebook, Inc.*, *supra,* 2019 WL 3254208 [applying section 230(c)(1) to claims under Title II of the Civil Rights Act of 1964, the Unruh Act, and for breach of the implied covenant of good faith and fair dealing].) The Court finds that immunity under section 230(c)(1) also applies here, to the allegations involving both "Restricted Mode" and defendants' advertising service.

While the Court understands Prager's argument that all three provisions of section 230 should have a good faith requirement, this argument is contrary to the plain language of the statute. (See *Hassell v. Bird*, *supra,* 5 Cal.5th at p. 540 [noting that *Barrett v. Rosenthal*, *supra,* 40 Cal.4th 33 voiced "qualms" that *Zeran*'s interpretation of section 230 provides blanket immunity for those who intentionally redistribute defamatory statements, but held "these concerns were of no legal consequence" where principles of statutory interpretation compelled a broad construction].) And while it is not this Court's role to judge the wisdom of the policy embodied by section 230, there are good reasons to support it. As the court in *Levitt v. Yelp! Inc.* (N.D. Cal., Oct. 26, 2011, No. C-10-1321 EMC) 2011 WL 5079526 reasoned,

> traditional editorial functions often include subjective judgments informed by political and financial considerations. [Citation.] Determining what motives are permissible and what are not could prove problematic. Indeed, from a policy perspective, permitting litigation and scrutin[izing] motive could result in the "death by ten thousand duck-bites" against which the Ninth Circuit cautioned in interpreting § 230(c)(1). [(*Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, *supra,* 521 F.3d at p. 1174.)]
>
> One of Congres[s]'s purposes in enacting § 230(c) was to avoid the chilling effect of imposing liability on providers by both safeguarding the "diversity of political discourse ... and myriad avenues for intellectual activity" on the one hand, and "remov[ing] disincentives for the development and utilization of blocking and filtering technologies" on the other hand. §§ 230(a), (b); *see also* S.Rep. No. 104–230, at 86 (1996) (Conf.Rep.), *available at* 1996 WL 54191, at *[194] (describing purpose of section 230 to protect providers from liability "for actions to restrict or to enable restrict[ion] of access to objectionable online material"). For that reason, "[C]lose cases ... must be resolved in favor of immunity, lest we cut the heart out of section 230 ...." [(*Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, *supra,* 521 F.3d at p. 1174.)]
>
> As illustrated by the case at bar, finding a bad faith exception to immunity under § 230(c)(1) could force Yelp to defend its editorial decisions in the future on a case by case basis and reveal how it decides what to publish and what not to publish. Such exposure could lead Yelp to resist filtering out false/unreliable reviews (as someone could claim an improper motive for its decision), or to immediately remove all negative reviews about which businesses complained (as failure to do so could expose Yelp to a business's claim that Yelp was

> strong-arming the business for advertising money). The Ninth Circuit has made it clear that the need to defend against a proliferation of lawsuits, regardless of whether the provider ultimately prevails, undermines the purpose of section 230.

(*Levitt v. Yelp! Inc.*, *supra,* 2011 WL 5079526, at *8-9.) In the Court's view, these concerns are particularly salient here, where the challenged services are by definition more curated than defendants' core service and could not exist without more robust screening by defendants.

In opposition to defendants' demurrer, Prager cites a number of cases that affirm the principle applied in *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, *supra,* 521 F.3d 1157, which held that a service provider is not entitled to CDA immunity with regard to content it develops itself. However, this principle is inapposite here. Prager does not allege that defendants developed any of Prager's content or appended any commentary to it—to the contrary, they allege the content became completely invisible in "Restricted Mode" or was simply demonetized. Applying CDA immunity under these circumstances does not conflict with *Roommates*. (See *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, *supra,* 521 F.3d at p. 1163 [in enacting CDA immunity, "Congress sought to immunize the *removal* of user-generated content, not the *creation* of content"].)[8]

Finally, Prager contends that applying CDA immunity here would constitute an unlawful prior restraint on its speech in violation of the First Amendment. However, a federal court has already held that defendants' conduct does not violate the First Amendment, and this Court agrees with that analysis for the reasons discussed in connection with its analysis of Prager's claim under the California Constitution. Moreover, Prager does not allege that defendants prevented it from engaging in speech, even on their own platform—again, it contends that certain videos were excluded from "Restricted Mode" and/or were demonetized.

