

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ERIK MISHIYEV,

Plaintiff,

No. C 19-05422 WHA

v.

ALPHABET, INC.; XXVI HOLDINGS,
INC.; GOOGLE, LLC; YOUTUBE, LLC;
YOUTUBE ENTERTAINMENT
STUDIOS, INC.; and DOES 1 through 10,
inclusive,

Defendants.

ORDER DISMISSING ACTION

INTRODUCTION

In this action arising out of defendants’ allegedly wrongful removal of plaintiff’s videos from defendants’ video-sharing website, defendants move to dismiss. Because the parties’ agreement expressly authorized the allegedly wrongful conduct, as well as for other reasons stated below, the motion is **GRANTED**.

STATEMENT

Defendant YouTube, LLC, operated a popular video-sharing website of the same name through which users could post and view video content. YouTube allowed users to upload or view videos for free, in exchange for a nonexclusive license to host users’ videos. Certain users could make money from their videos through YouTube’s AdSense program: YouTube would display advertising in connection with a video and share advertising revenue with the

1 user who uploaded it. As viewers, users could subscribe to another user’s channel to keep up
2 to date with new videos (First Amd. Compl. (“Compl.”) ¶¶ 9–12).

3 Starting in 2007, Plaintiff Erik Mishiyev operated two such channels, uploading videos of
4 “original music, DJ mixes, and celebrity interviews.” Users viewed plaintiff’s videos over 110
5 million times and over 250,000 users subscribed to his two channels. Through participation in
6 the AdSense program, plaintiff purportedly earned over \$300,000 between 2012 and 2018, his
7 primary source of income. In 2019, however, YouTube terminated plaintiff’s account and
8 removed all of his videos. YouTube explained that it terminated plaintiff’s account due to
9 repeated copyright violations. The complaint, however, alleges that YouTube “did not simply
10 remove [plaintiff’s] content because of copyright claims, but instead in retaliation for placing
11 [YouTube] on notice that [plaintiff] was filing a lawsuit against them.” Notably missing from
12 the complaint are any allegations that plaintiff’s videos did not infringe others’ copyrights
13 (Compl. ¶ 11, 31).

14 At bottom, this action is about YouTube’s decision to terminate plaintiff’s account and
15 disable the channels associated with it. YouTube’s “Terms of Service” agreement governed
16 the terminated relationship. The agreement vested YouTube with significant control over the
17 operation of its service, including the ability to remove uploaded content (Compl. Exh. B).

18 Section 6.G, in part, disallowed infringing material and gave YouTube the power to
19 remove content that infringed upon another’s intellectual property rights:

20 YouTube does not permit copyright infringing activities and
21 infringement of intellectual property rights on the Service, and
22 YouTube will remove all Content if properly notified that such
23 Content infringes on another’s intellectual property rights.
24 YouTube reserves the right to remove Content without prior notice.

25 Section 7 of the agreement provided YouTube’s account termination policy:

- 26 A. YouTube will terminate a user’s access to the Service if,
27 under appropriate circumstances, the user is determined to
28 be a repeat infringer.
- B. YouTube reserves the right to decide whether Content
violates these Terms of Service for reasons other than
copyright infringement, such as, but not limited to,
pornography, obscenity, or excessive length. YouTube may
at any time, without prior notice and in its sole discretion,

1 remove such Content and/or terminate a user's account for
2 submitting such material in violation of these Terms of
3 Service.

4 Section 8 provided a procedure for copyright owners to notify YouTube if the owner
5 believed a user's video infringed upon the owner's copyrights. If the copyright owner dutifully
6 complied with the notification requirements, YouTube would remove the allegedly infringing
7 content pursuant to Section 6.G. Section 8 also allowed users to rebut the notice by submitting
8 a "counter-notice." Section 8.B provided (emphasis added):

9 If a counter-notice is received by the Copyright Agent, YouTube
10 *may* send a copy of the counter-notice to the original complaining
11 party informing that person that it *may* replace the removed Content
12 or cease disabling it in 10 business days. Unless the copyright owner
13 files an action seeking a court order against the Content provider,
14 member or user, the removed Content *may* be replaced, or access to
15 it restored, in 10 to 14 business days or more after receipt of the
16 counter-notice, *at YouTube's sole discretion*.

