

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PRAGER UNIVERSITY,
Plaintiff,
v.
GOOGLE LLC, et al.,
Defendants.

Case No. 17-CV-06064-LHK

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS PLAINTIFF’S
FEDERAL CAUSES OF ACTION;
DISMISSING PLAINTIFF’S STATE
LAW CAUSES OF ACTION; AND
DENYING PLAINTIFF’S MOTION FOR
A PRELIMINARY INJUNCTION**

Re: Dkt. Nos. 24, 31

Plaintiff Prager University (“Plaintiff”) sues Defendants YouTube, LLC (“YouTube”) and Google LLC (“Google”) (collectively, “Defendants”) for allegedly censoring some of the videos that Plaintiff uploaded on YouTube based on Plaintiff’s conservative political identity and viewpoint. Before the Court are (1) Plaintiff’s motion for a preliminary injunction (ECF No. 24); and (2) Defendants’ motion to dismiss Plaintiff’s complaint (ECF No. 31).¹ Having considered the parties’ briefing, the relevant law, and the record in this case, the Court GRANTS with leave to

¹ Also before the Court is Plaintiff’s Administrative Motion for Leave to File Supplementary Material. ECF No. 48. That motion is GRANTED.

1 amend Defendants’ motion to dismiss Plaintiff’s federal causes of action, DISMISSES with leave
 2 to amend Plaintiff’s state law causes of action, and DENIES without prejudice Plaintiff’s motion
 3 for a preliminary injunction.

4 **I. BACKGROUND**

5 **A. Factual Background**

6 Plaintiff is “an educational 501(c)(3) nonprofit company” with its principal place of
 7 business in Los Angeles County, California. ECF No. 1 (“Compl.”) ¶ 17. Plaintiff states that its
 8 “mission” is to “provide conservative viewpoints and perspectives on public issues that it believes
 9 are often overlooked or ignored.” *Id.* ¶ 33. As part of its mission, Plaintiff creates short
 10 educational videos, the content of which “espouses viewpoints and perspectives based on
 11 conservative values.” *Id.* ¶ 34. Despite its name, Plaintiff “is not an academic institution and does
 12 not offer certifications or diplomas.” *Id.*

13 Defendant YouTube is a “for profit limited liability corporation” that is “wholly owned
 14 by” Defendant Google, a “for profit, public corporation.” *Id.* ¶¶ 18–19. Both Defendants are
 15 “organized under the laws of the State of Delaware,” and have their principal place of business in
 16 Mountain View, California. *Id.* YouTube is the “largest video-sharing website in the world.” *Id.*
 17 ¶ 36. YouTube “allows users to upload, view, rate, share, add to favorites, report, [and] comment
 18 on videos.” *Id.*

19 Plaintiff states that Defendants “hold YouTube out to the public as a forum intended to
 20 defend and protect free speech where members of the general public may speak, express, and
 21 exchange their ideas.” *Id.* ¶ 3. Specifically, Plaintiff points to Defendants’ representations that
 22 “voices matter” and that YouTube is “committed to fostering a community where everyone’s
 23 voice can be heard.” *Id.* Plaintiff further identifies statements made by YouTube in its “Official
 24 Blog” that (1) YouTube’s “mission” is to “give people a voice” in a “place to express yourself”
 25 and in a “community where everyone’s voice can be heard”; and (2) YouTube is “one of the
 26 largest and most diverse collections of self-expression in history” that gives “people opportunities

1 to share their voice and talent no matter where they are from or what their age or point of view.”
2 *Id.* ¶ 28. Plaintiff states that “[s]ince its inception, [Plaintiff] has posted more than 250 of [its]
3 videos on” YouTube. *Id.* ¶ 34.

4 Plaintiff alleges that, despite YouTube’s purported viewpoint neutrality, Defendants have
5 discriminated against Plaintiff based on Plaintiff’s political identity and viewpoint by censoring
6 certain videos that Plaintiff uploaded on YouTube. *Id.* ¶ 52. According to Plaintiff, this
7 censorship takes the form of putting age restrictions on some of Plaintiff’s videos and/or excluding
8 them from YouTube’s “Restricted Mode” setting. YouTube’s “Restricted Mode” setting is an
9 “optional feature to help institutions like schools as well as people who wanted to better control
10 the content they see on YouTube.” *Id.* Defendants “ensure that videos containing potentially
11 mature content will not be shown to viewers who have Restricted Mode turned on” based on
12 certain criteria contained in different “guidelines.” *Id.* ¶ 42. For example, Defendants apply a set
13 of “Restricted Mode Guidelines” that contain criteria like whether the video in question contains
14 discussions about drug use, “overly detailed conversations about” sex, or “inappropriate
15 language.” *Id.* Further, if a video is “flagged” as “inappropriate” by a viewer, a “team” of
16 YouTube employees will review that video for “violations of [YouTube’s] Community
17 Guidelines,” which focus on “[n]udity of sexual content,” “[v]iolent or graphic content,”
18 “[h]armful or dangerous content,” “[h]ateful content,” copyright violations, “threats,” “spam,
19 misleading metadata, and scams.” *Id.* ¶ 43. Beyond that, “on some occasions, a video may not
20 violate the Community Guidelines but may still be subject to” an age restriction—and are
21 therefore made “not visible to users who are logged out, are under 18 years of age, or have
22 Restricted Mode enabled”—based on certain age-restriction criteria, including “vulgar language,”
23 “violence and distributing imagery,” “nudity and sexually suggestive content,” and “portrayal of
24 harmful or dangerous activities involving content that intends to incite violence or encourage
25 dangerous or illegal activities.” *Id.* ¶ 45. Plaintiff alleges that Defendants provide “a limited
26 appeal process for any users who believe that the application of age restriction filtering to the

1 user’s video contents is unwarranted or inappropriate.” *Id.* ¶ 46. Users may appeal the age
2 restriction on any particular video only once. *Id.*

3 Plaintiff alleges that although YouTube has insisted in the past that YouTube’s Restricted
4 Mode and age restriction filtering—which purportedly apply the criteria described above—should
5 not and are not intended to filter out content based on political viewpoints, *see id.* ¶ 51,
6 Defendants have restricted access to some of Plaintiff’s videos “based on [Defendants’] animus
7 towards [Plaintiff’s] political identity and viewpoint.” *Id.* ¶ 52. Plaintiff also appears to allege
8 that Defendants have “demonetized” some of Plaintiff’s videos—by preventing advertisements
9 from running on those videos—in a viewpoint-discriminatory manner. *See id.* ¶ 91 (“No
10 compelling, significant, or legitimate reason justifies demonetizing or restricting Plaintiff’s
11 videos.”). Plaintiff does not allege, however, that any of Plaintiff’s videos have been completely
12 removed from YouTube. As discussed above, Plaintiff alleges only that some of Plaintiff’s videos
13 have been demonetized or censored (in the form of an age restriction or exclusion from the
14 Restricted Mode setting) based on Defendants’ intolerance towards Plaintiff’s political views.

