SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

JAN LEWIS, Plaintiff, vs. YOUTUBE, LLC, Defendant,	Case No. 1-13-CV-256300 ORDER RE: DEFENDANT YOUTUBE LLC'S DEMURRER TO COMPLAINT

The demurrer to the complaint by defendant YouTube, LLC ("Defendant") came on for hearing before the Honorable Mary E. Arand on February 4, 2014 at 9:00 a.m. in Department 9. The matter having been submitted, after full consideration of the authorities submitted by each party, and arguments made by the parties in their papers and the hearing, the court makes the following rulings:

Jan Lewis ("Plaintiff") is a user of defendant YouTube, LLC ("Defendant") and posts videos of her musical group, the Remington Riders. (See complaint, ¶¶ 9-10.) There was no commercial component related to the videos posted on YouTube; however, she did extensively use the "share feature" of YouTube. (See complaint, ¶ 11.) It was this extensive over-sharing

that led to Defendant shutting down her YouTube channel since she violated the term of use that prohibited Plaintiff from "collect[ing] or harvest[ing] any personally identifiable information, including account names, from the Service... [and] us[ing] the communication systems provided by the Service (e.g. comments, email) for any commercial solicitation purposes." (Complaint, ¶ 12.) Plaintiff appealed her channel's deletion. (See complaint, ¶ 12.) On November 18, 2013, Plaintiff filed a complaint for breach of contract and "damages."

The Terms of Service

Attached to the complaint are the Terms of Service associated with using YouTube. Paragraph 1, subparagraph A of the Terms of Service, attached as Exhibit A to the complaint, specifically states that "YouTube's Community Guidelines, found at http://www.youtube.com/t/community_ guidelines... [are] incorporated herein by reference." (Complaint, exh. A, ¶ 1, subpara. A.) The Terms of Service also expressly state that users such as Plaintiff "agree that [they] will not submit to the Service any Content or other material that is contrary to the YouTube Community Guidelines, currently found at http://www.youtube.com/t/community_ guidelines, which may be updated from time to time...." (Complaint, exh. A, ¶ 6(E).) The YouTube Community Guidelines are clearly a proper subject of judicial notice. (See Evid. Code § 452, subd. (h); see also *Pacific Employers Ins. Co. v. State of Cal.* (1970) 3 Cal.3d 573, 575, fn.1 (stating that, where portions of agreement was attached as exhibit to plaintiff's complaint, the balance of that agreement was properly a subject of judicial notice); see also *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285 (Sixth District opinion stating that judicial notice of letter and media release was proper where, although they were not attached to the complaint, it 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"); see also *Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 130 (taking judicial notice of entire master lease of which portions were quoted in complaint); see also *Morton v. Loveman* (1968) 267 Cal. App. 2d 712, 717 (stating that "the pleader should not be allowed to by-pass a demurrer by suppressing facts which the court will judicially notice"); see also *Purcell v. Colonial Ins. Co.* (1971) 20 Cal. App. 3d

807, 810 (taking judicial notice of agreement that was filed as exhibit to answer because "[t]o fail to do so would be to ignore the pivotal factor in the proper resolution of this case... [and n]o useful or desirable end would result from such technical rigidity"); see also *In re Forchion* (2011) 198 Cal. App. 4th 1284, 1287 (taking judicial notice of content of website and any website to which it provides a link); see also *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1573, fn. 2 (taking judicial notice of computer printouts from website and online message board to show they existed in the public eye); see also *Scott v. JP Morgan Chase Bank* (2013) 214 Cal.App.4th 743, 753 (taking judicial notice of agreement posted on a government agency's website).)

The Terms of Service expressly state that:

- "YouTube reserves the right to discontinue any aspect of the Service at any time."
- "Content is provided to [the user] AS IS."
- Pursuant to the Terms of Service, the user agrees to not submit any Content—which is defined to include any text and interactive features such as posting comments or private messages via the share feature—that is contrary to the YouTube Community Guidelines, which in turn expressly states that "[i]t's not okay to post large amounts of untargeted, unwanted or repetitive content, including comments and private messages."
- "YouTube reserves the right to decide whether Content violates these Terms of Service for reasons other than copyright infringement."

The Terms of Service also includes an explicit Limitation of Liability provision that states that Defendant is not "liable to [Plaintiff] for any... damages whatsoever, resulting from [] any errors, mistakes, or inaccuracies of content... any interruption or cessation of transmission to or from Defendant's services... and/or any errors or omissions in any content...." (Complaint, exh.A, ¶ 10.)

Defendant demurs to the complaint on the ground that Plaintiff has not alleged an available remedy or damages. The Court notes that Plaintiff did not request leave to amend the complaint if demurrer is sustained, either in her opposition or at the hearing.

Specific performance is not available where there is no term of the agreement that requires Defendant to provide the remedy sought.

The first cause of action is for "breach of contract—specific performance" and seeks "a court order restoring [Plaintiff's] channel to its condition prior to YouTube's breach." (Complaint, ¶ 20.) Pursuant to Civil Code section 3384, specific performance of a contractual obligation may be compelled. (See Civ. Code § 3384.) The Court may only order the specific performance of a contract pursuant to its terms; if the contract's terms are indefinite, uncertain or incomplete, specific performance is not available as a remedy. (See *Martin v. Bank of San Jose* (1929) 98 Cal.App. 390, 397 (stating that if "the action is one looking toward a specific performance of the alleged agreement... [one must examine] the pleaded agreement as the basis of such relief"); see also *Colorado Corp. v. Smith* (1953) 121 Cal. App. 2d 374, 376 (stating that "[a] court must be able to say what is the stipulated performance"; also stating that "[w]here a party seeks specific performance of a contract, the terms of the contract must be certain and definite in all particulars essential to its enforcement"); see also *Boro v. Ruzich* (1943) 58 Cal.App.2d 535, 541 (stating that "when a contract is incomplete, uncertain or indefinite in its material terms... it will not be specifically enforced in equity"); see also *Federated Income Properties v. Hart* (1948) 84 Cal.App.2d 663, 665 (stating that "[i]t is well settled that an action for specific performance must fail unless the contract upon which it is based is shown to be complete and certain"); see also *Wilson v. Ward* (1957) 155 Cal.App.2d 390, 392 (stating that "[o]nly contracts which clearly express the intention of the parties may be specifically performed"); see also *Sackett v. Starr* (1949) 95 Cal.App.2d 128, 134 (stating that "[s]pecific performance will not be compelled unless there is a contract containing all the material terms").) Here, as Defendant argues, there is nothing pursuant to the Terms of Service that require Defendant to restore Plaintiff's channel to its condition prior to any purported breach.

Plaintiff's opposition failed to address this issue; however, at the hearing, Plaintiff's counsel argued that Plaintiff was seeking the enforcement of an inferred right pursuant to the contract. Plaintiff provided no authority to support this novel theory, and Plaintiff's argument is

counter to the weight of established authority on the matter. Specific performance is not available to Plaintiff where no provision can be found in the contract alleged to be enforced. (See *Pasqualetti v. Galbraith* (1962) 200 Cal.App.2d 378, 382 (stating that "[s]pecific performance is not a matter of absolute right, but rests within the sound discretion of the court, and is to be granted only in accordance with established principles of equity and always with reference to the facts of the particular case").) Accordingly, the demurrer to the first cause of action is SUSTAINED without leave to amend.

Plaintiff has not and cannot allege facts supporting any damages because the Terms of Service's Limitation of Liability provision prohibits such damages.

Defendant demurred to the second cause of action for damages, asserting that Plaintiff's "claims are plainly within the ambit of the [Limitation of Liability provision—Paragraph 10 of the Terms of Service]." (Def.'s memorandum in support of demurrer to complaint ("Def.'s memo"), p.12:15.) In its supporting memorandum, Defendant noted—and Plaintiff, in opposition, did not dispute, that "limitation of liability provisions have long been recognized as valid in California." (Def.'s memo, p.12:6-7, citing *Markborough Cal. v. Super. Ct. (J. Harlan Glenn & Associates)* (1991) 227 Cal. App. 3d 705, 714; see also Food *Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126 (stating same).) Defendant also argued in its memorandum that the provision was enforceable since the complaint specifically alleges that the Terms of Service are valid and binding on Plaintiff, and that there is no allegation of fraud or illegality. (See Def.'s memo, p.12:7-14.) Indeed, the complaint alleges that the "Terms of Service represent a binding written agreement between YouTube and its users… [and Plaintiff] accepted the Terms of Service and was bound by it." (Complaint, ¶¶ 8-9.)

In its tentative ruling, the Court agreed that the limitation of liability provision clearly limited any liability on Defendant's part, noting that it specified that Defendant is not "liable to [Plaintiff] for any… damages whatsoever, resulting from [] any errors, mistakes, or inaccuracies of content… any interruption or cessation of transmission to or from Defendant's services… and/or any errors or omissions in any content…." (Complaint, exh.A, ¶ 10.)

At the oral hearing, Plaintiff's counsel argued that the opposition sufficiently addressed the issue. However, Plaintiff's opposition merely contends that the limitation of liability provision "does not apply." (See Pl.'s memorandum of points and authorities in opposition to demurrer to complaint ("Opposition"), pp.9:13-27, 10:1-2.) The Court does not agree, and Plaintiff has not requested or provided a basis to amend the Complaint. (See *Goodman v. Kennedy* (1976)18 Cal. 3d 335, 349 (stating that "Plaintiff [or a defendant answering a complaint] must show in what manner he can amend his complaint [or answer] and how that amendment will change the legal effect of his pleading"), quoting *Cooper v. Leslie Salt Co.* (1969) 70 Cal. 2d 627, 636; see also *Hendy v. Losse* (1991) 54 Cal. 3d 723, 742 (stating that "the burden is on the plaintiff [or answering defendant]... to demonstrate the manner in which the complaint [or answer] might be amended").) The demurrer to the second cause of action for "damages" is SUSTAINED without leave to amend on this basis. (See *Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 (requiring damages as an element of a breach of contract claim).)

Plaintiff's second cause of action for "damages" also lacks merit because the complaint specifically alleges that "there was no commercial component" to the efforts in producing her videos as they were "strictly avocational on her part."

At the hearing on the demurrer, Plaintiff's counsel stated that Defendant reinstated Plaintiff's channel but without the video content. Plaintiff's counsel also conceded that Plaintiff still has her videos, but that she was seeking damages for her time and production costs of the videos. However, the Court restated its position set forth in the tentative ruling that although the complaint alleges that Plaintiff "has been damaged in an amount to be determined at trial... includ[ing] her out-of-pocket costs associated with producing the videos and the reasonable value of her time spent generating her original content and participating as a member of the YouTube community," the complaint also alleges that the work and money "producing the videos... was strictly avocational on her part; there was no commercial component." (Complaint, ¶ 11.) Plaintiff's counsel asserted that Plaintiff was nevertheless at least entitled to "nominal damages." However, Plaintiff's counsel failed to describe any factual basis to seek

even nominal damages. (See *Goodman v. Kennedy* (1976)18 Cal. 3d 335, 349 (stating that "Plaintiff [or a defendant answering a complaint] must show in what manner he can amend his complaint [or answer] and how that amendment will change the legal effect of his pleading"), quoting *Cooper v. Leslie Salt Co.* (1969) 70 Cal. 2d 627, 636; see also *Hendy v. Losse* (1991) 54 Cal. 3d 723, 742 (stating that "the burden is on the plaintiff [or answering defendant]... to demonstrate the manner in which the complaint [or answer] might be amended"); see Civ. Code § 3301 (stating that "[n]o damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin"); see also *Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 (stating that contract damages are "clearly ascertainable in both their nature and origin").)

Any damages based on the view counts, comments, URLs and any other digital information related to prior posting of the video were not reasonably foreseeable by the parties when the contract was entered into as a matter of law considering the language of the Terms of Service. (See *Erlich, supra,* 21 Cal.4th at p.550 (stating that "[c]ontract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable").) Moreover, even if such damages were reasonably foreseeable, they are expressly subject to the limitation of liability provision. Accordingly, the demurrer to the second cause of action for damages is SUSTAINED without leave to amend on this basis as well. (See *Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 (requiring damages as an element of a breach of contract claim).)

Defendant did not breach the Terms of Service by Deleting Plaintiff's Channel.

The complaint admits that Plaintiff "use[d] the 'share' feature of the website to share her videos with other users who she thought might like them." (Complaint, ¶ 11.) In response, Defendant deleted her channel because of this sharing. In opposition, Plaintiff acknowledges that the Community Guidelines prohibit the posting of "large amounts of untargeted, unwanted or repetitive content, including comments or private messages," but instead argues that "[n]othing indicates that the communications were either repetitive or unwanted." (Opposition,

p.17-20.) However, paragraph 7, subparagraph B of the Terms of Service specifically states that "YouTube reserves the right to decide whether Content violates these Terms of Service for reasons other than copyright infringement." (Complaint, exh. A, ¶ 7, subpara. B.) Both the Community Guidelines and the Terms of Service specifically provide that violations "can lead to account termination." (Community Guidelines, § 3 ("We Enforce These Guidelines"); see also complaint, exh. A, ¶ 7, subpara. A (stating that Defendant will terminate a user's access if the user is determined to be a repeat violator).)

In opposition, Plaintiff asserts that "Section 7.B has no application to this case... [because a]t no time has YouTube contended that there was anything inappropriate about Lewis' content, and nothing in the complaint indicates that there was." (Opposition, p.6:18-21.) However, "Content" as defined by the Terms of Content is not so limited as Plaintiff asserts: "'Content' includes the text... interactive features and other materials you may view on, access through, or contribute to the Service." (Terms of Service, ¶ 2, subpara. A.) Plainly, this definition of "Content" would encompass Plaintiff's "use [of] the 'share' feature of the website to share her videos with other users" that Defendant has determined to violate the Terms of Service. Plaintiff's argument is without merit.

In a footnote, Plaintiff also asserts that "section 4J, which permits [Defendant] to discontinue any aspect of its service... has no application here... [because] YouTube deleted Lewis' content; no aspect of its service was changed." (Opposition, p.6:26-28, fn. 2.) However, again, Plaintiff ignores the definition of "Service" as defined by the Terms of Service: "Service includes all aspects of YouTube, including but not limited to all products, software and services offered via the YouTube website, such as the YouTube channels...." (Complaint, exh. A, ¶ 2, subpara. A.) Here, Plaintiff's claim specifically arises out of Defendant's discontinuance of her channel. Again, Plaintiff's argument is without merit.

Judicially noticeable facts also indicate that Plaintiff lacks any damages.

Defendant requests judicial notice of the full email correspondence between parties—a portion of which is quoted by the complaint. As with the YouTube Community Guidelines referenced by the Terms of Service, the full exchange of emails similarly provide context for the

quoted excerpts provided in the complaint. (See Evid. Code § 452, subd. (d); see also *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285 (Sixth District opinion stating that judicial notice of letter and media release was proper where, although they were not attached to the complaint, it 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"); see also *Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 130 (taking judicial notice of entire master lease of which portions were quoted in complaint).)

In the emails attached to Defendant's Request for Judicial Notice, Plaintiff thanks Defendant for reinstating the channel, but asks Defendant to reinstate the videos with their original posting dates and original URLs. In opposition, Plaintiff does not dispute the authenticity of the emails; on the contrary, she discusses the substance of the emails to support her argument against the demurrer. Plaintiff does not dispute that Defendant has restored her channel with the exception of the original posting dates and original URLs of the videos. Indeed, she acknowledges that she "is seeking the return of her channel as it was prior to being removed." (Pl.'s opposition to demurrer, p.9:7-8.) Defendant's request for judicial notice of the emails is GRANTED.

As already stated, even without taking judicial notice of the email showing the crux of the dispute, Plaintiff fails to allege facts supporting damages as she alleges that the work and money "producing the videos... was strictly avocational on her part; there was no commercial component." Moreover, as previously stated, the Terms of Service's limitation of liability provision expressly proscribes recovery of "her out-of-pocket costs associated with producing the videos and the reasonable value of her time spent generating her original content and participating as a member of the YouTube community."

However, with judicial notice of the fact that the crux of the dispute is the "reinstate[ment of] the videos with their original posting dates and original [URL]s," it is even more clear that Plaintiff's purported damages are nonexistent considering the lack of any commercial component to the production of the videos, and even if nonexistent, any purported damages are within the scope of the limitation of liability provision prohibiting such damages. For this additional and

alternative reason, the demurrer to the second cause of action for damages is SUSTAINED without leave to amend.

Defendant shall prepare a judgment of dismissal consistent with this order.

February 21, 2014

Mary E. Arand
Judge of the Superior Court