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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

JOHN DOE, et al.,
Plaintiffs,
v.
GOOGLE LLC, et al.,
Defendants.

Case No. 20-cv-07502-BLF

**ORDER DENYING APPLICATION
FOR TEMPORARY RESTRAINING
ORDER**

United States District Court
Northern District of California

Plaintiffs John Doe, Michael Doe, James Doe, Henry Doe, Robert Doe, Christopher Doe, Matthew Doe, Polly St. George, Scott Degroat, David J. Hayes, Daniel Lee, Mishel Mccumber, Jeff Pedersen, Jordan Sather, and Sarah Westall (collectively, “Plaintiffs”) filed the complaint in this action on October 26, 2020, asserting claims against Defendants Google LLC (“Google”) and YouTube LLC (“YouTube”) for breach of contract, breach of covenant of good faith and fair dealing, and violation of First Amendment right to freedom of speech. *See* Compl., ECF 1. The next day, Plaintiffs filed a motion seeking a temporary restraining order (“TRO”) and an order to show cause why a preliminary injunction should not issue. *See* Mot., ECF 8. In light of the time between the conduct alleged in the complaint and the application for the TRO, The Court directed Defendants to respond by October 30, 2020. ECF 16. The Court held a video hearing on the motion on November 2, 2020, at which Plaintiffs and Defendants’ counsels appeared. As set forth below, Plaintiffs’ motion is DENIED.

I. BACKGROUND

Plaintiffs are “journalists, videographers, advocates, commentators and other individuals who

1 regularly exercise their right to free speech under the First Amendment of the Constitution of the
2 United States.” Compl. ¶ 1. Defendants are YouTube, an online video-sharing platform, and
3 Google, YouTube’s parent company.

4 Plaintiffs created eighteen channels on the YouTube platform. *Id.* Plaintiffs describe their
5 channels as “extremely controversial” “conservative news” channels that feature content about
6 “Hunter Biden and the Ukraine scandal,” “the ongoing corruption probe,” “social media
7 censorship,” “race relations or protests in America,” and “anonymous posts on political issues by
8 someone identifying themselves as ‘Q.’” Mot. at 8, 15; Compl. ¶ 8. Plaintiffs allege that as of
9 October 15, 2020, their channels attracted over 4.5 million subscribers and over 800 million
10 views. *Id.* In posting content to the YouTube platform, Plaintiffs entered into a contract with
11 YouTube, as detailed in YouTube’s Terms of Service (“TOS”). Compl. ¶ 1; *see* ECF 21-1, Exhs. 1
12 (TOS), 2 (Community Guidelines), 3 (harassment and cyberbullying policy), 4 (hate speech
13 policy), and 5 (channel or account terminations).

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16 Although the complaint and TRO application provide only vague descriptions about the
17 content on Plaintiffs’ channels, Defendants offer further details. Defendants submitted the
18 declaration of a YouTube employee who works on the company’s Trust and Safety team.
19 YouTube Decl., ECF 21-1. The employee stated that Plaintiffs’ channels “were rife with content
20 espousing harmful conspiracy theories” and contained videos with “horrifying and unsubstantiated
21 accusations of violent and criminal conduct supposedly committed by specific individuals.”
22 *Oppo.*, ECF 21, at 5 (citing YouTube Decl., ¶¶ 23-25). For example, the employee reported that
23 videos posted on the channel “JustInformed Talk” suggested that Hillary Clinton “was involved
24 with satanic rituals with children,” (including “human ritual sacrifice”) while videos posted on the
25 “TRUReporting” channel made claims about famous Americans, including that one “eats babies,”
26 another “killed his wife,” others are “pedophiles or ‘pedowoods,’” and others still “breed children
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1 in order to sell them.” YouTube Decl. ¶¶ 23-24.

2 On October 2, 2020, the United States House of Representatives passed Resolution 1154 that
3 “condemn[ed] QAnon and reject[ed] the conspiracy theories it promotes” based on the fact that
4 QAnon conspiracy motivated anti-Semitism and domestic extremists to engage in criminal or
5 violent activity. Condemning QAnon and rejecting the conspiracy theories it promotes, H.R. Res.
6 1154, 116th Cong. (2020). The Resolution further highlighted that “Facebook, Twitter, and
7 Google [had already] removed or blocked QAnon groups and content from their platforms for
8 violating their policies against misinformation, bullying, hate speech, and harassment.” *Id.*

9 On October 15, 2020, YouTube announced that it would “tak[e] another step in [its] efforts to
10 curb hate and harassment by removing more conspiracy theory content used to justify real-world
11 violence.” *See* “Managing harmful conspiracy theories on YouTube,” YouTube, Oct. 15, 2020,
12 <https://blog.youtube/news-and-events/harmful-conspiracy-theoriesyoutube>. The post explicitly
13 mentioned QAnon. *Id.* To this end, YouTube amended its Community Guidelines harassment and
14 cyberbullying policy to include a new example of prohibited behavior: “Targeting an individual
15 and making claims they are involved in human trafficking in the context of a harmful conspiracy
16 theory where the conspiracy is linked to direct threats or violent acts.” *Compare* ECF 14, Ex. C
17 (Internet Archive, October 15, 2020) *with* ECF 14, Ex. D (Internet Archive, October 17, 2020).

18 That same day, YouTube “abruptly instigated a mass purge of conservative accounts,
19 including those operated by plaintiffs, based on its ‘hate and harassment’ policies” (“the
20 Takedown”). Compl. ¶ 6. This purge included Plaintiffs’ YouTube channels. Defendants
21 confirmed that YouTube “terminated (i.e., removed) Plaintiffs’ channels from the YouTube
22 service for multiple violations of the Community Guidelines.” YouTube Decl. ¶ 22. Plaintiffs
23 contend that the Takedown occurred before YouTube amended its Community Guidelines. Mot. at
24 6. Defendants, however, maintain that the Takedown occurred only after the Community
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1 Guidelines were amended. YouTube Decl. ¶ 22.

2 Plaintiffs submitted evidence that they received an email notice from YouTube that their
3 YouTube channel had been suspended or deleted. *See* ECF 14 at 8 ¶ 8, 11 ¶ 8, 14 ¶ 8, 17 ¶ 8, 20 ¶
4 8, 22 ¶ 8, 25 ¶ 8, 27 ¶ 8, 29 ¶ 8, 31 ¶ 8, 34 ¶ 8, 36 ¶ 8, 38 ¶ 8, 40 ¶ 8, 43 ¶ 8 (declarations). The
5 notice referenced YouTube’s cyberbullying and harassment policy, although Plaintiffs believe that
6 “[their] content was not cyberbullying or harassing in the ways described in the policy that existed
7 on or before October 15, 2020.” *Id.* YouTube’s Trust and Safety team member explained that
8 YouTube terminated Plaintiffs’ channels because videos in those channels “may incite others to
9 ‘take action’ and may cause harm to our users or other people.” YouTube Decl. ¶ 26. The
10 employee pointed to a May 2019 Federal Bureau of Investigation bulletin that cited QAnon as
11 among the conspiracy theories that “very likely will emerge, spread, and evolve in the modern
12 information marketplace, occasionally driving both groups and individual extremists to carry out
13 criminal or violent acts.” *Id.*

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15 Plaintiffs filed suit in this Court alleging that Defendants violated their contractual and First
16 Amendment rights when they “excised them and their political viewpoints from the YouTube
17 platform without notice, just days 19 before the 2020 presidential election.” Compl. ¶¶ 1, 69-215
18 (claims for relief). Plaintiffs request the Court issue a TRO that the “Defendants, along with their
19 agents, employees, and successors, shall be restrained and enjoined from breaching their contract
20 with Plaintiffs, as set forth in YouTube’s Terms of Service, by taking down their videos and/or
21 YouTube channels that discuss, analyze, or mention “QAnon.”” Mot. at 18. Plaintiffs seek an
22 injunction compelling YouTube to restore their content.
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25 **II. LEGAL STANDARD**

26 Preliminary injunctive relief, whether in the form of a temporary restraining order or a
27 preliminary injunction, is an “extraordinary and drastic remedy,” that is never awarded as of right.
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1 *Munaf v. Geren*, 553 U.S. 674, 689-690 (2008) (internal citations omitted). “It is so well settled as
2 not to require citation of authority that the usual function of a preliminary injunction is to preserve
3 the status quo ante litem pending a determination of the action on the merits.” *Tanner Motor*
4 *Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963). A temporary restraining order is “not
5 a preliminary adjudication on the merits but rather a device for preserving the status quo and
6 preventing the irreparable loss of rights before judgment.” *Sierra On-Line, Inc. v. Phoenix*
7 *Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) (citation omitted).
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9 The standard for issuing a temporary restraining order is identical to the standard for issuing a
10 preliminary injunction. *Stuhlberg Int’l Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839
11 n.7 (9th Cir. 2001); *Lockheed Missile & Space Co. v. Hughes Aircraft*, 887 F. Supp. 1320, 1323
12 (N.D. Cal. 1995). An injunction is a matter of equitable discretion and is “an extraordinary remedy
13 that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*
14 *v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking preliminary
15 injunctive relief must establish “[1] that he is likely to succeed on the merits, [2] that he is likely to
16 suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in
17 his favor, and [4] that an injunction is in the public interest.” *Id.* at 20. “[I]f a plaintiff can only
18 show that there are serious questions going to the merits – a lesser showing than likelihood of
19 success on the merits – then a preliminary injunction may still issue if the balance of hardships tips
20 sharply in the plaintiff’s favor, and the other two *Winter* factors are satisfied.” *Friends of the Wild*
21 *Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014) (internal quotation marks and citations omitted).
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24 Because the Plaintiffs here seek a mandatory injunction—one that “orders a responsible party
25 to ‘take action’”—“[they] must establish that the law and facts clearly favor [their] position, not
26 simply that [they are] likely to succeed.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH &*
27 *Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (quoting *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484
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1 (1996); *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

2 **III. DISCUSSION**

3 After carefully considering the parties arguments in the briefing and at the motion hearing, the
4 Court concludes Plaintiffs have not satisfied the requirements for issuance of a TRO.

5 **A. Anonymous Declaration**

6 As an initial matter, the Court considers Defendants' submission of a declaration by an
7 anonymous YouTube employee who works on YouTube's Trust and Safety team. *See* YouTube
8 Decl.; *see also* ECF 25. Plaintiffs objected, arguing that Defendants were required to explain the
9 circumstances justifying anonymity. *See* ECF 23 at 1. The Court requested Defendants
10 demonstrate good cause for the anonymous declaration along with a signed version of the affidavit
11 be delivered to the Court in hard copy for in camera review. *See* ECF 25. The Court concludes that
12 there is good cause to redact the name of the declarant. And, having conducted an in camera
13 review of the declaration, the Court is satisfied that a real individual employed at YouTube as
14 described in the declaration has signed it.

15 **B. Likelihood of Success on the Merits**

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18 "The first factor under *Winter* is the most important—likely success on the merits." *Garcia*,
19 786 F.3d at 740. As noted above, because Plaintiffs seek a mandatory injunction, they "must
20 establish that the law and facts clearly favor [their] position, not simply that [they are] likely to
21 succeed." *Id.* at 740. Plaintiffs fall short of this bar.

22 Although Plaintiffs' lawsuit is based on contract and First Amendment theories, their TRO
23 application focuses on their contract-based claims. *See, e.g.*, Mot. at 12-15 (arguing that Plaintiffs
24 did not materially breach the TOS contract). Plaintiffs argue that under the TOS there are only
25 three circumstances under which Defendants may terminate or suspend their channels:
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27 "YouTube may suspend or terminate your access, your Google
28 account, or your Google account's access to all or part of the Service

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if (a) you materially or repeatedly breach this Agreement; (b) we are required to do so to comply with a legal requirement or a court order; or (c) we believe there has been conduct that creates (or could create) liability or harm to any user, other third party, YouTube or our Affiliates.”

Mot. at 12; *see* ECF 21-1, Exh. 1, “Account Suspension & Termination.” Defendants respond that this provision is inapt here because it only governs YouTube’s right to “suspend or terminate your access, your Google account, or your Google account’s access to all or part of the Service.” *Oppo*. at 8-9; *see* ECF 21-1, Exh. 1, “Account Suspension & Termination.” They argue that YouTube did not suspend or terminate Plaintiffs’ access to YouTube or their Google accounts, but rather suspended Plaintiffs’ channels and removed the videos and other features associated with those channels. *Oppo*. at 9. The Takedown, Defendants contend, is thus governed by the TOS provisions titled “Content on the Service” and “Removal of Content by YouTube.” *Id.*; *see* ECF 21-1, Exh. 1. These provisions state that

Content is the responsibility of the person or entity that provides it to the Service. YouTube is under no obligation to host or serve Content. If you see any Content you believe does not comply with this Agreement, including by violating the Community Guidelines or the law, you can report it to us.

ECF 21-1, Exh. 1, “Content on the Service,” and

If we reasonably believe that any Content is in breach of this Agreement or may cause harm to YouTube, our users, or third parties, we may remove or take down that Content in our discretion. We will notify you with the reason for our action unless we reasonably believe that to do so: (a) would breach the law or the direction of a legal enforcement authority or would otherwise risk legal liability for YouTube or our Affiliates; (b) would compromise an investigation or the integrity or operation of the Service; or (c) would cause harm to any user, other third party, YouTube or our Affiliates. You can learn more about reporting and enforcement, including how to appeal on the Troubleshooting page of our Help Center.

ECF 21-1, Exh. 1, “Removal of Content by YouTube.” The Defendants claim that YouTube permissibly suspended Plaintiffs’ channels after concluding that the channels “amounted to

1 material that could cause real-world harm to users and third parties.” Oppo. at 9 (citing YouTube
2 Decl. ¶¶ 22-26).

3 Upon reviewing YouTube’s TOS agreement in totality, the Court agrees with Defendants.
4 Defendants plausibly argue that the actions they took were made under YouTube’s TOS Provision
5 “Removal of Content by YouTube.” *See Lewis v. Google LLC*, 461 F. Supp. 3d 938, 962 (N.D.
6 Cal. 2020) (“YouTube’s terms and guidelines explicitly authorize YouTube to remove or
7 demonetize content that violate its policies, including ‘Hateful content.’ Therefore, Defendants’
8 removal or demonetization of Plaintiff’s videos with ‘Hateful content’ or hate speech was
9 authorized by the parties’ agreements and cannot support a claim for breach of the implied
10 covenant of good faith and fair dealing.”); *Mishiyev v. Alphabet, Inc.*, 444 F. Supp. 3d 1154, 1159
11 (N.D. Cal. Mar. 13, 2020), *appeal docketed*, No. 10-15657 (9th Cir. Apr. 14, 2020) (YouTube did
12 not breach TOS by removing plaintiffs’ videos where the TOS “authorized YouTube to do exactly
13 that”). Both Plaintiffs’ declarations and the email notice forwarded by the Defendants indicate that
14 the action Defendants took was against Plaintiffs’ YouTube accounts, not their Google accounts.
15 *See* ECF 14 at 8 ¶ 8, 11 ¶ 8, 14 ¶ 8, 17 ¶ 8, 20 ¶ 8, 22 ¶ 8, 25 ¶ 8, 27 ¶ 8, 29 ¶ 8, 31 ¶ 8, 34 ¶ 8, 36
16 ¶ 8, 38 ¶ 8, 40 ¶ 8, 43 ¶ 8 (“suspension or deletion of my channel”); ECF 21-1, Exh. 9. (“YouTube
17 account”); *see also* YouTube Decl. ¶ 28.
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20 The parties also dispute whether the Community Guidelines were amended before or after the
21 Takedown occurred. The Court notes that there is contested evidence before it on this point, which
22 in and of itself prevents the Plaintiffs from meeting their high burden. And, even if the Court were
23 to accept Plaintiffs’ Takedown timeline, that YouTube added a new example of violative conduct
24 to its harassment and cyberbullying policy does not change the calculus here. Indeed, it is
25 undisputed that at the time of the Takedown, the harassment and cyberbullying policy otherwise
26 remained the same and still prohibited “[c]ontent that threatens individuals is not allowed on
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1 YouTube.” ECF 14, Exhs. C, D; ECF 21-1, Exh. 3.

2 With respect to Plaintiffs’ argument that YouTube contractually owed them an explanation for
3 why their channels were suspended or deleted, Plaintiffs’ own declarations belie this theory as
4 they state that YouTube referenced its harassment and cyberbullying policy in its email notices to
5 the Plaintiffs. *See* ECF 14 at 8 ¶ 8, 11 ¶ 8, 14 ¶ 8, 17 ¶ 8, 20 ¶ 8, 22 ¶ 8, 25 ¶ 8, 27 ¶ 8, 29 ¶ 8, 31 ¶
6 8, 34 ¶ 8, 36 ¶ 8, 38 ¶ 8, 40 ¶ 8, 43 ¶ 8; *see also* ECF 21-1, Exh. 9. The contract did not require
7 that Plaintiffs agree with the reasoning YouTube provided. And, in addition to providing Plaintiffs
8 with cause for the termination, it provided them with an appeal process. ECF 21-1, Exh. 1 at 4,
9 “Removal of Content by YouTube” (“You can learn more about reporting and enforcement,
10 including how to appeal on the Troubleshooting page of our Help Center.”), Exh. 9. The Plaintiffs
11 do not appear to have attempted to avail themselves of this process.

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13 Finally, Plaintiffs conceded at the motion hearing that they did not establish a First
14 Amendment theory in their TRO application. Accordingly, the Court does not consider the merits
15 of such a theory at this time.

16 **C. Remaining Factors**

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18 Because the Court has concluded that Plaintiffs have failed to show, at “an irreducible
19 minimum that there is a fair chance of success on the merits,” the Court cannot enter injunctive
20 relief based on the remaining three factors. *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 675 (9th
21 Cir. 1984).

22 **IV. ORDER**

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24 The Court DENIES Plaintiffs’ motion for a TRO. This Order is without prejudice to
25 Plaintiffs’ filing a motion for preliminary injunction

26 **IT IS SO ORDERED.**

1 Dated: November 3, 2020



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3 BETH LABSON FREEMAN
United States District Judge

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