15 To support its allegations of viewpoint discrimination, Plaintiff includes a chart that lists
16 (1) a number of Plaintiff’s videos to which access has been restricted by YouTube; and (2) various
17 unrestricted videos that discuss the same topics as Plaintiff’s videos, but from a liberal
18 perspective. *See id.* at 26–32. For example, the chart shows that one of Plaintiff’s videos titled
19 “Are 1 in 5 women in college raped?” has been restricted by YouTube, but that another video
20 titled “Author Jon Krakauer on new book ‘Missoula’ and college rape epidemic” and uploaded by
21 the “CBS This Morning” channel has no such restriction. *Id.* at 26. Additionally, Plaintiff alleges
22 that content from some of Plaintiff’s restricted videos “was not restricted after it was copied and
23 posted by other content providers or vloggers.” *Id.* ¶ 70.

24 Plaintiff alleges that Defendants’ discriminatory censorship of Plaintiff’s videos “continues
25 to this day.” *Id.* ¶ 67. Plaintiff’s chart indicates that as of October 23, 2017, at least twenty-one of
26 Plaintiff’s videos remain restricted by YouTube. *See id.* at 26–32.

B. Procedural History

On October 23, 2017, Plaintiff filed the instant suit against Defendants. *See* Compl. Plaintiff's complaint asserts seven causes of action: (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) a claim for declaratory relief based on Defendants' alleged violations of the First Amendment of the United States Constitution; Article I, section 2 of the California Constitution; the Unruh Act; and the Lanham Act. Compl. ¶¶ 74–122.²

On December 29, 2017, Plaintiff filed a motion for a preliminary injunction, *see* ECF No. 24, and Defendants filed a motion to dismiss Plaintiff's complaint. *See* ECF No. 31 ("Mot."). On February 9, 2018, Defendants opposed Plaintiff's preliminary injunction motion, *see* ECF No. 37, and Plaintiff opposed Defendants' motion to dismiss. *See* ECF No. 33 ("Opp."). Then, on February 23, 2018, Plaintiff filed a reply in support of its motion for a preliminary injunction, *see* ECF No. 41, and Defendants filed a reply in support of their motion to dismiss Plaintiff's complaint. *See* ECF No. 39 ("Reply").

II. LEGAL STANDARD

A. Motion to Dismiss Under Rule 12(b)(6)

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). The United States Supreme Court has held that Rule 8(a) requires a plaintiff to plead

² The Court notes that Plaintiff's "Seventh Cause of Action" for declaratory relief, Compl. ¶¶ 120–22, "is not an independent cause of action or theory of recovery." *Wishnev v. Northwestern Mut. Life. Ins. Co.*, 162 F. Supp. 3d 930, 952 (N.D. Cal. 2016). Rather, it is a claim for a particular remedy (declaratory relief) that is premised on four of Plaintiff's substantive causes of action.

1 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
 2 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual
 3 content that allows the court to draw the reasonable inference that the defendant is liable for the
 4 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is
 5 not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant
 6 has acted unlawfully.” *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule
 7 12(b)(6) motion, a court “accept[s] factual allegations in the complaint as true and construe[s] the
 8 pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire &*
 9 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

10 The Court, however, need not accept as true allegations contradicted by judicially
 11 noticeable facts, *see Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it “may look
 12 beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6)
 13 motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir.
 14 1995). Nor must the Court “assume the truth of legal conclusions merely because they are cast in
 15 the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per
 16 curiam) (internal quotation marks omitted). Mere “conclusory allegations of law and unwarranted
 17 inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183
 18 (9th Cir. 2004).

19 **B. Leave to Amend**

20 If the Court determines that the complaint should be dismissed, it must then decide
 21 whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave
 22 to amend “should be freely granted when justice so requires,” bearing in mind that “the underlying
 23 purpose of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or
 24 technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). When dismissing
 25 a complaint for failure to state a claim, “a district court should grant leave to amend even if no
 26 request to amend the pleading was made, unless it determines that the pleading could not possibly

1 be cured by the allegation of other facts.” *Id.* at 1130 (quoting *Doe v. United States*, 58 F.3d 494,
 2 497 (9th Cir. 1995)). Nonetheless, a court “may exercise its discretion to deny leave to amend due
 3 to ‘undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure
 4 deficiencies by amendments previously allowed, undue prejudice to the opposing party. . . , [and]
 5 futility of amendment.’” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892–93 (9th Cir.
 6 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

7 **C. Motion for Preliminary Injunction**

8 A preliminary injunction is an extraordinary remedy, never granted as a matter of right.
 9 *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). “A plaintiff seeking a preliminary
 10 injunction must establish that he is likely to succeed on the merits, that he is likely to suffer
 11 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,
 12 and that an injunction is in the public interest.” *Id.* at 20. The party seeking the injunction bears
 13 the burden of proving these elements. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th
 14 Cir. 2009). The issuance of a preliminary injunction is at the discretion of the district court.
 15 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

16 **D. Judicial Notice**

17 In support of Plaintiff’s motion for a preliminary injunction, Plaintiff has requested the
 18 Court to take judicial notice of Plaintiff’s complaint in the instant case. ECF No. 28. Defendants
 19 do not oppose this request. Further, in support of Plaintiff’s opposition to Defendants’ motion to
 20 dismiss, Plaintiff has requested the Court to take judicial notice of a class action complaint against
 21 Defendant Google filed in Santa Clara County Superior Court by two former employees. ECF No.
 22 35. Defendants oppose this request by arguing that the complaint is irrelevant and that the alleged
 23 misconduct by Google in the complaint is “subject to reasonable dispute.” ECF No. 40.

24 The Court may take judicial notice of matters that are either “generally known within the
 25 trial court’s territorial jurisdiction” or “can be accurately and readily determined from sources
 26 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Public records,

1 including judgments and other public filed documents, are proper subjects of judicial notice. *See,*
 2 *e.g., United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) (“[Courts] may take notice of
 3 proceedings in other courts, both within and without the federal judicial system, if those
 4 proceedings have a direct relation to matters at issue.”); *Rothman v. Gregor*, 220 F.3d 81, 92 (2d
 5 Cir. 2000 (taking judicial notice of a filed complaint as a public record).

6 However, to the extent any facts in documents subject to judicial notice are subject to
 7 reasonable dispute, the Court will not take judicial notice of those facts. *See Lee v. City of L.A.*,
 8 250 F.3d 668, 689 (9th Cir. 2001) (“A court may take judicial notice of matters of public record . .
 9 . . . But a court may not take judicial notice of a fact that is subject to reasonable dispute.” (internal
 10 quotation marks and citation omitted)), *overruled on other grounds by Galbraith v. Cty. of Santa*
 11 *Clara*, 307 F.3d 1119 (9th Cir. 2002).

12 The Court agrees with Plaintiff that both the complaint in the instant case and the class
 13 action complaint against Google are proper subjects of judicial notice because they are matters of
 14 public record. *See Rothman*, 220 F.3d at 92 (taking judicial notice of a filed complaint as a public
 15 record). However, because the facts alleged in both complaints are subject to reasonable dispute,
 16 the Court will not take judicial notice of the facts contained within those complaints. Moreover,
 17 the facts in the class action complaint against Google do not have a direct relation to the matters at
 18 issue in the instant case.

19 **III. DISCUSSION**

20 As discussed above, Defendants have moved to dismiss Plaintiff’s complaint, and Plaintiff
 21 has moved for a preliminary injunction. The Court first discusses Defendants’ motion to dismiss,
 22 and then discusses Plaintiff’s motion for a preliminary injunction.