17 Beginning in March 2016, plaintiff began receiving copyright claims on his most
18 profitable videos. If plaintiff failed to respond, these claims would leave strikes on plaintiff's
19 channels. Tally three strikes and YouTube would terminate plaintiff's channel. For the time
20 being, plaintiff succeeded in rebutting the claims and restoring his videos (Compl. ¶ 15).

21 By 2017, over 100,000 people allegedly subscribed to plaintiff's channels. With access
22 to plaintiff's channels and videos restored, that number continued to increase. Nevertheless,
23 the views on each video plaintiff posted remained low when compared to similar channels with
24 fewer subscribers (Compl. ¶¶ 17, 18).

25 At this point, plaintiff became suspicious of YouTube for failing to distribute his videos
26 to his subscribers. To confirm whether YouTube distributed his videos, plaintiff demanded
27 that YouTube customer service provide plaintiff with a list of subscribers that clicked on or
28 watched his videos. The support team explained they could not provide such information
(Compl. ¶ 18, Exh. E).

Eventually, according to the complaint, plaintiff lost faith in YouTube's customer service
representatives and threatened litigation several times. The complaint points to an appended
exhibit containing one such conversation, apparently to support the allegation that plaintiff
threatened litigation. During the conversation, plaintiff berated a support representative and

1 explained that plaintiff would “expose” YouTube’s “corruption.” Plaintiff made no mention of
2 a lawsuit (Compl. ¶¶ 18–21, Exh. G).

3 The complaint alleges that on December 14, 2018, YouTube sent plaintiff a notice that
4 YouTube would be terminating his account and removing his videos due to plaintiff’s
5 “litigation threat.” In connection with this allegation, the complaint appended a May 2019
6 email from YouTube, rather than the December email. According to the May 2019 email
7 plaintiff decided to append, the December 14 email “outlined the actions [YouTube was]
8 taking to address [plaintiff’s] threats made to YouTube employees.” Those actions included
9 “termination of [plaintiff’s] YouTube Content Licensing Agreement and all channel
10 monetization, and revoking [plaintiff’s] access to creator support channels and YouTube
11 Spaces indefinitely” (Compl. Exh. H).

12 In the month following the December 14 notice, the complaint alleges that plaintiff
13 “became bombarded with copyright claims like he never had been before[.]” On January 22,
14 YouTube allegedly acted upon the copyright claims and blocked all public access to plaintiff’s
15 videos. Over the next month, plaintiff submitted several counter-notices. In an April email
16 appended to the complaint, YouTube explained that certain videos remained ineligible for
17 counter-notice because YouTube had already reviewed and rejected previous counter-notices
18 associated with those videos (Compl. ¶¶ 23–28, Exh. N).

19 According to the complaint, when plaintiff inquired further, YouTube retracted its
20 statement that the videos had been ineligible for counter-notice and agreed to process the
21 pending counter-notices. In support, the complaint appends a screenshot of an email YouTube
22 allegedly sent. This order pauses to note that although the complaint suggests YouTube
23 retracted its statement as to the *January 2019* counter-notices, the email appears to predate
24 those counter-notices. The email is dated September 24, but no year is included. We can rule
25 out September 2019, however, because plaintiff filed the original complaint with these
26 allegations and exhibits in August 2019. Thus, YouTube sent the email no later than
27 September 2018, months prior to submitting the January 2019 counter-notices (Compl. ¶¶ 28–
28 29, Exh. O).

1 In any event, the May 2019 email explained that YouTube disabled plaintiff's channel
2 because the channel received more than three copyright strikes and that the information
3 plaintiff provided in response to the copyright claims failed to show that plaintiff had the
4 necessary rights to post the content on YouTube. As such, the copyright strikes were "not
5 eligible" to be resolved. Based on that determination, YouTube explained that any new
6 counter-notices plaintiff submitted would be rejected automatically (Compl. Exh. H).

7 As discussed, the complaint alleges that YouTube actually removed the videos "in
8 retaliation for placing [YouTube] on notice that [plaintiff was] filing a lawsuit against
9 [YouTube.]" As a result of YouTube's decision to terminate his account, plaintiff lost "new
10 subscribers, views, future hits, performance bookings, and lost advertising and sponsorship
11 revenue" (Compl. ¶¶ 31–34).

12 Plaintiff filed this action in August 2019 in our San Jose division. Plaintiff alleged six
13 claims, including: (1) breach of contract, (2) intentional interference with prospective business
14 advantage, (3) interference with contractual relations, (4) negligence, (5) negligent interference
15 with prospective economic relations, and (6) injunctive relief.

