



**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

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ORDER

JARED TAYLOR ET AL VS. TWITTER, INC.

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8 **SUPERIOR COURT OF CALIFORNIA**

9 **County of San Francisco**

10 Department No. 302

12 JARED TAYLOR and NEW CENTURY  
13 FOUNDATION,

14 Plaintiffs,

15 v.

16 TWITTER, INC.,

17 Defendant.

No. CGC-18-564460

ORDER DENYING PLAINTIFFS' MOTION  
FOR RECONSIDERATION OF THE  
SEPTEMBER 24, 2018 ORDER SUSTAINING  
TWITTER'S DEMURRER WITHOUT LEAVE  
TO AMEND TO THE THIRD CAUSE OF  
ACTION FOR VIOLATION OF THE UCL IN  
THE FIRST AMENDED COMPLAINT

19 A hearing was held on December 5, 2018 on the motion by plaintiffs Jared Taylor and  
20 New Century Foundation for reconsideration of my September 24, 2018 order sustaining without  
21 leave to amend defendant Twitter, Inc.'s demurrer to the third cause of action for violation of the  
22 Unfair Competition Law (UCL) in the first amended complaint. Noah Peters appeared for  
23 plaintiffs. Patrick Carome and Thomas Sprankling appeared for Twitter. At the conclusion of the  
24

1 hearing I took the motion under submission so that I could more fully consider the parties'  
2 written and oral arguments and issue a written decision.

3 After reviewing all published California decisions addressing section 230 of the  
4 Communications Decency Act (CDA) and dozens of published and unpublished federal  
5 decisions construing that section, I now issue this order denying the motion for reconsideration.  
6 Although nowhere near with the apparent certainty held by the Court of Appeal as expressed in  
7 its Order Issuing Alternative Writ of Mandate, I now believe that the broad interpretation of  
8 subsection 230(c)(1) by the California Supreme Court and Courts of Appeal requires my  
9 sustaining Twitter's demurrer to plaintiffs' UCL claim without leave to amend.

10 Plaintiffs' first amended complaint alleges three causes of action. The first and second  
11 causes of action allege that Twitter violated Sections 2 and 3 of Article I of the California  
12 Constitution and the Unruh Civil Rights Act by permanently suspending plaintiffs' Twitter  
13 accounts (thereby precluding plaintiffs from being able to communicate on Twitter's vast  
14 Internet platform) "based solely on their viewpoints and perceived political affiliations." (FAC  
15 ¶2).

16 Plaintiffs' third cause of action for violation of the UCL alleges that "portions of  
17 Twitters' Terms of Service purporting to give Twitter the right to suspend or ban an account 'at  
18 any time for any or no reason'" and other portions of Twitter's Terms of Service (TOS) are  
19 unconscionable. (FAC ¶100). Plaintiffs' UCL claim also alleged that Twitter made several "false  
20 and misleading representations" including that it "would respect the free speech rights of its  
21 users." (FAC ¶109).

22 At the conclusion of their FAC, plaintiffs prayed for injunctive relief barring Twitter  
23 from "enforcing its facially overbroad policy on 'Violent Extremist Groups,'" requiring Twitter  
24 to restore the accounts that were suspended based on that policy, and precluding Twitter from  
25

1 suspending accounts based on the user's viewpoints or perceived political affiliations. Plaintiffs  
2 also prayed for declaratory relief that Twitter violated the California Constitution, the Unruh Act,  
3 and the UCL.

4 By separate motions, Twitter moved to strike all three causes of action per the anti-  
5 SLAPP statute and demurred to all three causes of action. A hearing was held on June 14, 2018  
6 on the anti-SLAPP motion and demurrer. At the outset of the hearing I stated that my tentative  
7 rulings were to deny the motion to strike in its entirety and to sustain the demurrer without leave  
8 to amend to the first and second causes of action and overrule the demurrer to the third cause of  
9 action for violation of the UCL. After lengthy argument, I orally confirmed my tentative rulings.  
10 Written orders to the same effect were signed by me on July 10, 2018 and filed the next day.

11 On August 6, 2018 Twitter filed a petition for writ of mandate and/or prohibition in the  
12 Court of Appeal for the First Appellate District seeking to have my order overruling its demurrer  
13 to the UCL claim vacated. On August 17, 2018, Division One of that Court issued two  
14 documents entitled "Order Issuing Alternative Writ of Mandate" and "Alternative Writ of  
15 Mandate" commanding me to set aside and vacate the order overruling the demurrer to the UCL  
16 cause of action or "to appear and show cause before Division One of this court why a  
17 peremptory writ of mandate should not be granted." The Order explained why it "appear[ed]" to  
18 Division One that I had "erred" in overruling the demurrer to the UCL claim. In pertinent part,  
19 the Court stated:

20 Petitioner, Twitter, Inc., is a private internet communications platform that  
21 users can join and use for free. In 2011, real parties in interest Jared Taylor and  
22 New Century Foundation joined Twitter and created user accounts. At the time  
23 they joined Twitter, real parties agreed to Twitter's User Agreement, including  
24 Twitter's Terms of Service (TOS) and the Twitter Rules (Rules). At the time real  
25 parties joined the platform in June 2011, the TOS "reserve[d] the right at all times  
... to remove or refuse to distribute any Content on the Services and to terminate  
users or reclaim user names." Later versions of the TOS included an additional  
provision stating that Twitter "may suspend or terminate your accounts or cease

1 providing you with all or part of the Services at any time for any or no reason."  
2 Real parties allege that on October 2, 2017, the foregoing provision was amended  
3 to read: "We may also remove or refuse to distribute any Content on the Services,  
suspend or terminate users, or reclaim usernames without liability to you."

4 As of June 2011, when real parties joined Twitter, the Rules consisted of a  
5 three-page document that stated Twitter "will not censor user content, except in  
6 limited circumstances described below." There followed a list of exceptions  
7 including impersonation, trademark and copyright violations, and the misuse of  
8 others' private information. At the time, the exceptions did not include affiliation  
with a violent extremist group as a basis for suspension. The second paragraph of  
the Rules cautioned that to "make Twitter a better experience for all . . . [w]e may  
need to change these rules from time to time and reserve the right to do so. Please  
check back here [link to the webpage hosting the Rules] to see the latest."

9 On November 17, 2017, Twitter announced "updated . . . rules around  
10 abuse and hateful conduct as well as violence and physical harm, " to be enforced  
11 "starting December 18." This update added the Violent Extremist Group Rule,  
12 which states that users "may not affiliate with organizations that--whether by their  
own statements or activity both on and off the platform--use or promote violence  
13 against civilians to further their causes." Real parties allege that on December 18,  
2017, Twitter suspended their accounts and informed them that the accounts were  
permanently suspended "because the accounts were 'found to be violating . . . the  
Twitter Rules against being affiliated with a violent extremist group.' "...

14 Section 230(c)(1) states that "[n]o provider . . . of an interactive computer  
15 service shall be treated as the publisher or speaker of any information provided by  
another information content provider." Furthermore, subsection (e)(3) of section  
230 provides that "[n]o cause of action may be brought and no liability may be  
16 imposed under any State or local law that is inconsistent with this section."

17 Here, there appears to be no dispute that petitioner is the "provider . . . of  
an interactive computer service," and federal cases have treated it as such. (§  
230(f)(2); see *Pennie v. Twitter, Inc.* (N.D. Cal. 2017) 281 F.Supp. 3d 874, 888;  
18 *Fields v. Twitter, Inc.* (N.D. Cal. 2016) 217 F.Supp.3d 1116, 1121, *aff'd*, 881 F.3d  
739 (9th Cir. 2018).) Nor does there appear to be a dispute that real parties'  
19 postings are "information provided by another information content provider." (§  
230(c)(1), (f)(3); see *Hassell, supra*, 5 Cal.5th at p. 540.) The parties' dispute  
20 centers on whether real parties seek to impose liability on petitioner in its capacity  
as publisher.

21 " '[Section] 230 precludes courts from entertaining claims that would place  
22 a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a  
service provider liable for its exercise of a publisher's traditional editorial  
23 functions--*such as deciding whether to publish, withdraw, postpone or alter*  
*content*--are barred.' " (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 43 (*Barrett*),  
24 quoting *Zeran v. America Online, Inc.* (4th Cir.1997) 129 F.3d 327, 330, italics  
25

1 added.) *Barrett* also noted that one "important purpose of section 230 was 'to  
2 encourage service providers to self-regulate the dissemination of offensive  
3 material over their services.'" (*Barrett, supra*, at p. 44.) The immunity provided  
4 by section 230 was intended to shield service providers from the fear of liability  
5 that might deter them from " 'blocking and screening offensive material . . . ' "  
6 (*Ibid.*)

7 In *Hassell*, the Supreme Court reviewed judicial constructions of section  
8 230 and noted that courts have described the immunity the section confers as "  
9 'broad' " and " 'robust.' " (*Hassell, supra*, 5 Cal.5th at p. 535.) The high court  
10 explicitly rejected the plaintiffs' efforts "to avoid section 230 through the 'creative  
11 pleading' of barred claims . . . ." (*Id.* at p. 542.) It held that section 230 immunized  
12 Yelp from liability for what it described as "its ongoing decision to publish the  
13 challenged reviews." (*Ibid.*) The court concluded that the intent of section 230 is  
14 "to shield Internet intermediaries from the burdens associated with defending  
15 against state-law claims that treat them as the publisher or speaker of third party  
16 content, and from compelled compliance with demands for relief that, when  
17 viewed in the context of a plaintiff's allegations, similarly assign them the legal  
18 role and responsibilities of a publisher qua publisher." (*Id.* at p. 544; see also *id.* at  
19 p. 558 (conc. opn. of Kruger, J.) ["Section 230 forbids a cause of action or the  
20 imposition of liability when the effect is to impose liability for, or draw the  
21 provider into litigation to defend, its past editorial judgments (or lack thereof) in  
22 permitting third party postings."] *id.* at pp. 567-568 (dis. opn. of Cuéllar, J.)  
23 ["[S]ection 230 . . . confer[s] immunity . . . against a cause of action filed directly  
24 against the platform, seeking to hold it liable for conduct as the publisher of third  
25 party content."].)

15 Thus, we " 'must ask whether the duty that the plaintiff alleges the  
16 defendant violated derives from the defendant's status or conduct as a "publisher  
17 or speaker." If it does, section 230(c)(1) precludes liability.' " (*Cross v. Facebook,*  
18 *Inc.* (2017) 14 Cal.App.5th 190, 207 (*Cross*), quoting *Barnes v. Yahoo!, Inc.* (9th  
19 Cir. 2009) 570 F.3d 1096, 1102 (*Barnes*).) We observe that California courts have  
20 held that a service provider's decision "to restrict or make available certain  
21 material-is expressly covered by section 230." *Doe II v. MySpace, Inc.* (2009) 175  
22 Cal.App.4th 561, 573.) And federal courts have specifically ruled that a service  
23 provider's exercise of control over user accounts is immunized by section 230.  
24 (*Fields v. Twitter, Inc., supra*, 217 F.Supp.3d at p. 1124 ["[T]he decision to  
25 furnish an account, or prohibit a particular user from obtaining an account, is  
itself publishing activity."]; see also *Riggs v. MySpace, Inc.* (9th Cir. 2011) 444  
Fed.Appx. 986, 987 [claims "arising from MySpace's decisions to delete . . . user  
profiles on its social networking website yet not delete other profiles . . . were  
precluded by section 230(c)(1) of the Communications Decency Act."]; *Cohen v.*  
*Facebook, Inc.* (E.D.N.Y. 2017) 252 F.Supp.3d 140, 157 ["Facebook's choices as  
to who may use its platform are inherently bound up in its decisions as to what  
may be said on its platform, and so liability imposed based on its failure to  
remove users would equally derive[] from [Facebook's] status or conduct as a  
"publisher or speaker." ' "]; *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (N.D.

1 Cal. 2015) 144 F.Supp.3d 1088, 1094-1095 [CDA barred claim under title II of  
2 the Civil Rights Act of 1964 (42 U.S.C. § 2000a) alleging that Facebook "was  
3 motivated solely by unlawful discrimination" in blocking access to plaintiff's  
4 Facebook page in India; claim sought "to hold Defendant liable for Defendant's  
5 decision 'whether to publish' third-party content"].) Indeed, "any activity that can  
6 be boiled down to deciding whether to exclude material that third parties seek to  
7 post online is perforce immune under section 230." (*Fair Housing Council of San  
8 Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1170-  
9 1171 (en banc).)

10 That real parties allege a cause of action under the UCL does not place  
11 their claim outside the scope of immunity provided by the CDA. (See *Cross*,  
12 *supra*, 14 Cal.App.5th at pp. 196, 208; *Caraccioli v. Facebook, Inc.* (N.D. Cal.  
13 2016) 167 F.Supp.3d 1056, 1064.) Like the plaintiffs in *Cross*, real parties claim  
14 they are seeking to hold petitioner liable for statements or promises made in its  
15 TOS and Rules. (See *Cross, supra*, at pp. 200-201, 206-207.) But "[i]n evaluating  
16 whether a claim treats a provider as a publisher or speaker of user-generated  
17 content, 'what matters is not the name of the cause of action'; instead, what  
18 matters is whether the cause of action inherently requires the court to treat the  
19 defendant as the "publisher or speaker" of content provided by another.' " (Id. at p.  
20 207, quoting *Barnes, supra*, 570 F.3d at pp. 1101-1102.) Here, the duties real  
21 parties allege Twitter violated derive from its status or conduct as publisher  
22 because petitioner's decision to suspend real parties' accounts constitutes  
23 publishing activity. (*Cohen v. Facebook, Inc., supra*, 252 F.Supp.3d at p. 157;  
24 *Fields v. Twitter, Inc., supra*, 217 F.Supp.3d at pp. 1123-1124.) As *Hassell*  
25 reiterated, "lawsuits seeking to hold a service provider liable for its exercise of a  
publisher's traditional editorial functions-such as deciding whether to publish,  
withdraw, postpone or alter content-are barred." (*Hassell, supra*, 5 Cal.5th at p.  
536.)

Therefore, let an alternative writ of mandate issue commanding  
respondent San Francisco County Superior Court ... to set aside and vacate its  
order of July 10, 2018 order overruling part in part petitioner's demurrer to the  
first amended complaint of real parties in interest, and to enter a new and different  
order sustaining petitioner's demurrer in its entirety; or, in the alternative, to  
appear and show cause before Division One of this court why a peremptory writ  
of mandate should not be granted.

As I explained at the hearing on this motion for reconsideration, based solely on my  
reading of *Hassell* and the Order issued by the Court of Appeal, I remained of the view that I had  
correctly overruled the demurrer to the UCL claim because that claim was predicated on  
Twitter's speech, not content of others, which is beyond the purview of section 230. More  
specifically, I believed that the Court of Appeal was mistaken when it suggested that plaintiffs

1 did not dispute the required element for a section 230(c)(1) defense that the claim concerned  
2 third party content and when it stated that the “parties’ dispute centers on whether” the UCL  
3 claim “seeks to impose liability on petitioner in its capacity as publisher.” Nonetheless, and  
4 without the benefit of any legal research on the effect of an alternative writ, I believed I had no  
5 choice but to accede to the “command” of the Court of Appeal. Accordingly, on September 24,  
6 2018, the last day for me to do so and without prior notice to the parties or affording them an  
7 opportunity to be heard, I vacated my prior demurrer order and issued a new order sustaining  
8 Twitter’s demurrer as to all of plaintiffs’ causes of action.

9         At the time I issued the new order, I was unaware that plaintiffs’ counsel had sent me and  
10 unsuccessfully tried to file a letter dated August 27, 2018 urging me to take no action in response  
11 to the Alternative Writ. Among other things, the letter correctly cited *Brown, Winfield &*  
12 *Canzoneri, Inc. v. Superior Court* (2010) 47 Cal. 4<sup>th</sup> 1233 for two propositions that I did not  
13 know about at the time I issued the new order. The first proposition is that, notwithstanding the  
14 unqualified language “commanding” me to vacate my prior order or “to appear and show cause  
15 before Division One” (the latter option appearing to me to be untenable and beyond my role as a  
16 neutral adjudicator), the California Supreme Court in *Brown* held that the Alternative Writ was  
17 “not binding” and “in no way commands or otherwise obligates the lower court to follow the  
18 course of action suggested by the appellate court.” (*Id.* at 1238). The second proposition is that,  
19 “if a trial court is considering changing an interim order in response to an alternative writ, it must  
20 give the respective parties notice and an opportunity to be heard.” (*Id.* at 150, n. 10).

21         I did not learn of these two propositions until after the Court of Appeal, having received  
22 notice of my new order, discharged its Alternative Writ on October 4, 2018. The same day  
23 plaintiffs filed their motion for reconsideration, which is the subject of this order. The thrust of  
24 plaintiffs’ motion is that, because the Court of Appeal’s non-binding Alternative Writ was  
25



1 incorrect in stating that I had erred in overruling the demurrer to the UCL claim, I should not  
2 have issued my new order. Twitter opposed the reconsideration motion on both procedural and  
3 substantive grounds, arguing, among other things, that plaintiffs' motion did not meet the  
4 requirements of CCP 1008 for a reconsideration motion and that my new order was correct on  
5 the merits.

6 Prior to the hearing on the reconsideration motion, I sent a list of six issues I wanted  
7 counsel for the parties to address. In response to those issues, the parties agreed that I had the  
8 authority to entertain the motion for reconsideration even though the the Court of Appeal had  
9 taken action based on my new order by discharging its Alternative Writ.

10 The threshold issue on this motion is whether, per CCP 1008, there are "new or different  
11 circumstances" permitting me to revisit the propriety of the September 24, 2018 order sustaining  
12 without leave to amend the demurrer to the UCL cause of action. The answer is an emphatic yes.  
13 My failure to provide the parties with notice and opportunity to be heard prior to issuance of the  
14 September 24 order in clear contravention of *Brown* constitutes new or different circumstances  
15 within the meaning of section 1008. Even if it didn't, I would exercise my discretion per *Le*  
16 *Francois v. Goel* (2005) 35 Cal. 4<sup>th</sup> 1094 to treat plaintiffs' motion for reconsideration as an  
17 invitation to reconsider the correctness of the September 24 order on my own motion and I  
18 would accept that invitation. Not only should I reconsider the correctness of the September 24  
19 order due to my failure to comply with the requirements enunciated in *Brown*, as I stated at the  
20 hearing on this motion, I owe the parties an apology for that failure. I re-affirm my statements at  
21 the hearing that I am truly sorry for the additional time and expense that my failure to comply  
22 with *Brown* has caused the parties and their counsel.

23 I reject Twitter's argument that, notwithstanding whether or not I agree with the  
24 Alternative Writ, the best course is to leave the September 24 order intact to avoid yet another  
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1 writ by Twitter and so the parties can proceed directly to plaintiffs' likely appeal. While  
2 Twitter's preferred course may be the most efficient outcome, it feels to me like an abdication of  
3 my obligation in this, as in every case, to reach the legally correct decision. Because I now know,  
4 having read *Brown*, that I am not bound by the Alternative Writ, it seems wrong for me to adhere  
5 to the Alternative Writ unless by, my own independent determination, I conclude that the Court  
6 of Appeal's "strongly worded tentative ruling" expressed in its Alternative Writ is legally  
7 correct. (*Brown*, 47 Cal. 4<sup>th</sup> at 1245 and 1247 (explaining that a suggestive *Palma* notice, which  
8 is functionally identical to the Alternative Writ is "analogous to a tentative ruling and is "merely  
9 a recommendation – albeit a strongly worded one – that the trial court reconsider the order  
10 challenged by the writ petition in light of the circumstance that the Court of Appeal tentatively  
11 has concluded that the trial court erred"))).

12 In my list of issues sent to counsel and at the hearing on plaintiffs' motion for  
13 reconsideration I did not hide my then view disagreeing with the position taken by the Court of  
14 Appeal in its Alternative Writ. Since that hearing I have looked at the application of section 230  
15 to plaintiffs' UCL claim anew and have done so in light of my review of the extensive section  
16 230 case law.

17 The United States Supreme Court, the court with the authority to definitively interpret the  
18 CDA, has not yet weighed in on the interpretation of section 230. "[I]n the absence of a  
19 controlling United States Supreme Court opinion," this court is required to follow the published  
20 decisions of the California Supreme Court and the California Courts of Appeal construing  
21 section 230 and "the decisions of the lower federal courts, while persuasive, are not binding."  
22 (*Wagner v. Apex Marine Ship Management Corp.* (2000) 83 Cal. App. 4<sup>th</sup> 1444, 1451, quoting  
23 *Forsyth v. Jones* (1997) 57 Cal. App. 4<sup>th</sup> 776, 782-783, citing *People v. Bradley* (1969) 1 Cal. 3d  
24 80, 86; see also *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455 ("Courts  
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1 exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction”)  
2 and *Doe II*, 175 Cal. App. 4<sup>th</sup> at 571 (in construing section 230, federal circuit decisions are  
3 “persuasive ... not binding”).

4 The California Supreme Court addressed the interpretation of section 230 in two  
5 decisions: *Barrett* and *Hassell*. Neither of those cases involved a claim either factually or legally  
6 similar to plaintiffs’ UCL cause of action and thus neither provides a definitive construction of  
7 that section as applicable to plaintiffs’ UCL claim. But that does not mean, as I once thought,  
8 that *Barrett* and *Hassell* have little or nothing to offer on the resolution of Twitter’s section 230  
9 defense to plaintiffs’ UCL claim. *Barrett* and *Hassell* establish that, unless and until there is a  
10 United States Supreme Court decision to the contrary, California courts will give a very “broad”  
11 and “robust” construction to section 230. (*Barrett*, 40 Cal. 4<sup>th</sup> at 40 (section 203 confers “broad  
12 immunity for defamatory republications”); *Hassell*, 5 Cal. 5<sup>th</sup> at 535 (approvingly quoting a  
13 Ninth Circuit decision that “reviewing courts have treated § 230(c) immunity as quite robust”).

14 In rejecting distinctions between “publisher” and “distributor” and between “active use”  
15 and “passive use” for purposes of section 230’s application to defamation claims, *Barrett*  
16 unmistakably places California as a jurisdiction favoring wide application of section 230 even  
17 when doing so “has some troubling consequences” in allowing defamatory posts to remain on the  
18 Internet. (*Barrett*, 40 Cal. 4<sup>th</sup> at 40).

19 In rejecting the argument that an injunction order requiring a defamer to remove her Yelp  
20 postings treated Yelp as a forum administrator not a publisher, *Hassell* re-affirmed the broad  
21 scope of section 230 and arguably enlarged that scope. Reversing a decision of the court of  
22 appeal, *Hassell* faulted the court of appeal for adopting “too narrow a construction of section  
23 230.” (*Hassell*, 5 Cal. 5<sup>th</sup> at 527). In the passage that has the greatest pertinence to this case,  
24 *Hassell* stated that “Just as other court courts have rebuffed attempts to avoid section 230  
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1 through the ‘creative pleading’ of barred claims, we are not persuaded by plaintiff’s description  
2 of the situation before the court.” (*Id.* at 542, quoting *Kimzy v. Yelp! Inc.* (9<sup>th</sup> Cir. 2016) 836 F. 3d  
3 1263, 1266). To ensure that “creative pleading” in that case did not improperly impinge on a  
4 broad construction of section 230, *Hassell* looked at the practical reality of what the plaintiff  
5 sought, which was to hold Yelp “to account for ... its ongoing decision to publish the challenged  
6 reviews,” rather than the way the plaintiff framed her case. Based on that practical reality,  
7 *Hassell* held that what the plaintiff sought to do, and what the trial court ordered, ran afoul of the  
8 required broad construction of section 230.

9         The California Court of Appeal case that is probably the closest factually and legally to  
10 the plaintiffs’ UCL claim is *Demetriades v. Yelp, Inc.* (2014) 228 Cal. App. 4<sup>th</sup> 294, a case that at  
11 the hearing on this motion plaintiffs’ counsel argued was “devastating to the arguments” made  
12 by Twitter that the Alternative Writ correctly stated that section 230 barred the UCL claim.  
13 (December 5, 2018 Transcript at 28:18-20). *Demetriades* is not mentioned in the Alternative  
14 Writ Order and thus it is not possible to know whether the Court of Appeal considered  
15 *Demetriades* and, if so, what significance, if any, it believed *Demetriades* had for plaintiffs’ UCL  
16 cause of action. It is possible to distinguish the brief two paragraph discussion of section 230 in  
17 *Demetriades* on the ground that the plaintiffs in this case, unlike the plaintiff in *Demetriades*,  
18 seek injunctive relief regarding specific content of third parties. However, that distinction is an  
19 extremely thin reed not to follow *Demetriades* given that, much like plaintiffs’ third cause of  
20 action, the plaintiff in *Demetriades* alleged a UCL fraud prong claim that the host of an Internet  
21 forum made false and misleading statements about the postings of others.

22         A more intellectually sound approach and the one I endorse is that the section 230  
23 discussion in *Demetriades* is out of step with the California courts’ robust interpretation of  
24 section 230. I think a good a strong case can be made that the section 230 discussion in  
25

1 *Demetriades* has been impliedly overruled by the California Supreme Court's later decision in  
2 *Hassell*. *Demetriades* is difficult to reconcile with *Hassell*'s strong rejection of both a "narrow  
3 construction" of section 230 and "creative pleading" to avoid section 230 immunity.

4 Although the short discussion of section 230 in *Demetriades* quotes subsection 230(c)(1),  
5 it does not cite, much less discuss, any case law construing section 230. That brief discussion  
6 failed to take into account that the practical reality of the plaintiff's claimed harm in *Demetriades*  
7 was the decision of the Internet forum provider not to remove third party postings. That is, what  
8 was really going on in *Demetriades* is that the plaintiff restaurant operator was not happy with  
9 Yelp for "filtering" out "several positive reviews" of his restaurants and not "filtering" out  
10 reviews that made false statements" about plaintiff's restaurants. (*Id.* at 301-302). But instead of  
11 alleging a claim directly attacking Yelp's decisions not to post some reviews and to post other  
12 reviews, the plaintiff instead filed UCL and False Advertising Law claims that focused on what  
13 Yelp said about its manner and methods of filtering reviews for inclusion and exclusion on its  
14 website. In the words of *Hassell*, "[i]n substance," the plaintiff's claims in *Demetriades* sought to  
15 hold Yelp "to account for nothing more than its ongoing decision to publish the challenged  
16 reviews" and not to publish other reviews. (*Hassell*, 5 Cal. 5<sup>th</sup> at 542). Because section 230 as  
17 interpreted in *Hassell* precludes the *Demetriades* plaintiff from seeking to hold Yelp to account  
18 for its decisions to or not to publish reviews of others, notwithstanding his "creative pleading" of  
19 his claims as based on Yelp's own speech, *Hassell* has invalidated, albeit not expressly, the brief  
20 discussion in *Demetriades* stating that those claims are not barred by section 230. (*Price v.*  
21 *Superior Court* (2001) 25 Cal. 4<sup>th</sup> 1046, 1071 (recognizing that a later decision inconsistent with  
22 an earlier decision impliedly overrules the earlier decision)).

23 Even if the brief section 230 discussion in *Demetriades* was not impliedly overruled by  
24 *Hassell*, that discussion is *dicta* and thus is not binding precedent. *Demetriades* was an appeal of  
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1 a trial court's order granting an anti-SLAPP motion striking a UCL claim. In keeping with the  
2 familiar two prong analysis for an anti-SLAPP motion, the court addressed the threshold first  
3 prong issue of whether the claims alleged by the plaintiff arose from activity protected by the  
4 anti-SLAPP statute. After an extensive discussion of that issue, the court concluded that the  
5 commercial speech exemption to protected activity in CCP 425.17(c) applied to plaintiff's claims  
6 and thus the trial court erred in striking plaintiff's claims. At the end of its first prong discussion,  
7 the court stated that "As we conclude that plaintiff has established that his action is subject to the  
8 [commercial speech] exemption ... we need not ... consider the second prong ... analysis,  
9 namely whether plaintiff has a reasonable likelihood of prevailing on the merits." (*Id.* at 312).

10         Despite saying that it need not do so and without explaining why it was doing so, the  
11 *Demetriades* court proceeded to discuss the second prong issue of whether "section 230 bars  
12 plaintiff's claims." (*Id.* at 313). The section 230 discussion is thus *dicta* which, while it should  
13 not be ignored, must be followed only to the extent that it accurately reflects California's  
14 interpretation of section 230. Because the section 230 discussion in *Demetriades* is out of  
15 alignment with *Hassell* (as well as the Alternative Writ and two other California Court of Appeal  
16 decisions discussed below), I choose not to follow it.

17         Even if the section 230 discussion in *Demetriades* is treated as an alternate holding rather  
18 than *dicta* and was not impliedly overruled by *Hassell*, I would still not be required to follow it  
19 and would choose not to follow it because it is contrary to the better-reasoned, more faithful to  
20 *Barrett* and *Hassell* California Court of Appeal decisions in *Doe II* and *Cross*, both of which  
21 were cited in the Alternative Writ Order. (*Auto Equity Sales*, 57 Cal. 2d at 456 ("where there is  
22 more than one appellate court decision, and such appellate decisions are in conflict ... the court  
23 exercising inferior jurisdiction can and must make a choice between the conflicting decisions.")).

1 In *Doe II*, plaintiffs, girls under the age of eighteen who had been sexually assaulted by  
2 adults they met on the MySpace website, filed an array of claims alleging that MySpace failed to  
3 “institute reasonable measures to prevent older users from directly searching out, finding, and or  
4 communicating with minors.” (*Doe II*, 175 Cal. App. 4<sup>th</sup> at 565-66). After the trial court  
5 sustained a demurer to all of plaintiffs’ claims based on section 230, the plaintiffs filed an  
6 amended complaint which explicitly alleged that the claims therein did not “implicate” the CDA.  
7 (*Id.* at 565). Applying the same practical reality approach that *Hassell* would do nine years later,  
8 the court of appeal affirmed the trial court’s sustaining of a demurrer to all of plaintiffs’ claims  
9 without leave to amend. The court stated:

10 Given the general consensus to interpret section 230 immunity broadly,  
11 extending from *Zeran* to the Fifth Circuit's opinion in *Doe v. MySpace, Inc.*  
12 addressing identical facts and legal issues, we also conclude that section 230  
13 immunity shields MySpace in this case. That appellants [plaintiffs] characterize  
14 their complaint as one for failure to adopt reasonable safety measures does not  
15 avoid the immunity granted by section 230. It is undeniable that appellants seek to  
16 hold MySpace responsible for the communications between the Julie Does  
17 [plaintiffs] and their assailants. At its core, appellants want MySpace to regulate  
18 what appears on its Web site. Appellants argue they do not “allege liability on  
19 account of MySpace's exercise of a publisher's traditional editorial functions, such  
20 as editing, altering, or deciding whether or not to publish certain material, which  
21 is the test for whether a claim treats a website as a publisher under *Barrett*.” But  
22 that is precisely what they allege; that is, they want MySpace to ensure that sexual  
23 predators do not gain access to (i.e., communicate with) minors on its Web site.  
24 That type of activity—to restrict or make available certain material—is expressly  
25 covered by section 230....

(*Id.* at 573).

20 In much the same way as occurred in *Hassell*, the quoted passage shows that *Doe II*  
21 refused to accept, even on a demurrer, the way that the plaintiffs framed their case. Rather,  
22 utilizing what I have been referring to as a practical reality approach, *Doe II* focused on what  
23 was the real cause of the plaintiffs’ alleged harm vis-à-vis MySpace. Since that real cause was  
24  
25

1 MySpace's decision to publish third party content, all of plaintiffs' claims were barred by section  
2 230.

3 *Cross* is another example of a California Court of Appeal employing a practical reality  
4 approach to give effect to the broad scope of section 230 and not to allow the "creative" way that  
5 a plaintiff alleged his claims to avoid section 230 immunity. *Cross* reversed a trial court order  
6 denying an anti-SLAPP motion based on section 230 of three claims alleging that Facebook's  
7 TOS constituted an "explicit promise" that it would remove users' pages that included "credible  
8 threats of physical harm..." (*Cross*, 14 Cal. App. 5<sup>th</sup> at 201). Although the plaintiff Mikel Knight  
9 framed his claims as based on the speech of Facebook as set forth in its TOS, to effectuate  
10 California's robust construction of section 230, *Cross* focused on the reality that plaintiff's true  
11 complaint was with the Facebook pages containing hostile third party content, not with  
12 Facebook's own speech. The court stated:

13 In Knight's words, his "Complaint specifically alleges that Facebook is  
14 liable because of its *own promises and representations* to [Knight], not because of  
15 anyone else's statements. And the CDA does not immunize website providers for  
16 failing to adhere to legally enforceable promises such as the ones at issue here." Or, as Knight goes on, he does "not allege that Facebook is vicariously liable for the statements of any third parties," but rather "that Facebook failed to adhere to its own legally enforceable promise."...

17 This ... argument ... [lacks] merit ... In evaluating whether a claim treats  
18 a provider as a publisher or speaker of user-generated content, "what matters is  
19 not the name of the cause of action"; instead, "what matters is whether the cause  
20 of action inherently requires the court to treat the defendant as the 'publisher or  
21 speaker' of content provided by another." Put slightly differently, "courts must  
22 ask whether the duty that the plaintiff alleges the defendant violated derives from  
23 the defendant's status or conduct as a 'publisher or speaker.' If it does, section  
24 230(c)(1) precludes liability."

25 (*Id.* at 206-7) (citations omitted) (emphasis in original).

The quoted language shows that *Cross* looked beyond plaintiff's framing of his claims  
and, as was done in *Doe II*, *Cross* held that section 230 barred plaintiff's claims when those



1 claims were viewed from the perspective of what plaintiff was really complaining about. *Cross*  
2 has particular application to plaintiffs' UCL claim because in both cases the plaintiffs seek to  
3 avoid section 230 immunity based on the contention that their claims are based on the speech of  
4 an Internet provider about what it will or will not do regarding third party content.

5 Applying the practical reality approach that I have distilled from *Hassell, Doe II* and  
6 *Cross* to plaintiffs' UCL claim, section 230 bars that claim. A fair and practical reading of the  
7 FAC makes clear that plaintiffs' core beef with Twitter is that their accounts were permanently  
8 suspended based on Twitter's evaluation of the content of those accounts and plaintiffs'  
9 perceived political affiliations, not that Twitter made false and misleading statements about what  
10 it would allow on its platform or that its TOS is unconscionable. Indeed, the primary form of  
11 relief sought in the FAC is an injunction barring Twitter from enforcing a content-based  
12 policy and requiring it to restore plaintiffs' and others' accounts that were suspended based on  
13 that policy. As interpreted by California's courts, section 230 precludes this relief, regardless of  
14 whether the plaintiffs (as they did in their first and second causes of action) based their claims  
15 directly on Twitter's conduct removing plaintiffs' own speech or (as they "creatively" did in  
16 their third cause of action for violation of the UCL) based their claim on Twitter's own speech  
17 regarding its regulation of plaintiffs' speech.

18 My summaries of *Hassell, Doe II* and *Cross* also help explain where I went astray in  
19 believing until recently that the determinations of whether plaintiffs seek to hold Twitter liable as  
20 a publisher and whether plaintiffs' UCL claim is based on Twitter's speech or plaintiffs' own  
21 speech are distinct inquiries. As to plaintiffs' UCL claim, I now realize that these seemingly  
22 different issues are actually the same issue, merely expressed in different language. In the  
23 evaluation of plaintiffs' UCL claim, framing the salient question as whether Twitter is being  
24 treated as a publisher or whose speech is the basis for the claim, is a single indivisible question.

1           Because of my prior view that there were two distinct inquiries, I previously believed that  
2 the portion of the Alternative Writ Order stating that “The parties’ dispute centers on whether  
3 real parties seek to impose liability on petitioner in its capacity as publisher” mistakenly failed to  
4 appreciate plaintiffs’ argument that their UCL claim was based on Twitter’s speech, not third  
5 party content. With the benefit of a more careful reading of that Order, viewed against the prism  
6 of *Hassell*, *Doe II*, and *Cross*, I now understand that the quoted language from the Alternative  
7 Writ Order did not fail to appreciate plaintiffs’ position, but simply articulated the parties’  
8 disagreement in terms of one of the two ways to express a single dispute.

9           Based on the binding decisions of *Barrett*, *Hassell*, *Doe II*, and *Cross*, and my rejection  
10 of *Demetriades*, in the exercise of my independent judgment, I conclude that the reasoning in the  
11 Alternative Writ Order accurately reflects California courts’ interpretation of section 230. At the  
12 hearing on the motion for reconsideration counsel for plaintiffs candidly acknowledged that,  
13 were I to agree with the reasoning in the Alternative Writ, there was nothing more that his clients  
14 could allege that would enable them to avoid the bar of section 230. (December 5, 2018  
15 Transcript at 43:28-45:6). Thus, no useful purpose would be served by giving plaintiffs leave to  
16 amend and I re-affirm the portion of the September 24 order sustaining the demurrer to the UCL  
17 claim without leave to amend.

18           In arguing that their UCL claim fell outside the scope of section 230, plaintiffs relied not  
19 only on *Demetriades*, but also the Ninth Circuit decisions in *Barnes* (cited in the Alternative Writ  
20 Order) and *Doe v. Internet Brands* (9<sup>th</sup> Cir. 2016) 824 F. 3d 846 and several other published and  
21 unpublished federal decisions. *Barnes*, *Internet Brands*, and a few other federal decisions contain  
22 helpful language for plaintiffs, if not outright holdings in their favor. But those cases are only of  
23 persuasive value and must give way to the binding authority of the California court decisions.  
24 This is true even though *Barnes* and some of the other federal decisions supportive of plaintiffs’  
25

1 position have been cited and discussed by California courts. *Barnes*, *Internet Brands* and the  
2 other federal cases (as well as *Demetriades*) relied on by plaintiffs show that plaintiffs' argument  
3 that their UCL claim survives the defense of section 230 finds support in the text of that section,  
4 is far from frivolous, and might some day even be adopted by the United States Supreme Court.  
5 In the absence of a United States Supreme Court authoritative decision, my job is to apply the  
6 California courts' interpretation of section 230, not the interpretation of some lower federal  
7 courts (or a no longer good law decision of a California court).

8         As my own *dicta*, I note that the California courts' interpretation of section 230, as  
9 discussed in this order, is by no means an outlier and finds ample support in other federal  
10 decisions, some of which were cited in the Alternative Writ Order and some were not. (See, e.g.,  
11 *Doe v. Backpage.com* (1<sup>st</sup> Cir. 2016) 817 F. 3d 12, 19-20 (rejecting plaintiffs' characterization of  
12 their own allegations to avoid section 230 immunity and stating that "[t]he broad construction  
13 accorded to section 230 as a whole has resulted in a capacious conception of what it means to  
14 treat a website operator as the publisher or speaker of information provided by a third party");  
15 *Fair Housing Council*, 521 F. 3d at 1170-71 ("any activity that can be boiled down to deciding  
16 whether to exclude material that third parties seek to post online is perforce immune under  
17 section 230"); *Igbonwa v. Facebook, Inc.* (ND CA October 9, 2018) 2018 WL 4907632 \*7  
18 (where the real alleged harm to the plaintiff is the content of third party posts, section 230  
19 immunity applies); *Cohen*, 252 F. Supp. 3d at 156 ("Section 230(c)(1) is implicated not only by  
20 claims that explicitly point to third party content but also by claims which, though artfully  
21 pleaded to avoid direct reference, implicitly require recourse to that content to establish liability  
22 or implicate a defendant's role, broadly defined, in publishing or excluding third party  
23 communications"))).

1 For the reasons set forth above, plaintiffs' motion for reconsideration of the September  
2 24, 2018 order sustaining Twitter's demurrer to the third cause of action in the first amended  
3 complaint for violation of the Unfair Competition Law is denied.

4 IT IS SO ORDERED.

5 Dated: March 8, 2019



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6  
7 Harold Kahn  
Superior Court Judge

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on March 11, 2019 I served the foregoing DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE SEPTEMBER 24, 2018 ORDER SUSTAINING TWITTER'S DEMURRER WITHOUT LEAVE TO AMEND TO THE THIRD CAUSE OF ACTION FOR VIOLATION OF THE UCL IN THE FIRST AMENDED COMPLAINT on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: March 11, 2019

  
By: M. GOODMAN

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