23 **A. Defendants’ Motion to Dismiss**

24 In their motion to dismiss, Defendants argue that Plaintiff’s complaint should be dismissed
 25 because (1) the Communications Decency Act (“CDA”), 47 U.S.C. § 230(c), bars all of Plaintiff’s
 26 causes of action except Plaintiff’s First Amendment claim, Mot. at 8–13; (2) the First Amendment

1 bars all of Plaintiff’s causes of action, *id.* at 13–15; and (3) Plaintiff’s complaint fails to
 2 sufficiently plead any causes of action. *Id.* at 15–24. The Court finds that Plaintiff’s complaint
 3 should be dismissed for failure to state any federal claims, and therefore declines to address
 4 Defendants’ other arguments for dismissal. The Court first addresses Plaintiff’s federal causes of
 5 action, and then addresses together Plaintiff’s state law claims.

6 **1. Federal Causes of Action**

7 As discussed above, Plaintiff’s complaint asserts only two substantive federal causes of
 8 action: violation of the First Amendment, and violation of the Lanham Act. Further, Plaintiff’s
 9 claim for declaratory relief is premised in part on Defendants’ alleged violations of the First
 10 Amendment and the Lanham Act. The Court agrees with Defendants that Plaintiff has failed to
 11 state a claim under either the First Amendment or the Lanham Act, and accordingly, Plaintiff has
 12 failed to state a claim for declaratory relief premised on the First Amendment and the Lanham
 13 Act. The Court addresses each claim in turn.

14 **a. First Amendment**

15 Plaintiff argues that Defendants violated Plaintiff’s First Amendment rights by applying
 16 their “censorship criteria . . . as a pretext to” demonetize and restrict access to some of Plaintiff’s
 17 videos “based not on the content of the [videos] but because of [Plaintiff’s] identity and political
 18 viewpoints.” Compl. ¶ 89. In their motion to dismiss, Defendants contend that Plaintiff’s First
 19 Amendment claim fails because Plaintiff does not sufficiently allege that Defendants are state
 20 actors. Mot. at 15–16. For the reasons discussed below, the Court agrees with Defendants.

21 “It is, of course, a commonplace that the constitutional guarantee of free speech is a
 22 guarantee only against abridgment by government, federal or state.” *Hudgens v. N.L.R.B.*, 424
 23 U.S. 507, 513 (1976). Plaintiff does not dispute that Defendants are private entities. *See* Compl.
 24 ¶¶ 18–19; ECF No. 25 at 14 (conceding that “Defendants are not public entities”). However, in
 25 some circumstances, a private entity can be a state actor for constitutional purposes. Specifically,
 26 “[t]he Supreme Court has articulated four tests for determining whether a private party’s actions

1 amount to state action: (1) the public function test; (2) the joint action test; (3) the state
 2 compulsion test; and (4) the governmental nexus test.” *Tsao v. Desert Palace, Inc.*, 698 F.3d
 3 1128, 1140 (9th Cir. 2012) (alteration adopted) (quoting *Franklin v. Fox*, 312 F.3d 423, 444–45
 4 (9th Cir. 2002)).

5 Plaintiff contends that Defendants are state actors under the “public function” test. *See*
 6 Compl. ¶ 87 (stating that “Defendants further act as state actors because Defendants and the
 7 YouTube site perform an exclusively and traditionally public function”). Under the public
 8 function test, “[p]rivate activity becomes a ‘public function’ only if that action has been
 9 ‘traditionally the exclusive prerogative of the State.’” *Brunette v. Humane Soc’y of Ventura Cty.*,
 10 294 F.3d 1205, 1214 (9th Cir. 2002) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)).
 11 The United States Supreme Court has stated that “[w]hile many functions have been traditionally
 12 performed by governments, very few have been ‘exclusively reserved to the State.’” *Flagg Bros.*,
 13 *Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345,
 14 352 (1974)). Examples of functions that have been deemed to be “traditionally the exclusive
 15 prerogative of the State” include “hold[ing] [public] elections,” “govern[ing] a town,” and
 16 “serv[ing] as an international peacekeeping force.” *Brunette*, 294 F.3d at 1214 (citing *Terry v.*
 17 *Adams*, 345 U.S. 461, 484 (1953), *Marsh v. Alabama*, 326 U.S. 501, 507–09 (1946), and *Dobyns*
 18 *v. E-Systems, Inc.*, 667 F.2d 1219, 1226–27 (5th Cir. 1982)).

19 Plaintiff does not point to any persuasive authority to support the notion that Defendants,
 20 by creating a “video-sharing website” and subsequently restricting access to certain videos that are
 21 uploaded on that website, Compl. ¶¶ 35, 41–46, have somehow engaged in one of the “very few”
 22 functions that were traditionally “exclusively reserved to the State.” *Flagg Bros.*, 436 U.S. at 158.
 23 Instead, Plaintiff emphasizes that Defendants hold YouTube out “as a public forum dedicated to
 24 freedom of expression to all” and argues that “a private property owner who operates its property
 25 as a public forum for speech is subject to judicial scrutiny under the First Amendment.” Opp. at
 26 18.

1 Plaintiff primarily relies on the United States Supreme Court’s decision in *Marsh v.*
2 *Alabama* to support its argument, but *Marsh* plainly did not go so far as to hold that any private
3 property owner “who operates its property as a public forum for speech” automatically becomes a
4 state actor who must comply with the First Amendment. Opp. at 18. In *Marsh*, a “company
5 town” that was entirely owned by a private corporation, Gulf Shipbuilding Corporation, imposed a
6 criminal penalty on a Jehovah’s Witness who distributed religious literature “on the premises of
7 the company-owned town contrary to the wishes of the town’s management.” 326 U.S. at 502.
8 The company town had “all the characteristics of any other American town,” including
9 “residential buildings, streets, a system of sewers, a sewage disposal plant and a ‘business block’
10 on which business places [were] situated.” *Id.* In short, there was “nothing to distinguish” the
11 company town “from any other town and shopping center” except for the fact that a private
12 corporation owned all the property and ran all aspects of the town, including all of its municipal
13 functions. *Id.* Ultimately, despite the fact that Gulf Shipbuilding Corporation was a private entity,
14 the Supreme Court held that it was a state actor that was required to run the town in compliance
15 with the Constitution. *Id.* at 505–08. As a result, the criminal penalty imposed on the Jehovah’s
16 Witness was due to be reversed because it violated her First Amendment rights. *Id.* at 504–05.

17 *Marsh*’s holding stands for the proposition that a private entity that owns all the property
18 and controls all the municipal functions of an entire town is a state actor that must run the town in
19 compliance with the Constitution. Thus, contrary to Plaintiff’s position, *Marsh* does not compel
20 the conclusion that Defendants are state actors that must comport with the requirements of the
21 First Amendment when regulating access to videos on YouTube. Unlike the private corporation in
22 *Marsh*, Defendants do not own all the property and control all aspects and municipal functions of
23 an entire town. Far from it, Defendants merely regulate content that is uploaded on a video-
24 sharing website that they created as part of a private enterprise.