16 In October 2019, before an order reassigned the action to the undersigned, Judge Davila
17 allowed plaintiff's counsel to withdraw without substitution of new counsel (Dkt. No. 11). The
18 action stalled while plaintiff sought new counsel. In December 2019, plaintiff's current
19 counsel substituted in (Dkt. No. 19).

20 Defendants now move to dismiss under Rule 12(b)(6). This order follows full briefing
21 and a hearing.

22 ANALYSIS

23 To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient
24 factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft*
25 *v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible when there are sufficient
26 factual allegations to draw a reasonable inference that defendants are liable for the misconduct
27 alleged. While a court must take all of the factual allegations in the complaint as true, it is "not
28 bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v.*

1 *Twombly*, 550 U.S. 544, 555 (2007). “Factual allegations must be enough to raise a right to
2 relief above the speculative level.” *Ibid*.

3 **1. BREACH OF CONTRACT.**

4 The complaint alleges that YouTube breached the parties’ agreement by declining to
5 restore plaintiff’s videos after YouTube removed them based on allegations of copyright
6 infringement. The agreement, however, authorized YouTube to do exactly that. “And if
7 defendants were given the right to do what they did by the express provisions of the contract
8 there can be no breach.” *Carma Dev. (Cal.) Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal.4th 342,
9 374 (1992).

10 Section 6.G provided that “YouTube [did] not permit copyright infringing activities and
11 infringement of intellectual property rights on the Service, and YouTube [would] remove all
12 Content if properly notified that such Content infringes on another’s intellectual property
13 rights.” Section 8.B provided an opportunity for users to rebut such a notice if they believed
14 the videos did not infringe the allegedly protected material. Importantly, however, once a user
15 submitted a counter-notice, the agreement reserved to YouTube’s sole discretion the decision
16 to take any further action, including whether to restore the videos or even to send the counter-
17 notice to the purported copyright owner. Thus, YouTube did not agree to act as a neutral
18 processor of notices and counter-notices. YouTube retained control to evaluate counter-notices
19 and infringement on its own.

20 The complaint omits any discussion of whether plaintiff maintained the necessary rights
21 to the materials in his videos. Instead, the complaint claims that YouTube had a separate,
22 wrongful purpose for removing the videos: Retaliation against plaintiff’s litigation threats.
23 Even taking the retaliation allegations as true, however, the complaint fails to overcome
24 YouTube’s express right to terminate plaintiff’s account for repeat copyright infringement.
25 *See Carma*, 2 Cal.4th at 374.

26 In his opposition brief, plaintiff relies on *Storek & Storek, Inc. v. Citicorp Real Estate,*
27 *Inc.*, 100 Cal. App. 4th 44, 57–61 (2002), for the proposition that the discretion the agreement
28 reserved to YouTube remained limited by the duty of good faith. *Storek*, however, held that

1 the covenant of good faith and fair dealing could not be implied so as to prohibit the defendant
 2 from doing what it remained expressly permitted to do under the parties' agreement. The
 3 defendant "had no duty to act in good faith when making its [discretionary determination]; it
 4 was required only to make an objectively reasonable determination."

5 Here, YouTube allowed plaintiff to post videos on its platform free of charge in exchange
 6 for a license to its content. Videos infringing intellectual property rights were verboten and
 7 YouTube determined that plaintiff did not have the necessary rights to use the content in his
 8 videos. Plaintiff does not dispute that determination. According to the only decision plaintiff
 9 relies on, our inquiry is over.

10 Because the agreement unambiguously forecloses plaintiff's contract claim, granting
 11 leave to amend would be futile. The breach of contract claim is **DISMISSED WITH PREJUDICE**.

12 The complaint also alleges that YouTube breached the agreement by failing to resolve
 13 continual technical difficulties that prevented the distribution of plaintiff's new content. That
 14 failure allegedly breached Section 6.F, which provides "YouTube will process any audio or
 15 audiovisual content uploaded by you to the Service in accordance with the YouTube Data
 16 Processing Terms . . . except in cases where you uploaded such content for personal purposes
 17 or household activities." The data processing terms, however, include no promise to distribute
 18 plaintiff's videos in any specific manner. Even if the data processing terms were applicable,
 19 plaintiff's claims are based on YouTube's decision to remove plaintiff's videos. Plaintiff does
 20 not and cannot allege that the purported technical difficulties caused the removal of the videos
 21 without severely contradicting the remaining allegations and the many exhibits appended to the
 22 complaint. So, amendment to patch up this theory would be futile (Compl. ¶ 19, Exh. B).