The Court consequently finds that section 230(c)(2)(B) bars Prager's claims related to "Restricted Mode" and section 230(c)(1) bars all of its claims, with the possible exception of those based on its own promises and representations, which are discussed below.[9]

C. Breach of the Implied Covenant of Good Faith and Fair Dealing and Fraud Under the UCL

Finally, Prager correctly urges that some California authority holds section 230(c)(1) of the CDA does not apply to claims based on a defendant's own promises and representations to a plaintiff, rather than its role as a publisher. (See *Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 313 [this immunity does not apply where "plaintiff seeks to hold Yelp liable for its own statements regarding the accuracy of its filter"]; but see *Hassell v. Bird*, *supra,* 5 Cal.5th at p. 542 [disapproving of "creative pleading" in an attempt to avoid section 230 immunity].) This authority does not apply to the Court's finding of immunity under section 230(c)(2)(B). In any event, Prager's claims asserting this type of theory—namely, its claim for

[8] Although it does not bring a claim for defamation, Prager appears to suggest that defendants have defamed it by removing its content from "Restricted Mode" or demonetizing it. Such a claim would likely be foreclosed by the ruling in *Bartholomew v. YouTube, LLC.* (2017) 17 Cal.App.5th 1217, 1234.

[9] The Court thus does not address defendants' argument that Prager's claims are barred by the First Amendment.

breach of the implied covenant of good faith and fair dealing and its claim under the fraud prong of the UCL—do not state a cause of action.

Prager does not and cannot state a claim for breach of the implied covenant of good faith and fair dealing in light of the express provisions of YouTube's Terms of Service, which provide that "YouTube reserves the right to remove Content without prior notice" and which also allow YouTube to "discontinue any aspect of the Service at any time." (See Declaration of Brian Willen, Ex. 1; *Song fi Inc. v. Google, Inc.* (N.D. Cal. 2015) 108 F.Supp.3d 876, 885 [plaintiff could not state a claim for violation of the covenant of good faith and fair dealing based on content removal in light of YouTube's Terms of Service].) Similarly, YouTube's AdSense Terms of Service reserve the right "to refuse or limit your access to the Services." (Declaration of Brian Willen, Ex. 8; see *Sweet v. Google Inc.* (N.D. Cal., Mar. 7, 2018, No. 17-CV-03953-EMC) 2018 WL 1184777, at *9-10 [plaintiff could not state a claim for violation of the covenant of good faith and fair dealing based on demonitization in light of similar reservation of rights in YouTube's Partner Program Terms].) "[C]ourts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement." (*Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 808.) That is not the case here, and Prager does not contend that it is. (See *Sweet v. Google Inc.*, *supra,* 2018 WL 1184777, at *9-10 [applying *Third Story*].)

As to the UCL fraud claim, to the extent it is based on the "four essential freedoms" set forth above and similar statements, these statements are non-actionable puffery. (See *Demetriades v. Yelp, Inc.*, *supra,* 228 Cal.App.4th at p. 311 [" 'a statement that is quantifiable, that makes a claim as to the "specific or absolute characteristics of a product," may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery,' " quoting *Newcal Industries, Inc. v. Ikon Office Solution* (9th Cir.2008) 513 F.3d 1038, 1053]; *Prager University v. Google LLC*, *supra,* 2018 WL 1471939, at *11 ["None of the statements about YouTube's viewpoint neutrality identified by Plaintiff resembles the kinds of 'quantifiable' statements about the 'specific or absolute characteristics of a product' that are actionable under the Lanham Act."].)

Prager also alleges that defendants represented that "the 'same standards apply equally to all' when it comes to the content regulation on YouTube." (FAC, ¶ 85; see also *id.* at ¶ 13.) While this statement is arguably more than mere puffing (see *Demetriades v. Yelp, Inc.*, *supra,* 228 Cal.App.4th at p. 311-312), Prager does not allege that it suffered a loss of money or property as a result of its reliance on this statement. "There are innumerable ways in which economic injury from unfair competition may be shown," including where a plaintiff "ha[s] a present or future property interest diminished." (*Kwikset Corp. v. Superior Court (Benson)* (2011) 51 Cal.4th 310, 323; see also *Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 38 [UCL "unlawful" plaintiffs established standing by alleging diminished credit score caused by defendant's false negative reporting to credit agencies, even where they never made payments on the loan at issue].) The "lost income, reduced viewership, and damage to brand, reputation, and goodwill" that Prager alleges (FAC, ¶ 157) would certainly satisfy this requirement if there were a causal connection between Prager's alleged reliance on defendants' statement in participating in the YouTube service and these harms. However, these injuries cannot have resulted from Prager's decision to use YouTube: they could only have been caused by YouTube's later decisions to restrict and/or demonetize Prager's content.