25 To be sure, *Marsh* does contain some broader language that could be construed to support
26 Plaintiff’s position that because Defendants hold out and operate their private property (YouTube)

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1 as a forum dedicated to allowing its users to express diverse points of view, Defendants should be
2 treated as state actors “subject to judicial scrutiny under the First Amendment.” Opp. at 18. For
3 example, the United States Supreme Court stated in *Marsh* that “[t]he more an owner, for his
4 advantage, opens up his property for use by the public in general, the more do his rights become
5 circumscribed by the statutory and constitutional rights of those who use it.” 326 U.S. at 506.

6 However, subsequent United States Supreme Court decisions confirm that *Marsh* cannot
7 be extended to support Plaintiff’s position despite *Marsh*’s broad language. Specifically, as
8 discussed below, although the Supreme Court initially appeared to expand the reach of *Marsh*
9 beyond the context of a company town in *Amalgamated Food Employees Union Local 590 v.*
10 *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Supreme Court quickly disavowed that
11 expansion in two subsequent decisions. In *Logan Valley*, the Supreme Court held that a privately
12 owned shopping center could not prohibit striking workers from picketing a store within the
13 shopping center because that prohibition violated the First Amendment rights of the picketing
14 workers. *Id.* at 325. In reaching this holding, the Supreme Court emphasized that the shopping
15 center was “open to the public to the same extent as the commercial center of a normal town” and
16 analogized the case to *Marsh*. *Id.* at 319. Specifically, the Supreme Court observed that the
17 shopping center was “clearly the functional equivalent of the business district of [the company
18 town] involved in *Marsh*.” *Id.* at 318. Further, the Supreme Court rejected the shopping center’s
19 argument that it was not a state actor because it was privately owned by “simply repeat[ing]” the
20 broad language in *Marsh* discussed above: ““The more an owner, for his advantage, opens up his
21 property for use by the public in general, the more do his rights before circumscribed by the
22 statutory and constitutional rights of those who use it.”” 391 U.S. at 325 (quoting *Marsh*, 326 U.S.
23 at 506).

24 Justice Black—who wrote the majority opinion in *Marsh*—authored a vigorous dissent in
25 *Logan Valley* asserting that the majority opinion had “completely misread[.]” *Marsh*. *Id.* at 332
26 (Black, J., dissenting). In particular, Justice Black argued that “[t]he question is, Under what

1 circumstances can private property be treated as though it were public? The answer that *Marsh*
 2 gives is when that property has taken on all the attributes of a town, i.e., ‘residential buildings,
 3 streets, a system of sewers, a sewage disposal plant and a business block on which business places
 4 are situated.’” *Id.* (quoting *Marsh*, 326 U.S. at 502). Justice Black further argued that “nothing in
 5 *Marsh* [] indicates that if one these features is present, e.g., a business district, this is sufficient for
 6 the Court to confiscate a part of an owner’s private property and give its use to people who want to
 7 picket on it.” *Id.* In Justice Black’s view, *Marsh* “dealt with the very special situation of a
 8 company-owned town” and “was never intended to apply” outside of that context. *Id.* at 330.

9 It took the United States Supreme Court all of eight years to explicitly overturn its holding
 10 in *Logan Valley* and adopt Justice Black’s dissent. First, four years after *Logan Valley*, in *Lloyd*
 11 *Corp. v. Tanner*, 407 U.S. 551 (1972), the Supreme Court addressed a situation that was very
 12 similar to *Logan Valley* and held that a privately owned shopping center could prohibit anti-
 13 Vietnam War protestors from distributing literature in the shopping center because it was not a
 14 state actor that was required to comply with the First Amendment. *Id.* at 570. In reaching this
 15 holding, the Supreme Court quoted Justice Black’s assertion in his *Logan Valley* dissent that
 16 *Marsh* ““was never intended to apply”” outside ““the very special situation of a company-owned
 17 town.”” *Id.* at 562–63 (quoting *Marsh*, 326 U.S. at 502). Further, the Supreme Court
 18 distinguished *Marsh* and rejected the argument that because the shopping center had “sidewalks,
 19 streets, and parking areas which are functionally similar to facilities customarily provided by
 20 municipalities,” “all members of the public, whether invited as customers or not, have the same
 21 right of free speech [in the shopping center] as they would have on the similar public facilities in
 22 the streets of a city or town.” *Id.* at 569. Specifically, the *Lloyd* Court observed that *Marsh*
 23 “involved the assumption by a private enterprise of all of the attributes of a state-created
 24 municipality and the exercise by that enterprise of semiofficial municipal functions as a delegate
 25 of the State,” such that “the owner of the company town was performing the full spectrum of
 26 municipal powers and stood in the shoes of the State.” *Id.* The *Lloyd* Court then explained that

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1 the privately owned shopping center that was open to the public in *Lloyd* involved “no comparable
2 assumption or exercise of municipal functions or power.” *Id.*

3 Second, although the United States Supreme Court did not explicitly overrule *Logan*
4 *Valley* in *Lloyd*, it did so four years after *Lloyd* in *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976).
5 Once again, like in *Logan Valley*, the Supreme Court was tasked with addressing whether a
6 privately owned shopping center that had prohibited labor union members from picketing in the
7 shopping center was a state actor that was required to comply with the First Amendment. *See id.*
8 at 508. Ultimately, the Supreme Court concluded that the privately owned shopping center was
9 not a state actor, and thus the picketers “did not have a First Amendment right to enter th[e]
10 shopping center for the purpose of advertising their strike.” *Id.* at 520–21. In reaching this
11 holding, the *Hudgens* Court explained that “the rationale of *Logan Valley* did not survive the
12 Court’s decision in the *Lloyd* case” and that “the ultimate holding in *Lloyd* amounted to a total
13 rejection of the holding in *Logan Valley*.” *Hudgens*, 424 U.S. at 518. Further, like in *Lloyd*,
14 *Hudgens* quoted at length from Justice Black’s *Logan Valley* dissent. *Id.* at 516–17. As the
15 Supreme Court would observe two years later in *Flagg Brothers*, *Hudgens* “adopted Mr. Justice
16 Black’s interpretation of the limited reach of *Marsh*” expressed in his *Logan Valley* dissent. *Flagg*
17 *Bros.*, 436 U.S. at 159.

18 In short, *Logan Valley*, *Lloyd*, *Hudgens*, and *Flagg Brothers* confirm that *Marsh*’s reach is
19 limited. *See also Cable Invs., Inc. v. Woolley*, 867 F.2d 151, 162 (3d Cir. 1989) (“*Marsh* has been
20 construed narrowly.” (citing *Flagg Bros*, 436 U.S. at 158–59, and *Hudgens*, 424 U.S. at 513–21));
21 *Faiaz v. Colgate Univ.*, 64 F. Supp. 3d 336, 353 (N.D.N.Y. 2014) (“The holding in *Marsh* has
22 been limited to the facts of that case.” (citing *Lloyd*, 407 U.S. at 561)). In light of the ill-fated (and
23 short-lived) extension of *Marsh* to privately owned shopping centers held open to the public and
24 the United States Supreme Court’s subsequent adoption of Justice Black’s view that *Marsh* “was
25 never intended to apply” outside “the very special situation of a company-owned town,” *Logan*
26 *Valley*, 391 U.S. at 330 (Black, J., dissenting), this Court is not convinced that *Marsh* can be

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1 extended to support Plaintiff’s contention that Defendants should be treated as state actors subject
2 to First Amendment scrutiny merely because they hold out and operate their private property as a
3 forum for expression of diverse points of view. Opp. at 18.

4 Plaintiff also cites to the United States Supreme Court’s recent opinion in *Packingham v.*
5 *North Carolina*, 137 S. Ct. 1730 (2017), but that case also does not support Plaintiff’s position. In
6 *Packingham*, the Supreme Court invalidated a North Carolina state law that made it a felony for a
7 registered sex offender to access any social media website that permitted minors to become
8 members as violative of the First Amendment’s Free Speech Clause. *Id.* at 1738. Although
9 *Packingham* spoke of “cyberspace” and “social media in particular” as “the most important places
10 . . . for the exchange of views” in modern society, *id.* at 1735–36, *Packingham* did not, and had no
11 occasion to, address whether *private social media corporations* like YouTube are state actors that
12 must regulate the content of their websites according to the strictures of the First Amendment.
13 Instead, as discussed above, *Packingham* concerned whether *North Carolina* ran afoul of the First
14 Amendment by enacting a statute that prohibited certain persons from using certain social media
15 websites. *See also Nyabwa v. Facebook*, 2018 WL 585467, *1 (S.D. Tex. Jan. 26, 2018)
16 (“Although the Court recognized in *Packingham* . . . that social media sites like Facebook and
17 Twitter have become the equivalent of a public forum for sharing ideas and commentary, the
18 Court did not declare a cause of action against a private entity such as Facebook for a violation of
19 the free speech rights protected by the First Amendment.”).

20 Plaintiff’s citations to *Denver Area Educational Telecommunications Consortium, Inc. v.*
21 *FCC*, 518 U.S. 727 (1996), and *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*,
22 473 U.S. 788 (1985), are unavailing for similar reasons. Although both cases mentioned that
23 public forums may include “private property dedicated to public use,” *see Denver Area*, 518 U.S.
24 at 749; *Cornelius*, 473 U.S. at 801, both cases addressed whether certain speech restrictions
25 enacted by the federal government violated the First Amendment. Specifically, *Denver Area*
26 involved a challenge to a federal statute regulating the broadcasting of offensive “sex-related

1 material on cable television,” 518 U.S. at 732, while *Cornelius* addressed a challenge to an
 2 executive order that excluded “legal defense and political advocacy organizations” from
 3 participating in a “charity drive aimed at federal employees.” 473 U.S. at 790. Therefore, neither
 4 case addressed the circumstances in which a private property owner must be treated as a state actor
 5 for constitutional purposes.

6 In sum, Plaintiff has not shown that Defendants have engaged in one of the “very few”
 7 public functions that were traditionally “exclusively reserved to the State.” *Flagg Bros.*, 436 U.S.
 8 at 158. Defendants do not appear to be at all like, for example, a private corporation that governs
 9 and operates all municipal functions for an entire town, *see Marsh*, 326 U.S. at 507–09, or one that
 10 has been given control over a previously public sidewalk or park, *see Evans v. Newton*, 382 U.S.
 11 296 (1966), or one that has effectively been delegated the task of holding and administering public
 12 elections, *see Smith v. Allwright*, 321 U.S. 649, 664 (1944). Instead, Defendants are private
 13 entities who created their own video-sharing social media website and make decisions about
 14 whether and how to regulate content that has been uploaded on that website. Numerous other
 15 courts have declined to treat similar private social media corporations, as well as online service
 16 providers, as state actors. *Howard v. Am. Online, Inc.*, 208 F.3d 741, 754 (3d Cir. 2000) (rejecting
 17 argument that AOL should be deemed a state actor because it is a “quasi-public utility” that
 18 “involves a public trust”); *Nyabwa*, 2018 WL 585467 at *1 (“Because the First Amendment
 19 governs only governmental restrictions on speech, Nyabwa has not stated a cause of action against
 20 Facebook.”); *Shulman v. Facebook.com*, 2017 WL 5129885, *4 (D.N.J. Nov. 6, 2017) (rejecting
 21 the plaintiff’s constitutional claims against Facebook for failure to sufficiently allege that
 22 Facebook is a state actor); *Kinderstart.com LLC v. Google, Inc.*, 2007 WL 831806, *13–15 (N.D.
 23 Cal. Mar. 16, 2007) (rejecting arguments that Google is a state actor for constitutional purposes);
 24 *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631–32 (D. Del. 2007) (finding that Google is a
 25 private entity that is “not subject to constitutional free speech guarantees” and asserting that the
 26 United States Supreme Court “has routinely rejected the assumption that people who want to

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1 express their views in a private facility, such as a shopping center, have a constitutional right to do
2 so”); *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 442 (E.D. Pa. 1996) (“AOL
3 has not opened its property to the public by performing any municipal power or essential public
4 service and, therefore, does not stand in the shoes of the State.”). The Court likewise declines to
5 find that Defendants in the instant case are state actors that must regulate the content on their
6 privately created website in accordance with the strictures of the First Amendment. As a result,
7 the Court concludes that Plaintiff has failed to state a claim against Defendants under the First
8 Amendment.

9 Accordingly, the Court GRANTS Defendants’ motion to dismiss (1) Plaintiff’s substantive
10 cause of action for violation of the First Amendment; and (2) Plaintiff’s claim for declaratory
11 relief, to the extent that it is premised on a violation of the First Amendment. The Court affords
12 leave to amend because Plaintiff may be able to allege sufficient facts to support a First
13 Amendment claim. *See Lopez*, 203 F.3d at 1127 (holding that “a district court should grant leave
14 to amend . . . unless it determines that the pleading could not possibly be cured by the allegation of
15 other facts” (internal quotation marks omitted)).

16 **b. Lanham Act**

17 Plaintiff also asserts a cause of action against Defendants for false advertising in violation
18 of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). Section 1125(a)(1)(B) forbids a person from
19 making any false or misleading statements of fact “in commercial advertising or promotion” that
20 “misrepresent[] the nature, characteristics, qualities or geographic origin of his or her or another
21 person’s goods, services, or commercial activities.” In order to prevail on a false advertising claim
22 under § 1125(a)(1)(B), a plaintiff must demonstrate: “(1) false statement of fact by the defendant
23 in a commercial advertisement about its own or another’s product; (2) the statement actually
24 deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is
25 material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false
26 statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a

1 result of the false statement, either by direct diversion of sales from itself to defendant or by a
 2 lessening of the goodwill associated with its products.” *Southland Sod Farms v. Stover Seed Co.*,
 3 108 F.3d 1134, 1139 (9th Cir. 1997) (citations omitted). For purposes of § 1125(a)(1)(B), a
 4 representation by a defendant amounts to “commercial advertising or promotion” only if it was (1)
 5 commercial speech; (2) made “for the purpose of influencing consumers to buy defendant’s goods
 6 or services”; and (3) “disseminated sufficiently to the relevant purchasing public to constitute
 7 ‘advertising’ or ‘promotion’ within that industry.” *Coastal Abstract Serv. Inc. v. First Am. Title*
 8 *Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999) (quoting *Gordon & Breach Sci. Publishers v. Am. Inst.*
 9 *of Physics*, 859 F. Supp. 1521, 1535–36 (S.D.N.Y. 1994)). However, the representation “need not
 10 be made in a ‘classic advertising campaign,’ but may consist instead of more informal types of
 11 ‘promotion.’” *Id.*

12 Although the section of Plaintiff’s complaint dedicated to the Lanham Act does not
 13 identify any specific representations made by Defendants, *see* Compl. ¶¶ 115–19, Plaintiff’s
 14 opposition to Defendants’ motion to dismiss points to a handful of discrete alleged instances of
 15 false advertising by Defendants. *Opp.* at 24. In particular, Plaintiff identifies (1) YouTube’s
 16 suggestion that some of Plaintiff’s videos are “inappropriate”; (2) YouTube’s policies and
 17 guidelines for regulating video content; (3) YouTube’s statement that “voices matter” and that
 18 YouTube is “committed to fostering a community where everyone’s voice can be heard”; (4)
 19 YouTube’s statement on its “Official Blog” that YouTube’s “mission” is to “give people a voice”
 20 in a “place to express yourself” and in a “community where everyone’s voice can be heard,” and
 21 that YouTube is “one of the largest and most diverse collections of self-expression in history” that
 22 gives “people opportunities to share their voice and talent no matter where they are from or what
 23 their age or point of view”; and (5) Defendants’ representations in the terms of the agreements
 24 between Plaintiff and Defendants that Defendants seek to “help you grow,” “discover what works
 25 best for you,” and “giv[e] you tools, insights and best practices for using your voice and videos.”
 26 *Id.* (citing Compl. ¶¶ 3, 11, 14, 28, 104, 112). The Court agrees with Defendants that Plaintiff has

1 failed to allege sufficient facts to support a Lanham Act false advertising claim based on any of
2 these representations. The Court addresses each representation in turn.

3 **i. Implying that Plaintiff’s Videos are “Inappropriate”**

4 Plaintiff appears to argue that Defendants engaged in false advertising by deciding to
5 exclude some of Plaintiff’s videos from YouTube’s Restricted Mode. Specifically, Plaintiff
6 asserts that “when Defendants restrict [Plaintiff’s] videos, they send clear but false signals to all
7 users and controllers of Restricted Mode that [Plaintiff’s] videos contain content that is
8 inappropriate for younger viewers.” Opp. at 25. However, as Defendants point out, Plaintiff has
9 not “pointed to anything that YouTube said publicly about its classification of those videos.”
10 Reply at 15. For example, there is no indication that in addition to ensuring that some of
11 Plaintiff’s videos are not accessible to Restricted Mode users, Defendants also publish statements
12 notifying Restricted Mode users that those specific videos have been deemed to be inappropriate
13 or unsuitable for certain viewers. *See, e.g., Darnaa, LLC v. Google, Inc.*, 2015 WL 7753406, *1
14 (N.D. Cal. Dec. 2, 2015) (rejecting a claim that “YouTube’s posting of a notice that [a] video had
15 been removed because it violated YouTube’s Terms of Service” amounted to false advertising in
16 violation of the Lanham Act). All that Plaintiff’s complaint alleges is that by restricting access to
17 some of Plaintiff’s videos, Defendants have falsely *implied*—or, in Plaintiff’s words, have “sen[t]
18 clear but false *signals*,” Opp. at 25—that those videos are inappropriate.

19 The Court does not see how the mere implications that flow from Defendants’ decisions to
20 restrict access to some of Plaintiff’s videos can constitute “commercial advertising or promotion”
21 within the meaning of the Lanham Act. 15 U.S.C. § 1125(a)(1)(B). Even assuming that these
22 implications can be considered false statements under § 1125(a)(1)(B), Plaintiff alleges no facts
23 that remotely suggest that Defendants restricted access to Plaintiff’s videos for any “promotional
24 purpose.” *Darnaa*, 2015 WL 7753406 at *8 (finding that allegations were insufficient to plausibly
25 suggest that YouTube’s notice that a video had been removed for violating YouTube’s terms of
26 service was published for a “promotional purpose”). Put another way, Plaintiff’s factual

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1 allegations do not plausibly suggest that Defendants restricted access to some of Plaintiff’s videos
2 “as part of an organized campaign to penetrate the relevant market,” which the Second Circuit has
3 stated is “the touchstone of whether a defendant’s actions may be considered ‘commercial
4 advertising or promotion’ under the Lanham Act.” *Fashion Boutique of Short Hills, Inc. v. Fendi
5 USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002). Further, there is no indication that word of Defendants’
6 restriction decisions regarding Plaintiff’s videos was “disseminated sufficiently to the relevant
7 purchasing public to constitute ‘advertising’ or ‘promotion’” by Defendants. *Coastal Abstract,*
8 173 F.3d at 735. As a result, Plaintiff has failed to state a cause of action under the Lanham Act
9 based on Defendants’ decisions to restrict access to some of Plaintiff’s videos.

10 **ii. YouTube’s Policies and Guidelines**

11 As discussed above, Plaintiff alleges that Defendants restrict access to content on YouTube
12 based on a number of policies and guidelines. These guidelines contain criteria “for determining
13 whether [the video’s] content warrants” some sort of restricted access. Compl. ¶ 42. For example,
14 the “Restricted Mode Guidelines” look to, among other things, whether a video contains
15 “[g]raphic descriptions of violence,” “inappropriate language,” and “[o]verly detailed
16 conversations about or depictions of sex or sexual activity.” *Id.*

17 In its opposition to Defendants’ motion to dismiss, Plaintiff appears to assert that these
18 policies and guidelines amount to false advertising on the part of Defendants. Opp. at 24 (“As
19 Defendants concede, the Complaint references YouTube’s policies and guidelines . . .”).
20 However, even assuming that the policies and guidelines could be considered “false statement[s]
21 of fact” *Southland Sod*, 108 F.3d at 1139, presumably on the theory that Defendants allegedly
22 apply them as a “pretext to censor and restrict [Plaintiff’s] speech,” Compl. ¶ 79, Defendants
23 correctly point out that Plaintiff has not alleged sufficient facts to plausibly suggest that these
24 policies and guidelines amounted to or were contained in “commercial advertising or promotion”
25 within the meaning of 15 U.S.C. § 1125(a)(1)(B). Mot. at 24. Like with Defendants’ decisions to
26 restrict access to some of Plaintiff’s videos, there is no indication from Plaintiff’s complaint that

1 Defendants’ policies and guidelines, which ostensibly inform YouTube’s users about the criteria
 2 Defendants use to regulate uploaded content on YouTube, were created and published for any
 3 “promotional purpose,” *Darnaa*, 2015 WL 7753406 at *8, or were disseminated as part of a “more
 4 informal type[] of ‘promotion,’” *Coastal Abstract*, 173 F.3d at 735, or were published as “part of
 5 an organized campaign to penetrate the relevant market.” *Fashion Boutique*, 314 F.3d at 57.
 6 Instead, Defendants’ policies and guidelines are more akin to instruction manuals for physical
 7 products, which “are not advertisements or promotions” within the meaning of § 1125(a)(1)(B).
 8 *Interlink Prods. Int’l, Inc. v. Cathy Trading, LLC*, 2017 WL 931712 (D.N.J. Mar. 9, 2017).

9 In addition to failing to allege that Defendants’ policies and guidelines constitute
 10 “commercial advertising or promotion,” Plaintiff has also failed to sufficiently plead that it “has
 11 been or is likely to be injured as a result of the” (allegedly false) policies and guidelines.
 12 *Southland Sod*, 108 F.3d at 1139. Although Plaintiff asserts that it has suffered injury in the form
 13 of “lower viewership, decreased ad revenue, a reduction in advertisers willing to purchase
 14 advertisements shown on Plaintiff’s videos, diverted viewership, and damage to its brand,
 15 reputation and goodwill,” Compl. ¶ 118, nothing in Plaintiff’s complaint suggests that this harm
 16 flowed directly from Defendants’ publication of their policies and guidelines. Instead, any harm
 17 that Plaintiff suffered was caused by Defendants’ decisions to limit access to some of Plaintiff’s
 18 videos, which, as the Court explained above, are not actionable as false advertisements under the
 19 Lanham Act. As a result, Plaintiff has failed to state a Lanham Act false advertising claim based
 20 on Defendants’ policies and guidelines.

21 **iii. YouTube’s Statements About Its Viewpoint Neutrality**

22 Next, Plaintiff alleges that Defendants violated the Lanham Act by falsely advertising
 23 YouTube “as a forum for open expression by diverse speakers” and “an equal and diverse public
 24 forum,” Compl. ¶ 117, when in reality Defendants engaged in viewpoint discrimination against
 25 Plaintiff. Opp. at 24. In particular, Plaintiff identifies the following statements made by
 26 YouTube: (1) “voices matter” and YouTube is “committed to fostering a community where

1 everyone’s voice can be heard,” Compl. ¶ 3; (2) YouTube’s “mission” is to “give people a voice”
2 in a “place to express yourself” and in a “community where everyone’s voice can be heard,” *id.* ¶
3 28 (quoting YouTube’s “Official Blog”); and (3) YouTube is “one of the largest and most diverse
4 collections of self-expression in history” that gives “people opportunities to share their voice and
5 talent no matter where they are from or what their age or point of view.” *Id.* (quoting YouTube’s
6 “Official Blog”).

7 The Court finds that all of these statements constitute mere “puffery” and are therefore not
8 actionable under the Lanham Act. *See Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038,
9 1053 (9th Cir. 2008) (affirming a district court’s finding that a statement amounted to “puffing”
10 that was non-actionable under the Lanham Act). “A statement is considered puffery if the claim is
11 extremely unlikely to induce consumer reliance,” *id.*, or if it is so vague that it is not “capable of
12 being proved false.” *Coastal Abstract*, 173 F.3d at 731. “Ultimately, the difference between a
13 statement of fact and mere puffery rests in the specificity or generality of the claim.” *Newcal*
14 *Indus.*, 513 F.3d at 1053. A statement that is “quantifiable, that makes a claim as to the ‘specific
15 or absolute characteristics of a product,’ may be an actionable statement of fact while a general
16 subjective claim about a product is non-actionable puffery.” *Id.* (quoting *Cook, Perkiss, & Liehe*
17 *v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990)); *see also Cook*, 911 F.2d at
18 246 (“In *Smith-Victor*, an advertiser’s statement that its lamps were ‘far brighter than any lamp
19 ever before offered for home movies’ was ruled puffery. However, when the advertiser quantified
20 numerically the alleged superior brightness with statements such as ‘35,000 candle power and 10-
21 hour life,’ the court found a potential Lanham Act claim.”).

22 None of the statements about YouTube’s viewpoint neutrality identified by Plaintiff
23 resembles the kinds of “quantifiable” statements about the “specific or absolute characteristics of a
24 product” that are actionable under the Lanham Act. *Newcal Indus.*, 513 F.3d at 1053. Rather, the
25 statements are vague representations about how YouTube is generally “committed to fostering a
26 community where everyone’s voice can be heard” and providing “opportunities” for people from

1 all over to share their diverse “point[s] of view.” Compl. ¶¶ 3, 28. The statements do not say
 2 anything specific about YouTube’s “mission” to “give people a voice,” and make no concrete and
 3 measurable guarantees or representations about the “opportunities” made available for people to
 4 express themselves “no matter where they are from or what their age or point of view.” *Id.* ¶ 28.
 5 As a result, the Court concludes that these statements are neither “[l]ikely to induce consumer
 6 reliance,” *Newcal Indus.*, 513 F.3d at 1053, nor “capable of being proved false,” *Coastal Abstract*,
 7 173 F.3d at 731, and are therefore non-actionable puffery under the Lanham Act.

8 Further, like with YouTube’s policies and guidelines, Plaintiff has not sufficiently alleged
 9 that it “has been or is likely to be injured as the result of the” statements about YouTube’s
 10 viewpoint neutrality. *Southland Sod*, 108 F.3d at 1139. As discussed above, any harm that
 11 Plaintiff suffered was caused by Defendants’ decisions to limit access to some of Plaintiff’s
 12 videos, which are also not actionable as false advertisements under the Lanham Act. For these
 13 reasons, the Court finds that Plaintiff has not sufficiently pled a false advertising claim under the
 14 Lanham Act based on Defendants’ statements about YouTube’s viewpoint neutrality.

15 **iv. Terms of Agreements Between Plaintiff and Defendants**

16 Finally, Plaintiff states that it relied on false representations contained in the terms of
 17 certain agreements between Plaintiff and Defendants, and argues that those representations amount
 18 to false advertising under the Lanham Act. Opp. at 24 (citing Compl. ¶ 112). Specifically,
 19 Plaintiff points to Defendants’ representations that Defendants endeavor to “help you grow,”
 20 “discover what works best for you,” and “giv[e] you tools, insights and best practices for using
 21 your voice and videos.” Compl. ¶ 112. Plaintiff alleges that these false representations induced
 22 Plaintiff to “cho[o]se YouTube as the host of its videos.” *Id.*

23 The Court finds that Plaintiff falls well short of stating a false advertising claim based on
 24 these representations. First, like the statements about YouTube’s viewpoint neutrality, these
 25 representations are vague, general statements about YouTube’s services that amount to no more
 26 than puffery. Once again, there is nothing quantifiable or specific about Defendants’ endeavor to

1 “help [Plaintiff] grow” and “giv[e] [Plaintiff] tools, insights and best practices.” Compl. ¶ 112.
2 The representations give no detail as to what specific “tools, insights and best practices” will be
3 provided and the ways in which Defendants will “help you grow.” As a result, these general
4 representations constitute puffery that is not actionable under the Lanham Act. *See Newcal Indus.*,
5 513 F.3d at 1053 (affirming a district court’s finding that a statement amounted to “puffing” that
6 was non-actionable under the Lanham Act).

7 Second, and more importantly, even if the representations in the agreement terms
8 amounted to more than mere puffery, Plaintiff lacks statutory standing to assert a Lanham Act
9 false advertising claim based on those representations. In *Lexmark International, Inc. v. Static*
10 *Control Components, Inc.*, 134 S. Ct. 1377 (2014), the United States Supreme Court took on the
11 task of determining “the appropriate analytical framework for determining a party’s standing to
12 maintain an action for false advertising under the Lanham Act.” *Id.* at 1385. The Supreme Court
13 explained that “a statutory cause of action extends only to plaintiffs whose interests ‘fall within the
14 zone of interests protected by the law invoked.’” *Id.* at 1388 (quoting *Allen v. Wright*, 468 U.S.
15 737, 751 (1984)). Then, the Supreme Court analyzed “the interests protected by the Lanham Act”
16 and surmised that the Act’s focus was clearly on protecting businesses against “unfair
17 competition”—that is, “injuries to business reputation and present and future sales.” *Id.* at 1389–
18 90. Based on this analysis, the Supreme Court held that “to come within the zone of interests in a
19 suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest
20 in reputation or sales.” *Id.* at 1390. Additionally, as relevant to the instant case, the Court further
21 explained that “[a] consumer who is hoodwinked into purchasing a disappointing product may
22 well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the
23 Lanham Act—a conclusion reached by every Circuit to consider the question.” *Id.*

24 As discussed above, Plaintiff’s complaint alleges that Defendants’ false representations
25 about “help[ing] you grow” and “giv[ing] you tools, insights and best practices for using your
26 voice and videos” induced Plaintiff to “cho[o]se YouTube as the host of its videos.” Compl. ¶

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1 112. Thus, to the extent that Plaintiff’s Lanham Act claim is based on these allegedly false
2 representations, Plaintiff is suing Defendants as a consumer of Defendants’ video-hosting services.
3 In other words, Plaintiff is clearly asserting that it was “hoodwinked” by Defendants’
4 representations “into [using] a disappointing” video-hosting service (YouTube). *Lexmark*, 134 S.
5 Ct. at 1390. However, the United States Supreme Court confirmed in *Lexmark* that a consumer in
6 Plaintiff’s position “cannot invoke the protection of the Lanham Act.” *Id.* For these reasons, the
7 Court concludes that Plaintiff has failed to state a Lanham Act claim based on the allegedly false
8 representations in the terms of agreements between Plaintiff and Defendants.

9 Accordingly, the Court GRANTS Defendants’ motion to dismiss (1) Plaintiff’s cause of
10 action for violation of the Lanham Act; and (2) Plaintiff’s claim for declaratory relief, to the extent
11 that it is premised on a violation of the Lanham Act. The Court affords leave to amend because
12 Plaintiff may be able to allege sufficient facts to support a Lanham Act claim. *See Lopez*, 203
13 F.3d at 1127 (holding that “a district court should grant leave to amend . . . unless it determines
14 that the pleading could not possibly be cured by the allegation of other facts” (internal quotation
15 marks omitted)).

16 **2. State Law Causes of Action**

17 Plaintiff’s remaining claims are based on state law. Specifically, Plaintiff asserts four
18 substantive state law causes of action for: (1) violation of Article I, section 2 of the California
19 Constitution; (2) violation of the Unruh Act; (3) violation of the UCL; and (4) breach of the
20 implied covenant of good faith and fair dealing. Further, Plaintiff’s claim for declaratory relief is
21 based in part on Defendants’ alleged violations of Article I, section 2 of the California
22 Constitution and the Unruh Act.

23 A federal court may exercise supplemental jurisdiction over state law claims “that are so
24 related to claims in the action within [the court’s] original jurisdiction that they form part of the
25 same case or controversy under Article III of the United States Constitution.” 28 U.S.C.
26 § 1367(a). Conversely, a court may decline to exercise supplemental jurisdiction where it “has

1 dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3); *see also*
 2 *Albingia Versicherungs A.G. v. Schenker Int’l, Inc.*, 344 F.3d 931, 937–38 (9th Cir. 2003) (as
 3 amended) (holding that Section 1367(c) grants federal courts the discretion to dismiss state law
 4 claims when all federal claims have been dismissed). In considering whether to retain
 5 supplemental jurisdiction, a court should consider factors such as “economy, convenience,
 6 fairness, and comity.” *Acri v. Varian Assocs.*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc)
 7 (citations and internal quotation marks omitted). However, “in the usual case in which all federal-
 8 law claims are eliminated before trial, the balance of factors . . . will point toward declining to
 9 exercise jurisdiction over the remaining state law claims.” *Exec. Software N. Am., Inc. v. U.S.*
 10 *Dist. Court*, 24 F.3d 1545, 1553 n.4 (9th Cir. 1994) (emphasis omitted), *overruled on other*
 11 *grounds by Cal. Dep’t of Water Res. v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008).

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

19 Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiff’s state
 20 law claims, and instead DISMISSES those claims.³ The Court provides leave to amend because
 21 Plaintiff may be able to plead a federal cause of action that warrants the Court’s exercise of
 22 supplemental jurisdiction.

23 **B. Plaintiff’s Motion for a Preliminary Injunction**

24
 25 ³ Although Plaintiff’s complaint invokes the Declaratory Judgment Act, *see* Compl. ¶ 24, that Act
 26 “does not by itself confer federal subject-matter jurisdiction.” *Nationwide Mut. Ins. Co. v.*
 27 *Liberatore*, 408 F.3d 1158, 1161 (9th Cir. 2005). As a result, Plaintiff’s citation to the Declaratory
 Judgment Act does not confer subject matter jurisdiction over Plaintiff’s state law claims.

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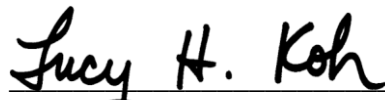
1 Plaintiff filed a motion for a preliminary injunction based on its causes of action for (1)
2 violation of the First Amendment; (2) violation of Article I, section 2 of the California
3 Constitution; (3) violation of the Unruh Act; (4) violation of the UCL; and (5) breach of the
4 implied covenant of good faith and fair dealing. ECF No. 24 at 2. However, the Court has already
5 dismissed the entirety of Plaintiff’s complaint with leave to amend. Thus, Plaintiff has not shown
6 that Plaintiff is “likely to succeed on the merits” of its claims. *Winter v. Natural Res. Def.*
7 *Council*, 555 U.S. 7, 20 (2008). As a result, the Court DENIES without prejudice Plaintiff’s
8 motion for a preliminary injunction. *See Physician’s Surrogacy, Inc. v. German*, 2017 WL
9 3622329, * 12 (S.D. Cal. Aug. 23, 2017) (denying without prejudice motion for preliminary
10 injunction because the court dismissed without prejudice all federal claims and declined to
11 exercise supplemental jurisdiction over the state law claims); *Shames v. Hertz Corp.*, 2008 WL
12 11318291, *5 (S.D. Cal. Apr. 8, 2008) (same).

13 **IV. CONCLUSION**

14 For the foregoing reasons, the Court GRANTS Defendants’ motion to dismiss Plaintiff’s
15 federal causes of action with leave to amend, DISMISSES Plaintiff’s state law claims with leave
16 to amend, and DENIES Plaintiff’s motion for a preliminary injunction without prejudice. Should
17 Plaintiff elect to file an amended complaint curing the deficiencies identified herein, Plaintiff shall
18 do so within thirty days of this Order. Failure to meet this thirty-day deadline or failure to cure the
19 deficiencies identified herein will result in a dismissal with prejudice of the deficient claims.
20 Plaintiff may not add new causes of action or parties without leave of the Court or stipulation of
21 the parties pursuant to Federal Rule of Civil Procedure 15.

22 **IT IS SO ORDERED.**

23
24 Dated: March 26, 2018



LUCY H. KOH
United States District Judge