23 **2. THE NEGLIGENCE CLAIMS.**

24 The complaint fails to set forth a duty that can support plaintiff's negligence claims. The
 25 complaint alleges that YouTube "owed a duty to Plaintiff to exercise reasonable care to prevent
 26 causing harm to Plaintiff" and that YouTube "breached it [sic] duty by engaging in the conduct
 27 described" in the complaint (Compl. ¶¶ 60, 61). In California, "conduct amounting to a breach
 28 of contract becomes tortious only when it also violates a duty independent of the contract

1 arising from principles of tort law.” *Erlich v. Menezes*, 21 Cal.4th 543, 551 (1999). Plaintiff
2 does not plead the existence of any duty independent of YouTube’s contractual obligations.

3 In his opposition brief, plaintiff argues that his negligence claim and negligent
4 interference with economic relations claim are both supported by YouTube’s implied duty to
5 perform its contractual duties competently, relying for support on *Holguin v. Dish Network*
6 *LLC*, 229 Cal. App. 4th 1310, 1324 (2014). *Holguin* recognized the “well-settled principle that
7 express contractual terms give rise to implied duties, violations of which may themselves
8 constitute *breaches of contract*.” *Ibid.* (emphasis added). Although the duties are implied,
9 they remain contractual duties, not duties “independent of the contract arising from principles
10 of tort law.” *Erlich*, 21 Cal. 4th at 551. The negligence claims fail.

11 Plaintiff amended his complaint once and proposes another amended complaint appended
12 to his opposition brief. Neither amended complaint deviates substantively from the original
13 complaint. The opposition brief also fails to explain what changes could be made to the
14 current allegations to fix the deficiencies discussed. The negligence claims are **DISMISSED**
15 **WITH PREJUDICE**.

16 3. TORTIOUS INTERFERENCE CLAIMS AND INJUNCTIVE RELIEF.

17 To state a claim for intentional interference with contractual relations, a plaintiff must
18 allege: “(1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of
19 this contract; (3) defendant’s intentional acts designed to induce breach or disruption of the
20 contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5)
21 resulting damages.” *PG&E v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 (1990).

22 Plaintiff fails to identify any contract between himself and a third party. The complaint
23 alleges that plaintiff “had many subscribers which as a result thereof, the Plaintiff was making
24 money from said subscribers” and that YouTube “interfered with Plaintiff’s contractual
25 relationships with said subscribers by doing all of the acts and omissions alleged” in the
26 complaint (Compl. ¶44). To the extent the complaint alleges that a contractual relationship
27 arose between plaintiff and his subscribers based on the advertisement revenue the subscribers
28 generated and YouTube shared with plaintiff, this is a legal conclusion we need not accept as

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true. *Twombly*, 550 U.S. at 555. The money plaintiff earned “from” his subscribers came from YouTube pursuant to YouTube’s agreement with plaintiff.

The opposition brief fares no better. Plaintiff argues that had YouTube not removed his videos, plaintiff may have gained “new subscribers, views, future hits, performance bookings, and lost advertising and sponsorship revenue” (Compl. ¶ 34; Opp. At 7). To the extent these economic benefits are distinct from those provided by the parties’ agreement, they amount only to speculation.

Plaintiff’s claim for interference with prospective economic advantage similarly fails because the tort requires, in part, a specific economic relationship between plaintiff and a third party. *Westside Center Associates v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 521–522 (1996). Plaintiff specifies no such relationship.

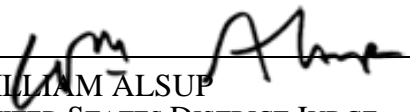
Finally, plaintiff’s claim for injunctive relief is misguided. “Injunctive relief is a remedy, not a cause of action.” *Ivanoff v. Bank of America, N.A.*, 9 Cal. App. 5th 719, 734 (2017). California does not recognize a standalone claim for injunctive relief. Because none of plaintiff’s claims for relief survive, his claim for injunctive relief fails too.

CONCLUSION

For the reasons stated above, defendants’ motion to dismiss is **GRANTED**. Amendment would be futile. The action is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

Dated: March 13, 2020.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE