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TWITCH INTERACTIVE, INC. and
SAMANTHA BRIASCO-STEWART

IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

BO SHANG,

Plaintiff,

v.

TWITCH INTERACTIVE, INC., and SAMANTHA BRIASCO-STEWART,

Defendants.

Case No. 24-cv-06664-TSH

(Removed from San Francisco County Superior Court, Case No. CGC-24-617303)

DEFENDANTS TWITCH INTERACTIVE, INC. AND SAMANTHA BRIASCO-STEWART'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES

Date: November 7, 2024
Time: 10:00 a.m.
Place: Courtroom E, 15th Floor

Hon. Thomas S. Hixson

NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 7, 2024 at 10:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Thomas S. Hixson in Courtroom E of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102, Defendants Twitch Interactive, Inc. ("Twitch") and Samantha Briasco-Stewart (collectively "Defendants") will and hereby do move this Court, under Federal Rule of Civil Procedure 12(b)(6), for an order dismissing with prejudice the Complaint filed by Plaintiff Bo Shang ("Plaintiff").

This Motion is made on the grounds that Plaintiff's claims fail as a matter for law for three reasons. ***First***, Plaintiff's claims against Twitch are barred by Section 230 of the Communications Decency Act. ***Second***, Plaintiff's claims against Twitch are barred by the First Amendment. ***Third***, Plaintiff fails to state any plausible claims against Twitch or Ms. Briasco-Stewart.

This Motion is based upon this Notice of Motion, the concurrently filed Memorandum of Points and Authorities, any reply memorandum or other papers submitted in connection with this Motion, the pleadings and other documents filed in this action, any matter of which this Court may properly take judicial notice, and such evidence and argument as may be presented at or before the hearing on this Motion.

Dated: September 30, 2024

Respectfully Submitted,

DAVIS WRIGHT TREMAINE LLP

By: /s/ *Megan C. Amaris*
Sanjay Nangia
Megan C. Amaris

Attorneys for Defendants
TWITCH INTERATIVE, INC. and
SAMANTHA BRIASCO-STEWART

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I. INTRODUCTION

For the past five years, Plaintiff Bo Shang has been engaging in a campaign of harassment, stalking, and threats against Defendant Twitch Interactive, Inc. ("Twitch") and its employees, including Defendant Samanatha Briasco-Stewart. Plaintiff has no relationship with Twitch or Ms. Briasco-Stewart, except as a Twitch user. Since 2019, Twitch has been forced to devote resources to blocking Plaintiff's harassing messages to Twitch employees' business and personal accounts, and securing its office locations and events in response to Plaintiff's threats of physical violence. Since January 2024, Plaintiff has sent Ms. Briasco-Stewart a barrage of threatening, harassing, and sexually explicit messages. Ms. Briasco-Stewart has obtained a restraining order, prohibiting Plaintiff from harassing, intimidating, stalking, threatening, contacting, or disturbing the peace of Ms. Briasco-Stewart. Under the restraining order, Plaintiff is further prohibited from coming within 100 yards of Ms. Briasco-Stewart and Twitch's office locations. Shortly after Ms. Briasco-Stewart filed her petition for a restraining order, Plaintiff initiated this lawsuit. Because this lawsuit fails to allege any plausible claims and is merely another attempt to further harass Twitch and Ms. Briasco-Stewart, the Court should dismiss the Complaint with prejudice.

First, Plaintiff's claims against Twitch are barred by Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230 ("Section 230"), which immunizes services like Twitch from liability for publishing or moderating third party content which, under established Ninth Circuit law, include decisions made to suspend or permit user accounts. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009), *as amended* (Sept. 28, 2009). ***Second***, Plaintiff's claims against Twitch are independently barred by the First Amendment, which protects Twitch's editorial decisions about speech it allows to be disseminated on its service, who may make that speech, and how Twitch enforces its content-moderation policies. ***Third***, Plaintiff fails to state any plausible claims against Twitch or Ms. Briasco-Stewart. For any and all of these reasons, the Complaint should be dismissed without leave to amend.

II. BACKGROUND & ALLEGATIONS

A. Background

Defendant Twitch Interactive, Inc. ("Twitch") is a popular livestreaming service that allows users to broadcast, share, arrange, and disseminate user-generated content. *See* Compl. (Dkt. 1-1) at 5.[1] At all relevant times, Defendant Samantha Briasco-Stewart was an employee of Twitch. *Id.* at 14. Plaintiff Bo Shang has no relationship with Twitch or Ms. Briasco-Stewart, except as a user of Twitch's service.

Since January 2024, Plaintiff has been repeatedly contacting and harassing Twitch and Ms. Briasco-Stewart. *See* Compl. at 20. In response to Plaintiff's repeated contact and harassment, Ms. Briasco-Stewart was forced to seek a civil harassment restraining order in July 2024. Compl. at 21; *see also* Request for Judicial Notice ("RJN") Ex. A (Petition for Civil Harassment Restraining Order). In support of her petition, Ms. Briasco-Stewart produced evidence of sexually explicit, threatening, and harassing emails, voicemails, and text messages from Plaintiff. RJN Ex. B (Declaration of Samantha Briasco-Stewart). As a result of Plaintiff's harassment, Ms. Briasco-Stewart has suffered severe emotional distress and has been forced to take multiple days off work. Compl. at 20. In issuing the restraining order, the court concluded that Ms. Briasco-Stewart had established a sufficient basis for her petition and found it was "based on unlawful violence, a credible threat of violence or stalking." RJN Ex. C ("Restraining Order"). Ms. Briasco-Stewart currently has a five-year civil harassment restraining order against Plaintiff, prohibiting Plaintiff from harassing, intimidating, stalking, threatening, contacting, or disturbing the peace of Ms. Briasco-Stewart. *Id.* at 5. Plaintiff is further prohibited from coming within 100 yards of Ms. Briasco-Stewart and Twitch's office locations. *Id.*

B. The Allegations

On August 19, 2024, Plaintiff, appearing *pro se*, filed a Complaint in San Francisco Superior Court against Defendants Twitch and Ms. Samantha Briasco-Stewart. *See generally* Compl. Plaintiff appears to allege several federal and state claims: (1) a First Amendment

[1] Because the Complaint does not consistently use paragraphs throughout, Defendants cite to the ECF-generated page numbers.

violation, (2) a Fourteenth Amendment violation, (3) a claim under the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, and (4) a negligence claim. Plaintiff asserts the following theories of liability.

Plaintiff alleges that he began using Twitch in 2017 when he created an account to follow Twitch streamer, Pokimane. Compl. at 15. Plaintiff alleges that Pokimane promised "everlasting love and appreciation" as part of her subscription. *Id.* He alleges that he subscribed to Pokimane for these "promised perks," which he never received. *Id.* And that Twitch "allows such false advertising to continue" to "generate more revenue from the naïve and desperate users who hope to find love and validation from their online idols." *Id.* at 11. Plaintiff claims that the failure to provide Plaintiff with Pokimane's "everlasting love and appreciation" amounts to deceptive and unfair business tactics under California Business and Professions Code section 17200. *Id.* at 15.

Separately, Plaintiff alleges that he observed "unethical and illicit activities" on Twitch, "such as stalking and harassment conducted by different users and broadcasters associated with Twitch." Compl. at 15. He does not identify these users and broadcasters. He further alleges that he "faced ongoing harassment and stalking by persons linked to Twitch, involving cyberattacks on their devices and tampering with software applications," but does not explain what the harassment involved or provide specifics about the alleged stalking. *Id.* Plaintiff claims that as a result of the harassment, he was unlawfully detained at Tewksbury Hospital from 2020 to 2021, "a facility masquerading as a mental health institution." *Id.* Plaintiff alleges that he reported the harassment to Tewksbury Hospital and was "informed . . . that every piece of harassment was imaginary psychosis of amphetamine." *Id.* at 23. Plaintiff alleges that beginning in January 2024, he repeatedly contacted Ms. Briasco-Stewart—a Twitch employee—about the alleged harassment on Twitch's service. *Id.* at 20. Plaintiff claims Ms. Briasco-Stewart did not respond to him but enabled read receipts to "mock and intimidate" Plaintiff because "no reasonable person would send such read receipts by default." *Id.* at 20, 22. And that these "read receipts constitute evidence of Defendant Briasco-Stewart's knowledge and involvement in the harassment and cyberattacks." *Id.* at 22.

Plaintiff alleges that he then signed up for another Twitch account that was indefinitely suspended for fraud in August 2024. Compl. at 6. Plaintiff alleges that his account was wrongfully suspended because he "conducted no fraud." Compl. at 7. He alleges that "Twitch screws around while claiming to enforce their Terms of Service without illegal bias." *Id.* He further claims that Twitch's Terms of Service are unconscionable and unenforceable because "they grant Twitch unlimited and arbitrary power to terminate, suspend, or modify user accounts and content, without providing any notice, explanation, or opportunity to appeal." *Id.* at 5. Plaintiff further alleges that Twitch favors certain streamers and content creators and that Twitch censors user content and communications "based on its own agenda, preferences, or biases." *Id.* at 8.

Plaintiff seeks $200,000 in compensatory damages for negligence in responding to harassment that allegedly resulted in his hospitalization and $5 million in punitive damages. Compl. at 23. Plaintiff also seeks, among others, a court order "mandating Twitch to adjust their business operations for societal economic benefit or halt activities." *Id.*

On September 23, 2024, Defendants timely removed to this Court based on federal question jurisdiction. *See* Dkt. 1. Defendants now move to dismiss Plaintiff's baseless Complaint with prejudice.

III. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Dismissal is appropriate "where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). Courts require "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim for relief requires "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The plausibility inquiry is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Dismissal should be with prejudice where amendment would be futile. *See, e.g.*, *Ctr. for Biological Diversity*

v. U.S. Forest Serv., 80 F.4th 943, 956 (9th Cir. 2023). Although pro se complaints are to be liberally construed, pro se plaintiffs are nonetheless "required to meet these pleading standards, just like every other plaintiff." *Bayer v. City & Cnty. of San Francisco*, 2023 WL 1975245, at *1 (N.D. Cal. Feb. 13, 2023).

IV. ARGUMENT

Plaintiff's claims fail for three reasons. First, Section 230 of the Communications Decency Act ("Section 230") bars Plaintiff's claims against Twitch relating to his use of and any activities on Twitch. Second, the First Amendment bars Plaintiff's claims against Twitch relating to his use of and any activities on Twitch. Third, Plaintiff's claims against either Defendant fail for a variety of other independent grounds. Because amendment would be futile, the Court should dismiss the Complaint without leave to amend.

A. Section 230 Bars Plaintiff's Claims against Twitch.

Section 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Section 230(e)(3) gives teeth to this intent by stating unequivocally that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). Section 230 is to be "construed broadly, 'to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.'" *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 206 (2017) (citation omitted). Crucially, Section 230 bars claims based on a service provider's decisions about "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content," including claims based on a service provider's decisions made to suspend or permit third party user accounts. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 and 1103 (9th Cir. 2009).

"This guidance emphasizes that Section 230(c)(1) is implicated not only by claims that explicitly point to third party content but also by claims which, though artfully pleaded to avoid direct reference, implicitly require recourse to that content to establish liability or implicate a defendant's role, broadly defined, in publishing or excluding third party [c]ommunications."

Gonzalez v. Google, Inc., 282 F. Supp. 3d 1150, 1164 (N.D. Cal. 2017) (citation omitted). This rule prevents plaintiffs from using "'artful pleading' to state their claims only in terms of the interactive computer service provider's own actions, when the underlying basis for liability is unlawful third-party content published by the defendant." *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 724 (Wis. 2019) (citation omitted); *accord M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1058 (E.D. Mo. 2011) (dismissing claims "artfully and eloquently" pleaded "to avoid the reach of § 230"). And because Section 230 "protect[s] websites not merely from ultimate liability, but [also] from having to fight costly and protracted legal battles," *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008), the immunity attaches "at the earliest possible stage of the case," *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009)—including on motions to dismiss, *e.g.*, *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010).

Section 230 immunity is governed by a three-part text. The statute bars any claim where: (1) the defendant is an "interactive computer service"; (2) the claim would treat the defendant as the "publisher" of content; and (3) that content was "provided by *another* information content provider." *Barnes*, 570 F.3d at 1100–01 (emphasis added). Plaintiff's allegations here unambiguously establish that each element is satisfied here.

1. Twitch is an interactive computer service.

An "interactive computer service" includes any "system" that "provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2); *see, e.g., Dyroff v. Ultimate Software Grp., Inc.,* 934 F.3d 1093, 1097 (9th Cir. 2019) ("We interpret the term 'interactive computer service' expansively."). Here, the Complaint alleges that Twitch is "a leading platform for streaming video games and other content." Compl. at 5. These allegations alone establish the definition in Section 230(f)(2). *See Winter v. Facebook, Inc.*, 2021 WL 5446733, at *4 (E.D. Mo. Nov. 22, 2021) (videosharing and social media applications were interactive computer services); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016) ("Today, the most common interactive computer services are websites.") (citation omitted); *Barnes*, 570 F.3d at 1101 (finding "no trouble" concluding that Yahoo was an interactive computer service);

Jurin v. Google Inc., 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010) (finding Google is an interactive computer service); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 n.7 (2002) (finding eBay treated as service provider). Twitch, as the operator of a website that provides a service for community members to gather and watch, play, and chat about shared interests, easily satisfies the first prong of the Section 230 test.

2. Plaintiff's claims impermissibly treat Twitch as the "publisher."

The Ninth Circuit construes the phrase "treated as the publisher" to reach any claim that "involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102. What matters "is not the name of the cause of action," but whether the substantive "duty" the claim seeks to impose "inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.* at 1101–02. A plaintiff accordingly "cannot sue someone for publishing third-party content simply by changing the name of the theory." *Id.* at 1102; *see, e.g.*, *Roommates.com*, 521 F.3d at 1170–71 ("any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230"); *Morton v. Twitter, Inc.*, 2021 WL 1181753, at *5 (C.D. Cal. Feb. 19, 2021) (Section 230 barred breach of contract and fraud claims where plaintiff alleged Twitter failed to suspend accounts and remove pornographic content); *King v. Facebook, Inc.,* 2019 WL 4221768, at *2–3 (N.D. Cal. Sept. 5, 2019) (dismissing breach of contract, fraud, violation of the UCL, and other claims, premised on allegations that account suspension violated terms of service, where "[e]ach of [plaintiff's] claims against Facebook seeks to hold it liable as a publisher"), *aff'd*, 845 F. App'x 691, 692 (9th Cir. 2021); *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 36 (2021) (plaintiff's contract claim was barred by Section 230 where plaintiff alleged "Twitter's terms of service are substantively unconscionable because Twitter could use them to suspend or terminate user accounts for petty, arbitrary, irrational, discriminatory, or unlawful reasons," and are "unreasonably favorable to the more powerful party" and "unfairly one-sided").

Here, Plaintiff's allegations and claims all stem from the same protected publisher conduct—the publication, monitoring, or removal of content by Plaintiff or other third-party users

on Twitch. Specifically, Plaintiff argues that Twitch indefinitely suspended Plaintiff's account without cause. Compl. at 6–7. Just as in *Murphy v. Twitter*, Plaintiff challenges the applicable terms of service and seeks an injunction "prohibiting Twitch from enforcing its Terms of Service, Privacy Policy, and Community Guidelines against the plaintiff" and "requiring Twitch to restore the plaintiff's account, content, and chat privileges, and to refrain from further interfering with his use of the service." Compl. at 24. Finally, Plaintiff lodges claims against Twitch for its role in publishing and transmitting third-party user-generated content that (1) allegedly contained an unfulfilled promise by another Twitch user to provide him with "everlasting love and appreciation" (Compl. at 11, 15), and (2) allegedly harassed him (Compl. at 14–15, 23). These claims and requested remedies are textbook examples of a publisher theory of liability that is barred by Section 230. *See, e.g.*, *Estate of Bride v. Yolo Techs., Inc.*, 112 F.4th 1168, 1182 (9th Cir. 2024) (finding Section 230 immunized claims that "attempt to hold [interactive service provider] responsible as the speaker or publisher of harassing and bullying speech"); *Roommates.com*, 521 F.3d at 1174 (Section 230 was "enacted to protect websites against the evil of liability for failure to remove offensive content.").

3. The offending conduct was created by another information content provider.

Section 230 defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). Plaintiff's account, and the other accounts of other third parties, and any content on Twitch, constitute "information provided by another information content provider" for the Section 230 analysis. *See* 47 U.S.C. § 230(c)(1); *see also Brittain v. Twitter, Inc.*, 2019 WL 2423375, at *4 (N.D. Cal. June 10, 2019) ("The [suspended Twitter] Accounts qualify as 'information provided by another information content provider'"), appeal dismissed, 2020 WL 4877527 (9th Cir. Mar. 6, 2020); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094 (N.D. Cal. 2015) (finding content that created and placed on Facebook by a user to be "another information content provider"), *aff'd*, 697 F. App'x 526 (9th Cir. 2017). As detailed directly above, Plaintiff acknowledges that his claims stem from Twitch's decision to remove Plaintiff's account and content created by him or other

Twitch users. Compl. at 15. "The accusation here is fundamentally that [Twitch] should have monitored and curbed third-party content." *See Jackson v. Airbnb, Inc.*, 2022 WL 16753197, at *2 (C.D. Cal. Nov. 4, 2022). Plaintiff also asserts that Twitch should not be permitted to suspend Plaintiff's account. *See Fed. Agency of News LLC v. Facebook, Inc.,* 432 F. Supp. 3d 1107, 1116–21 (N.D. Cal. 2020) (dismissing with prejudice, as precluded by the CDA, plaintiff's claims arising out of Facebook's decision to remove plaintiff Federal Agency of News LLC's account, postings, and content); *Lancaster v. Alphabet Inc.*, 2016 WL 3648608, at *3 (N.D. Cal. July 8, 2016) (finding that the CDA precluded the plaintiff from asserting "a claim based on Defendants' removal of her videos."). Accordingly, this element is also satisfied. Section 230 bars Plaintiff's claims against Twitch.

B. The First Amendment Bars Plaintiff's Claims against Twitch.

In addition to Section 230, the First Amendment bars Plaintiff's claims, which challenge Twitch's editorial decisions about what content is disseminated on its service, who may disseminate that content, and how Twitch enforces its content-moderation policies. Online publishing platforms enjoy First Amendment rights when engaged in "compiling and curating others' speech." *Moody v. Netchoice, LLC*, 144 S. Ct. 2383, 2401 (2024). That is because "[d]eciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own." *Id.* at 2402; *see also O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1186–88 (N.D. Cal. 2022) (dismissing on First Amendment grounds claims based in part on social media company's permanent suspension of a user's account), *aff'd on other grounds sub nom*. *O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (acknowledging "Facebook's First Amendment right to decide what to publish and what not to publish on its platform"), appeal dismissed, 2018 WL 1224417 (5th Cir. Feb. 15, 2018); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630–31 (D. Del. 2007) (claims against Google for its "editorial decisions" about third-party content were precluded by the First Amendment (and Section 230) and thus were dismissed).

As explained above, Plaintiff's claims seek to hold Twitter liable for its editorial decisions about whether Plaintiff and other Twitch users can disseminate content on Twitch's service—which is protected content moderation. The First Amendment therefore bars his claims against Twitch.

C. Plaintiff Fails to State Any Viable Claim for Relief Against Either Defendant.

In addition to the defenses above, the Complaint should also be dismissed because it fails to state any viable claims against Twitch or Ms. Briasco-Stewart. First, Plaintiff's constitutional claims fail because Defendants are not state actors. Second, Plaintiff's negligence claim fails because Plaintiff cannot establish any duty owed to him by Defendants. Third, Plaintiff's UCL claims fail because he cannot establish a claim under any prong of the UCL.

1. First and Fourteenth Amendment Claims

Plaintiff alleges that Twitch's Terms of Service violate the First Amendment and the Fourteenth Amendment, and that Twitch has "not consistently appl[ied] its Terms of Service or Community Guidelines in a manner that aligns with the Equal Protection [Clause]." Compl. at 5, 8. The First Amendment and the Fourteenth Amendment do not apply to actions by a private actor. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) ("The Fourteenth Amendment applies to actions by a State."); *Prager Univ. v. Google LLC*, 951 F.3d 991, 996 (9th Cir. 2020) ("The Free Speech Clause of the First Amendment prohibits the government—not a private party—from abridging speech.").[2] Plaintiff has not alleged that Defendants are state actors, and in fact recognizes that Twitch is a private corporation and Ms. Briasco-Stewart is a private individual. *See* Compl. at 14. Because neither Defendant is a state actor, the Court must dismiss Plaintiff's First and Fourteenth Amendment claims.

[2] On rare occasions, a private entity may be considered a state actor for First Amendment purposes. *See Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019) ("Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity." (internal citations omitted)). None of the exceptions are alleged or apply here.

2. Negligence

Plaintiff appears to assert a negligence claim in his Prayer for Relief, seeking "[c]ompensatory damages of $200,000 for negligence in responding to harassment the Plaintiff suffered on Twitch, leading to the Plaintiff's claims of harassment to Tewksbury Hospital." Compl. at 23. Plaintiff further alleges that "Tewksbury didn't believe the Plaintiff and informed the Plaintiff that every piece of harassment was imaginary psychosis of amphetamine." *Id.*

Under California law, "[t]o support a claim for negligence, a plaintiff must allege facts showing a legal duty to use due care, breach of the duty, causation, and damages." *Brown v. USA Taekwondo*, 40 Cal. App. 5th 1077, 1091 (2019), *aff'd*, 11 Cal. 5th 204 (2021). It is not enough to simply allege in a conclusory fashion that the defendant breached a duty; rather a plaintiff must allege sufficient facts to demonstrate the duty owed and how the defendant breached the duty. *See Flores v. Cnty. of Fresno*, 2020 WL 4339825, at *8 (E.D. Cal. July 28, 2020).

Here, Plaintiff's single reference to negligence in his Prayer for Relief is insufficient to allege a negligence claim. Furthermore, Plaintiff fails to—and cannot—allege the existence of any duty by Twitch or Ms. Briasco-Stewart. Any purported duty would allegedly be based on a failure to moderate third-party content posted to its service. *See* Compl. at 23. ***First***, it is "well established that, as a general matter, there is no duty to act to protect others from the conduct of third parties." *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 235 (2005). ***Second***, any duty to moderate third-party content is in direct contravention of Section 230 (and the applicable terms of service).[3] ***Third***, internet service providers do not have a duty to prevent users from publishing or consuming objectionable content. *See, e.g.*, *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 501 (2023) (Twitter did not have a duty to remove terrorist content posted by ISIS); *Herrick v. Grindr, LLC*, 765 F. App'x 579, 590 (S.D.N.Y. 2018) (Social networking application did not have a duty to prevent publication of allegedly dangerous and harassing content), *aff'd*, 765 F. App'x 586 (2d

[3]Twitch's terms of service expressly disclaim any responsibility or liability for monitoring user-generated content on its service: "Twitch takes no responsibility and assumes no liability for any User Content or for any loss or damage resulting therefrom, nor is Twitch liable for any mistakes, defamation, slander, libel, omissions, falsehoods, obscenity, pornography, or profanity you may encounter when using the Twitch Services. Your use of the Twitch Services is at your own risk." *See* RJN Ex. D (Twitch Terms of Service).

Cir. 2019). ***Lastly***, Ms. Briasco-Stewart is neither able to dictate nor responsible for policies or decisions by Twitch, and Plaintiff cannot establish any duty by Ms. Briasco-Stewart to moderate third-party content on Twitch. Any purported negligence claim must be dismissed.[4]

3. California Business and Professions Code section 17200

Plaintiff asserts a claim for deceptive, fraudulent, and unfair business practices under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq*. Plaintiff broadly alleges two theories of liability: (1) Twitch user Pokimane did not provide Plaintiff with the alleged promise of "everlasting love and appreciation" as part of his subscription to her channel (*see* Compl. at 15), and (2) Defendants did not prevent alleged harassment and cyberstalking by users on Twitch's service (*see id.* at 23). These theories attempt to hold Defendants liable for third-party content on Twitch's service. Neither theory supports a viable UCL claim.

Under the UCL, there are three varieties of unfair competition: acts or practices which are (1) unlawful, (2) unfair, or (3) fraudulent. *See Herron v. Best Buy Co.*, 924 F. Supp. 2d 1161, 1168 (E.D. Cal. 2013). Each prong is a separate and distinct theory of liability. *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007). A plaintiff alleging unfair business practices "must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of Cal., Inc.*, 14 Cal. App. 4th 612, 619 (1993).

First, Plaintiff cannot sustain a claim under the "unlawful" prong because the Complaint does not state a claim against Defendants for any predicate unlawful act. The UCL "creates an independent action when a business practice violates some other law." *See Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1118 (E.D. Cal. 2014) (citation omitted). "According to the California Supreme Court, the UCL 'borrows' violations of other laws and treats them as unlawful practices independently actionable under the UCL." *Id*. (quoting *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992)). Plaintiff fails to adequately plead a violation of any other law. As explained above, Section 230 bars Plaintiff's claims against Twitch. Plaintiff also fails to plausibly

[4] Plaintiff argues that the purported harassment and negligence resulted in his hospitalization at Tewksbury Hospital from 2020 to 2021. Under California law, the statute of limitations for a negligence action is two-years. Cal. Civ. Code § 335.1. Because the claimed negligence occurred over four years ago, Plaintiff's negligence claim is barred by the statute of limitations.

allege constitutional claims or a negligence claim against Defendants. Moreover, common law claims such as negligence do not support an "unlawful" UCL claim. *See, e.g.*, *Shroyer v. New Cingular Wireless Servs., Inc*., 622 F.3d 1035, 1044 (9th Cir. 2010) ("Because [plaintiff] does not go beyond alleging a violation of common law, he fails to state a claim under the unlawful prong of § 17200."); *Worldwide Travel, Inc. v. Travelmate US, Inc.*, 2016 WL 1241026, at *9 (S.D. Cal. Mar. 30, 2016)("[V]iolations of the common law (e.g., breach of contract, common law fraud) are insufficient to satisfy the unlawful prong."). Accordingly, his cause of action under the "unlawful" prong of the UCL fails.

Second, Plaintiff cannot sustain a claim under the unfair prong. A business practice is unfair when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[5] *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996) (citations omitted). A plaintiff must allege that the "consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 839 (2006). Here, Plaintiff does not plausibly allege any of three elements. Plaintiff does not allege a substantial consumer injury, that any alleged practice is not countervailed by benefits to consumers, or that the injury is not reasonably avoidable. Instead, Plaintiff alleges harms that only he claims to have suffered, including the suspension of his Twitch account, alleged harassment he suffered from unnamed third party users "leading to the Plaintiff's claims of harassment to Tewksbury Hospital," and love and appreciation he allegedly did not receive from third party Pokimane. *See generally* Compl. Nor does the failure to moderate third-party content rise to the level of immoral, unethical,

[5] The Ninth Circuit has endorsed the use of this test (the "balancing test") for consumer suits, but has on occasion also applied the tethering test. *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718, 736–37 (9th Cir. 2007) (noting that neither test is mutually exclusive and that a claim can be dismissed under both tests). The tethering test requires the alleged conduct be "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999) (endorsing "tethering test" for competitor suits but failing to clarify appropriate test for consumer suits). Here, Plaintiff's claims would also fail under the tethering test because he fails to allege what legislative policy is implicated or what the actual or threatened harm on competition is.

oppressive, unscrupulous, or substantially injurious business practices. Plaintiff's allegations are insufficient to establish an "unfair" UCL claim.

Third, Plaintiff cannot satisfy the "fraudulent" prong. A fraud UCL claim may arise where members of the public are likely to be deceived by the business's conduct. *See, e.g.*, *Shaeffer v. Califia Farms, LLC*, 44 Cal. App. 5th 1125, 1135 (2020) (affirming dismissal where label was not likely to deceive reasonable consumer and, thus, was not actionable under the UCL); *see Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (applying the "reasonable consumer" standard). Again, Plaintiff does not plausibly allege that a reasonable customer would be deceived by Defendants' conduct.[6] Plaintiff's allegations appear premised solely on an alleged failure to moderate third-party content on Twitch's service that has impacted him; not others.

In sum, Plaintiff cannot satisfy any of the three prongs and his UCL claim fails. Moreover, any content moderation decisions are legislatively protected behavior under section 230 and insufficient to establish a UCL claim. *See Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 744 (9th Cir. 2024) ("Section 230(c)(1) therefore shields Meta on the UCL claim.").

D. Plaintiff should not be granted leave to amend.

Although courts have wide discretion in determining whether to grant leave to amend, a court should deny leave when a proposed amendment would be futile. *See, e.g., Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008) (denying leave to amend based on utility); *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004) ("Futility alone can justify the denial of a motion to amend.") (citation omitted). Here, leave to amend would be inappropriate for the following reasons.

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[6] Plaintiff appears to allege that statements by Twitch user Pokimane were fraudulent or misleading. Specifically, Pokimane's statement that "You will receive my undying love and appreciation for a month (or even longer depending on how many months you sub for.") Compl. at 11. These statements were not made by Defendants. Even if the Court were to attribute Pokimane's statements to Defendants (which it should not), promises of "everlasting love and appreciation" are non-actionable puffery and insufficient to establish a UCL claim. *See Takahashi-Mendoza v. Coop. Regions of Organic Producer Pools*, 673 F. Supp. 3d 1083, 1094–95 (N.D. Cal. 2023) (statements that products were "Pasture-Raised with *Love*" were "unmeasurable opinions" and "non-actionable puffery" (emphasis added)); *Perez v. Bath & Body Works, LLC*, 2022 WL 2756670, at *5 (N.D. Cal. July 14, 2022) (dismissing claims about a statement as non-actionable puffery because "[l]ove [is] a subjective emotion"). In fact, Plaintiff concedes that these statements are "clearly impossible and unrealistic." Compl. at 11.

First, all of Plaintiff's claims against Twitch are barred by Section 230 no matter what additional facts he pleads. Courts generally deny leave to amend when Section 230 applies to bar claims, which cannot be "circumvent[ed]" with "creative pleading." *Kimzey*, 836 F.3d at 1265–66; *see, e.g.*, *King v. Facebook, Inc.*, 572 F. Supp. 3d 776, 795 (N.D. Cal. 2021) (dismissing claims barred by Section 230 with prejudice because "it would be futile for [Plaintiff] to try to amend the claim[s]"). ***Second***, Plaintiff has failed to allege sufficient facts to state any claim and there are no additional facts that could be plead in an amended complaint to assist his claims. ***Third***, the Complaint is the latest in a many years long campaign of harassment and threats by Plaintiff against Twitch and its employees, fueled by Plaintiff's psychological disorders and mental illness. That campaign (and Plaintiff's current misuse of the legal system in support of that campaign) has and continues to have real consequences for Twitch and its employees, including emotional distress to employees; continued resources devoted to protecting Twitch, its systems, and its employees from a never-ending barrage of harassing communications sent by Plaintiff to both business and personal accounts; resources devoted to protecting Twitch employees, buildings and properties from threats of physical harm; and now, resources spent defending a meritless, retaliatory Complaint. Ms. Briasco-Stewart, in particular, has faced threats to both herself and her family, and Twitch and Mr. Briasco-Stewart have already incurred costs (both financial and emotional) required to obtain a 5-year restraining order against Plaintiff.

Because Plaintiff cannot allege any valid claim against Twitch or Ms. Briasco-Stewart, "any proposed amendment would be futile" and the Complaint should be dismissed with prejudice. *See Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990). The Court should put an end to Plaintiff's attempt to use the legal process in retaliation against, and as further harassment of, Defendants.

V. CONCLUSION

For the foregoing reasons, Twitch and Ms. Briasco-Stewart respectfully request that the Court dismiss the Complaint without leave to amend.

Dated: September 30, 2024 Respectfully Submitted,

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