(See *Prager University v. Google LLC*, *supra,* 2018 WL 1471939, at *11-12 ["Plaintiff has not sufficiently alleged that it 'has been or is likely to be injured as the result of the' statements about YouTube's viewpoint neutrality. [Citation.] As discussed above, any harm that Plaintiff suffered was caused by Defendants' decisions to limit access to some of Plaintiff's videos."].) These later decisions by YouTube could not have been relied on by Prager. (See *id.* at *11 ["Although Plaintiff asserts that it has suffered injury in the form of 'lower viewership, decreased ad revenue, a reduction in advertisers willing to purchase advertisements shown on Plaintiff's videos, diverted viewership, and damage to its brand, reputation and goodwill," … nothing in Plaintiff's complaint suggests that this harm flowed directly from Defendants' publication of their policies and guidelines. Instead, any harm that Plaintiff suffered was caused by Defendants' decisions to limit access to some of Plaintiff's videos …."].) Moreover, recognizing this theory would appear to conflict with principles of defamation law as recently discussed in *Bartholomew v. YouTube, LLC.* (2017) 17 Cal.App.5th 1217.

Prager thus fails to state a cause of action based on the implied covenant of good faith and fair dealing or the fraud prong of the UCL.

D. Conclusion and Order

For all these reasons, the demurrer to the first through fourth causes of action is SUSTAINED WITHOUT LEAVE TO AMEND.

III. Motion for Preliminary Injunction

As discussed above, Prager has not shown a reasonable probability of success on the merits in this action. Its motion for a preliminary injunction is consequently DENIED. (See *San Francisco Newspaper Printing Co. v. Superior Court (Miller)* (1985) 170 Cal.App.3d 438, 442.)

The Court will prepare the order.

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Calendar Line 2

Case Name: *In re Alphabet, Inc, Shareholder Derivative Litigation*
Case No.: 19-CV-341522 (lead case)

Before the Court in these consolidated shareholder derivative actions are unopposed motions by nominal defendant Alphabet, Inc. to seal (1) portions of the Consolidated Stockholder Derivative Complaint filed on August 9, 2019 and (2) portions of the modified Consolidated Stockholder Derivative Complaint filed on August 16, 2019.

I. Legal Standard

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3.) In addition, confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court (Unity Pictures Corp.)* (2003) 110 Cal.App.4th 1273, 1285-1286.)

Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*In re Providian*, *supra*, 96 Cal.App.4th at p. 309.)

II. Analysis

The portions of the complaints that Alphabet seeks to filed under seal quote or reflect private and sensitive personal information from confidential "director and officer questionnaires" completed by Alphabet's board, reflecting private financial information about the directors, their family members, and their affiliates. Alphabet keeps this information confidential, and its publication would harm efforts to recruit new board members and retain the current board, as well as harming the privacy interests of the current board. The Court finds that these interests override the public's right of access to the limited portions of the complaints at issue, and the factors set forth by rule 2.550(d) are satisfied under the circumstances. (See *Valley Bank of Nevada v. Superior Court (Barkett)* (1975) 15 Cal.3d 652, 656 ["we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life"].)

III. Conclusion and Order

The motions to seal are GRANTED.

The Court will prepare the order.

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Calendar Line 3

Case Name: *Paul Hancock v. Magnolia Hi-Fi, LLC, et al.*
Case No.: 17-CV-315727

This is a Private Attorneys General Act ("PAGA") action alleging wage statement violations by defendants Magnolia Hi-Fi, LLC and Best Buy Stores, L.P. Before the Court is plaintiff's motion for approval of a PAGA settlement, which is unopposed.

I. Factual and Procedural Background

According to the operative Second Amended Complaint ("SAC"), plaintiff was hired by defendants to work as a Systems Designer in August 2015. (SAC, ¶ 7.) He was employed by defendants until August 2017. (*Ibid.*) Plaintiff alleges that he and other employees received wage statements that failed "to identify the correct rates of pay and number of hours worked for incentive overtime wages, … including but not limited to Reg Comm OT and Spiffs OT wage payments." (*Id.* at ¶ 16.)

Based on these allegations, plaintiff asserts a single claim under PAGA. He dismissed the individual and class claims under Labor Code section 226, subdivision (a) that were asserted in his original complaint after discovering that an arbitration agreement governed his employment. On April 29, 2019, the Court denied defendants' motion for summary judgment on the grounds that plaintiff failed to exhaust his PAGA claim and lacked standing to pursue it. Defendants filed a petition for writ of mandate with the Court of Appeal, which has been fully briefed and remains pending.

The parties have reached a settlement of plaintiff's PAGA claim. Plaintiff's motion for an order approving the PAGA settlement is now before the Court. The parties have requested a stay of any ruling on defendants' writ petition pending approval of their settlement.

II. Legal Standard for Approving a PAGA Settlement

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.) 75 percent of any penalties recovered go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the employees. (*Ibid.*) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id.* at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

Labor Code section 2699, subdivision (l) provides that "[t]he superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to" PAGA. "[T]here is no requirement that the Court certify a PAGA claim for representative treatment" as in a class action. (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *5.)

There is little case law addressing the standard for approving a PAGA settlement. (See *Syed v. M-I, L.L.C.* (E.D. Cal., Feb. 22, 2017, No. 112CV01718DADMJS) 2017 WL 714367, at *13, fn. 8.) As one federal court recently noted, "aside from [the] bland mandate" that courts "review" PAGA settlements, "the Act is surprisingly short on specifics. … [N]either the California legislature, nor the California Supreme Court, nor the California Courts of Appeal, nor the [LWDA] has provided any definitive answer to th[e] vexing question" of what standards govern the courts' review. (*Flores v. Starwood Hotels & Resorts Worldwide, Inc.* (C.D. Cal., May 19, 2017, No. SACV1401093AGANX) 2017 WL 2224265, at *1.)

What guidance there is comes largely from federal cases. In connection with one such case, the LWDA indicated that "when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Villalobos v. Calandri Sonrise Farm LP*, *supra,* 2015 WL 12732709, at *13.) The PAGA settlement must be reasonable in light of the potential verdict value (see *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 [rejecting settlement of less than one percent of the potential verdict]); however, it may be substantially discounted given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds a trial (see *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8-9).

III. Settlement Process and the Parties' Agreement

According to a declaration by plaintiff's counsel, the parties participated in a mediation with Mark Rudy, a well-known labor and employment neutral, on October 10, 2018, but this mediation was unsuccessful. After the Court denied defendants' motion for summary judgment, the parties held a second mediation with Lisa Klerman, another well-known labor and employment mediator. The second mediation was successful and resulted in the settlement before the Court.

The settlement requires defendants to pay a total of $1,450,000. $483,333.33 in attorney fees and $21,702.45 in costs, plus an incentive award of $10,000 to the named plaintiff, will be deducted from the gross settlement, along with $11,000 in administrative costs. The net settlement will be distributed 75 percent ($692,973.16) to the LWDA and 25 percent ($230,991.06) to the aggrieved employees, based on the number of impacted wage statements they received during the release period. By the Court's calculation, the 4,170 aggrieved employees will receive an average payment of approximately $55.

In exchange for the settlement, aggrieved employees will release "any claims under PAGA [that were] alleged or could have been alleged against Defendants and the Released Parties arising out of the facts, circumstances, and primary rights at issue in the Operative Complaint in the Action … that arose for Magnolia Aggrieved Employees during the Magnolia PAGA Release Period, and for Best Buy Aggrieved Employees during the Best Buy Release Period."

IV. Analysis of the Penalties Provided by the Settlement

Plaintiff estimates that the maximum penalties in this action would total $8,965,500. Thus, the gross settlement represents approximately 16 percent of the maximum penalties, and

the net settlement represents about 10 percent of the maximum. Plaintiff contends the settlement should be approved considering the technical nature of the violation alleged and the Court's discretion to reduce any penalty award following trial, the pending writ petition, and defendants' arguments on the merits. The Court agrees with this assessment and finds that the settlement provides genuine and meaningful relief to the aggrieved employees.

There is no guidance to be found in the case law regarding the Court's role in reviewing attorney fees associated with a PAGA settlement. However, it is difficult to imagine that courts can fulfill their statutory duty to review the penalties associated with PAGA settlements while turning a blind eye to the economically critical issue of attorney fees. The Court thus finds that it must scrutinize the attorney fee arrangement associated with a PAGA settlement. This is consistent with the observation of many courts that PAGA claims are analogous to "qui tam" suits like those under the federal False Claims Act: in reviewing settlements of qui tam claims, courts do consider any associated attorney fee arrangement. (See *U.S. v. Texas Instruments Corp.* (9th Cir. 1994) 25 F.3d 725, 728 [attorney fee award must be considered by the trial court as part of its review of the "entire settlement arrangement"].)

The conclusion that the Court must review an attorney fee arrangement associated with a PAGA settlement begs the question of what standard should be applied to this analysis. (See *Rodriguez v. RCO Reforesting, Inc.* (E.D. Cal., Jan. 25, 2019, No. 2:16-CV-2523 WBS DMC) 2019 WL 331159, at *6 [the PAGA statute does not "provide[] a standard for evaluating attorneys' fees related to a settlement"; applying lodestar method].) Plaintiff takes the position that the common fund doctrine should apply, and the Court agrees. The main advantage of the settlement at issue is that it creates a significant fund to benefit the LWDA and the remaining aggrieved employees. As noted by the trial court in *Harrington v. Payroll Entertainment Services, Inc*. (2008) 160 Cal.App.4th 589, plaintiff's attorneys should share in this recovery. (At p. 594.) These circumstances are analogous to cases, like wage and hour class actions, where the common fund doctrine is applied. (See *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-111 [California recognizes and consistently applies the common fund doctrine, recognizing the historic power of equity to permit a party recovering a fund for the benefit of others in addition to himself to recover costs including attorney fees from the fund itself].) The Court finds that the common fund approach is the most reasonable one here, given the nature of the case and of the parties' settlement.

Here, counsel requests a fee award of $483,333.33, or 1/3 of the settlement fund. This percentage is typical for wage and hour cases, and the Court finds it is reasonable considering counsel's lodestar of $251,720 (resulting in a multiplier of 1.92). (See *Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 1 Cal.5th 480, 488, 503-504 [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13].) The fee award is therefore approved.

Counsel's request for litigation costs of $21,702.45 is also reasonable based on the summary provided and is approved. The $10,000 incentive award to the named plaintiff and $11,000 allocated to administrative costs are also approved.

V. Order and Judgment

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiff's motion for approval of the PAGA settlement is GRANTED. The aggrieved employees are defined as: "(1) all current and former California non-exempt employees of Defendant Magnolia Hi-Fi, LLC who received Incentive Overtime True-Up Wage Statements (as defined below) at any time between September 8, 2016 to October 12, 2018 ("Magnolia Aggrieved Employees") and (2) all current and former California non-exempt employees of Defendant Best Buy Stores, L.P. who received Incentive Overtime True-Up Wage Statements (as defined below) at any time between September 8, 2016 and the earlier of: (1) the this order is filed or (2) November 30, 2019 ("Best Buy Aggrieved Employees").

"Incentive Overtime True-Up Wage Statements" are defined as "any wage statement in which Magnolia Aggrieved Employees and/or Best Buy Aggrieved Employees were paid incentive overtime true-up payments."

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff shall take from his complaint only the relief set forth in the settlement agreement and this order and judgment. The Court retains jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court will prepare the order and judgment.

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Calendar Line 4

Case Name: *In re Cloudera, Inc. Securities Litigation*
Case No.: 19-CV-348674 (lead case)

This consolidated putative class action arises from alleged misrepresentations and omissions in the registration statement and prospectus issued in connection with defendant Cloudera, Inc.'s acquisition of and merger with Hortonworks, Inc. Before the Court is a motion by Cloudera and individual defendants Thomas J. Reilly, Jim Frankola, Priya Jain, Michael A. Olson, Martin I. Cole, Kimberly Hammonds, Rosemary Schooler, Steve J. Sordello, Michael A. Stankey, Robert Bearden, Paul Cormier, Peter Fenton, and Kevin Klausmeyer (collectively, the "Cloudera Defendants") to stay all proceedings in this action pending the resolution of the pleadings in a related federal action. Alternatively, the Cloudera Defendants move to stay discovery until the pleadings are resolved in both this case and the federal action. Plaintiffs oppose the entry of a stay.

Defendant Intel Corporation's motion to join in the Cloudera Defendants' motion is GRANTED.

I. Factual and Procedural Background

As alleged in the operative Consolidated Class Action Complaint, Cloudera is a Delaware corporation with its principal executive offices located in Palo Alto, and is purportedly an enterprise data cloud company. (Consolidated Complaint, ¶ 15.) Intel is a semiconductor technology company headquartered in Santa Clara, which was a controlling shareholder of Cloudera at the time of the merger and appointed an employee to Cloudera's board. (*Id.* at ¶ 16.) The individual defendants are officers and directors of Cloudera and Hortonworks. (*Id.* at ¶¶ 18-31.)

Cloudera has described itself as a "Big Data" software company providing data warehousing and management tools and applications and related services to businesses. (Consolidated Complaint, ¶ 33.) Its software is designed in significant part using the open-source Apache Hadoop software. (*Ibid.*) Cloudera states that its software is designed to provide an easy to use and faster version of Hadoop, with a suite of complimentary applications and services to provide increased functionality. (*Ibid.*) Prior to the merger, its flagship product was its "Enterprise Data Hub," which combined other database and data engineering products with Cloudera's shared data experience technology ("SDX"). (*Ibid.*) SDX is a software framework that centralizes data functions and integrates with data storage products including Amazon Simple Storage Service ("S3") and Microsoft Azure Data Lake. (*Ibid.*) Although these products are primarily used on premises, Cloudera stated that they are "cloud" products. (*Ibid.*) It was also developing its own cloud service called "Altus," which it promoted as simple and adaptable. (*Ibid.*)

On October 3, 2018, Cloudera announced a proposed merger with Hortonworks, a competitor that also offered Hadoop-based software products. (Consolidated Complaint, ¶ 34.) The stock-for-stock deal was valued at $5.2 billion at the time, and would result in Hortonworks shareholders receiving 1.305 newly issued shares of Cloudera common stock in exchange for each of their Hortonworks shares. (*Ibid.*) After the merger, Hortonworks shareholders would own 40 percent of the combined company. (*Ibid.*)

At the time of the merger, Cloudera was suffering from material adverse circumstances that were not disclosed in the registration statement and associated documents, including Cloudera's Form 10-K for the fiscal year ending on January 31, 2018 and its Form 10-Q for the period ending July 31, 2018.[10] (Consolidated Complaint, ¶¶ 37, 39, 46.) Its platforms were technologically deficient and obsolete; in fact, it had no legitimate cloud product, an issue repeatedly raised by the company's sales force in internal meetings. (*Id.* at ¶ 37.) These discussions also addressed customer non-renewals due to the company's failure to provide a cloud product and because Cloudera's product was inferior and/or more costly than in-house solutions, with "Altus" rejected by all but a small fraction of customers. (*Ibid.*) Demoralized by management's failure to respond to these issues, the sales force and related management positions suffered a fifty percent turnover rate in the year leading up to the merger, which disrupted the company's sales cycles and further reduced sales. (*Ibid.*)

Despite these circumstances, the registration statement and associated documents were replete with references to Cloudera's purported "cloud" expertise and gave the impression that its products were highly desirable to existing and prospective customers, delivering "an integrated suite of capabilities for data management, machine learning and advanced analytics, affording customers an agile, scalable and cost-effective solution for transforming their business," and enabling organizations "to use vast amounts of data from a variety of sources, including the Internet of Things, to better serve and market to their customers, design connected products and services and reduce risk through greater insight from data." (Consolidated Complaint, ¶¶ 44-45.) The registration statement also touted Cloudera's "land and expand" growth strategy, in which the company worked with new customers to identify additional "use cases that can be developed on or moved to our platform, ultimately increasing the amount of data managed on our platform as well as the number and size of our platform deployment." (*Id.* at ¶ 47.) The registration statement claimed the merger would further this strategy, "increase cross-sell opportunities," "enlarge addressable market," "[e]xpande[] [the] buyer universe," and "improve Cloudera's … existing ability to expand customer relationships and increase the penetration of new customer accounts." (*Ibid.*) Plaintiffs allege that a number of statements in the registration statement and associated documents were misleading due to the circumstances described above, and that defendants failed to provide disclosures required under Items 303 and 503 of SEC Regulation S-K. (*Id.* at ¶¶ 44-65.)

On January 3, 2019, the merger was completed, and Cloudera common stock closed at $10.37 per share. (Consolidated Complaint, ¶ 42.) However, when the deficiencies in its platform were revealed by customers to securities analysts just two months after the merger, Cloudera's stock price dropped, and the price dropped further when Cloudera revealed in its first full maiden quarter that customers were not renewing and were choosing to go in-house to meet their needs. (*Id.* at ¶¶ 46, 67-69.) Meanwhile, attempts to release Altus repeatedly failed, and it was ultimately deployed without any adequate sales engine, with the Vice President responsible for its development leaving the company shortly after the merger. (*Id.* at ¶ 46) By June 7, 2019, Cloudera's stock was trading at $5.10 per share, and its price has continued to decline. (*Id.* at ¶¶ 72-73.)

[10] The registration statement incorporated these and other public filings by reference. (Consolidated Complaint, ¶ 39.)

Based on these allegations, plaintiffs bring claims for (1) violations of section 11 of the Securities Exchange Act (against all defendants), (2) violations of section 12(a)(2) of the Act (against Cloudera and the executive defendants), and (3) violation of section 15 of the Act (against all defendants), on behalf of a putative class of "all persons who received Cloudera stock in exchange for Hortonworks securities pursuant to the Registration Statement." (Consolidated Complaint, ¶¶ 75, 80-102.)

Plaintiff Sidney Lazard filed the first of these consolidated actions on June 7, 2019, at 6:35 p.m. On July 9, pursuant to a stipulation by the parties, *Lazard* was consolidated with two subsequently filed cases and co-lead plaintiffs' counsel was appointed. The Consolidated Complaint was filed on August 5.

Meanwhile, at 5:06 p.m. on June 7, *Christie v. Cloudera, Inc.* (N.D. Cal., No. 5:19-cv-3221-LHK) was filed in federal court. *Christie* alleges violations of sections 10(b) and 20(a) of the Securities Exchange Act arising from misrepresentations in Cloudera's public filings during the class period of April 28, 2017 to June 5, 2019, on behalf of a putative class of "all purchasers of Cloudera common stock during the Class Period who were damaged thereby." The allegations in *Christie* pertain to many of the same topics as the allegations here, but characterize defendants' misrepresentations somewhat differently: for example, while the plaintiffs here allege that Cloudera never really provided a "cloud" product and lost customers who opted for in-house solutions, *Christie* alleges that Cloudera's technology became obsolete and it lost business to competitors.

Christie was consolidated with two similar federal actions on September 10. Competing motions for the appointment of lead plaintiffs and counsel are scheduled to be heard by the federal court on November 21, 2019. The parties to the federal actions have stipulated that after lead plaintiffs and counsel are appointed, plaintiffs will file a consolidated amended complaint and defendants will file motions to dismiss. Pursuant to the Private Securities Litigation Reform Act ("PSLRA"), discovery in the federal case is stayed pending the resolution of the motions to dismiss.

II. Legal Standard

Trial courts have the inherent power to stay proceedings in the interests of justice and to promote judicial efficiency. (*Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489.) In addition, Code of Civil Procedure section 410.30 provides that "[w]hen a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." (Code Civ. Proc., 410.30, subd. (a).)

"Granting a stay in a case where the issues in two actions are substantially identical is a matter addressed to the sound direction of the trial court." (*Thomson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 746; see also *Simmons v. Superior Court* (1950) 96 Cal.App.2d 119, 123.) Specifically, "when a federal action has been filed covering the same subject matter as is involved in a California action, the California court has the discretion but not the obligation to stay the state court action." (*Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800, 804.)

> "In exercising its discretion the court should consider the importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with the courts of other jurisdictions. It should also consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced." (*Farmland Irrigation Co. v. Dopplmaier* [(1957)] 48 Cal.2d [208,] 215.) The California Supreme Court also has isolated another critical factor favoring a stay of the state court action in favor of the federal action[:] … the federal action is pending in California [and] not some other state. (*Thomson v. Continental Ins. Co., supra,* 66 Cal.2d at p. 747.)

(*Ibid.*)

III. Analysis

Defendants move for a "temporary" stay in this action "until resolution of the forthcoming motion to dismiss in federal court -- at which point this Court (with the benefit of Judge Koh's ruling) may consider the propriety of a continued stay in light of the progress in the federal case." (Mot., p. 11.) "If plaintiffs believe they have a meaningful basis for distinguishing Judge Koh's rulings from the allegations in this case (however unlikely), they can present their arguments to the Court at that time." (*Id.* at pp. 14-15.) Among other arguments, defendants urge that "every member of the alleged class in this case is also a member of the federal class" (*id.* at p. 16) and the Court should defer to the federal court on issues of federal law. They contend that the PSLRA's stay of discovery pending resolution of the pleadings applies in this case as well as in the federal action, and even if it does not apply directly, allowing discovery here would undermine the mandatory stay in federal court.

Plaintiffs respond that the instant action asserts different claims governed by a different pleading standard than the federal action, where the plaintiffs must prove scienter, reliance, and loss causation. (See *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 382 ["[A] Section 10(b) plaintiff carries a heavier burden than a Section 11 plaintiff. Most significantly, he must prove that the defendant acted with scienter, *i.e.,* with intent to deceive, manipulate, or defraud."]; *Hildes v. Arthur Andersen LLP* (9th Cir. 2013) 734 F.3d 854, 859 [citing *Hutchison v. Deutsche Bank Sec. Inc.* (2d Cir.2011) 647 F.3d 479, 484 for the proposition that section 11 plaintiffs need not plead scienter, reliance, or loss causation].) They contend that the putative class in the federal action does *not* include members of the putative class here, urging that the federal class is limited to "purchasers" on the open market as opposed to former Hortonworks shareholders. In addition, they argue that they will be prejudiced were the Court to stay this action in favor of the federal case, which is less advanced than this one since leadership has not yet been appointed. They urge that they should not be forced to wait for what will likely be many months for a ruling on motions to dismiss in the federal action in order to proceed with this case, particularly since the Supreme Court recently reaffirmed that section 11 claims filed in state court are properly litigated there, and in fact cannot be removed to federal court. (See *Cyan, Inc. v. Beaver County Employees Retirement Fund* (2018) 138 S.Ct. 1061.)

Considering the factors set forth in *Farmland Irrigation* and *Caiafa*, the Court declines to stay these proceedings. Given the significantly different pleading standards and different (though overlapping) theories of misrepresentation at issue here and in the federal case, the

federal court's ruling on motions to dismiss may or may not address issues relevant to the Court's determinations here. The Court does not view plaintiffs' choice to proceed with their claims in state court to be "harassing," and, while it appreciates the expertise of the federal court, does not believe it should delay the progress of this action when the outcome of the federal case may fail to shed light on the issues here.[11] The first of the actions in this Court was filed within a few hours of the first-filed federal case, and a leadership dispute has delayed progress on the federal claims. Thus, the stage of the proceedings weighs against a stay. While the location of the federal action does favor a stay, the Court finds the other factors to be more significant here. In sum, this Court has jurisdiction over plaintiffs' claims and is qualified to hear them; it views an unseemly conflict with the federal court as unlikely and gives weight to plaintiffs' choice of forum and their right to proceed with their case. For these reasons, defendants' motion for a stay of the entire action herein will be denied.

The Court appreciates defendants' argument that proceeding with discovery at this juncture could undermine the mandatory stay in the federal action. However, plaintiffs do not yet seek discovery in this case, and the Court exercises its discretion to continue the discovery stay already in place here pending resolution of the pleadings.[12] If the pleadings in the federal action are not also resolved by that time, the Court will consider a further extension of the discovery stay, along with plaintiffs' proposal that the issue be addressed through the entry of a protective order.

IV. Conclusion and Order

Defendants' motion is DENIED to the extent it seeks a stay of all proceedings in this action pending resolution of the pleadings in the federal action, and the motion is DENIED WITHOUT PREJUDICE to the extent it seeks a stay of discovery until that time. The motion is GRANTED IN PART to the extent it seeks to extend the existing discovery stay in this case until the pleadings in this action are resolved. The discovery stay shall remain in place until further order of the Court.

The Court will prepare the order.

[11] In any event, whether or not members of the putative class in this action are also members of the putative class in the federal action, the federal court's ruling on a motion to dismiss will not bind this Court, as pre-certification rulings in class actions do not have collateral estoppel effect. (See *Bridgeford v. Pacific Health Corp.* (2012) 202 Cal.App.4th 1034, 1043 [order denying class certification does not have collateral estoppel effect; "if no class was certified by the court in the prior proceeding, the interests of absent putative class members were not represented"]; *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1204 [new class representative's proposal of "a class that on its face attempts to correct flaws identified in [a prior putative class action] resulting in denial of certification" was not subject to issue preclusion]; but see *Alvarez v. May Dept. Stores Co.* (2006) 143 Cal.App.4th 1223 [order denying class certification does have collateral estoppel effect].)

[12] Given this decision, the Court need not resolve the issue of whether the PSLRA's mandatory discovery stay directly applies to this action.

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