District of Columbia
Court of Appeals

No. 19-CV-69

MINDY HILL,

Appellant,

v.

CAB3678-17

GOOGLE, LLC, *et al.*,

Appellees.

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman, * Thompson, * Beckwith, Easterly, McLeese, and Deahl, Associate Judges; Nebeker, * Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing *en banc*, and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

ORDERED by the merits division* that the petition for rehearing is denied. It is

FURTHER ORDERED that the petition for rehearing *en banc* is denied.

PER CURIAM

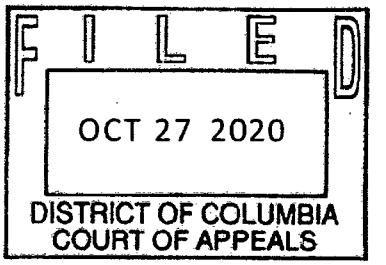
Copies emailed to:

Honorable Anthony C. Epstein

Director, Civil Division

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 19-CV-69



MINDY HILL, APPELLANT,

v.

GOOGLE, LLC, *et al.*, APPELLEES.

Appeal from the Superior Court
of the District of Columbia
(CAB-3678-17)

(Hon. Anthony C. Epstein, Trial Judge)

(Submitted September 17, 2020 Decided October 27, 2020)

Before GLICKMAN and THOMPSON, *Associate Judges*, and NEBEKER, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant, Mindy Hill, initiated a civil action against Google, LLC and YouTube, LLC alleging negligence and defamation arising from her use of an automated closed-captioning function available for videos uploaded to YouTube. After appellant acknowledged that she voluntarily signed the YouTube Terms of Service, the trial court issued a final order finding those terms enforceable and granting appellees' limited motion for summary judgment. For the reasons detailed below, we affirm.

I.

Appellant uploaded a video to YouTube in December 2016. In December 2016 she filed a complaint against Google, LLC and YouTube, LLC's holding company, Alphabet, Inc., seeking damages for defamation. After the initial claim was dismissed, appellant filed anew against Google, LLC and YouTube, LLC on May 26, 2017. Her amended complaint asserted liability based on negligence and defamation arising from YouTube's automated closed-captioning function that transcribed her spoken words, "What's up DC this is your girl Mindy Jo with the

DC Voice dot com" as, "What's up DC bitch girl maybe gel with." Appellees moved to dismiss on multiple grounds, one of which being that appellant's claims were barred by the YouTube Terms of Service. Those terms provide that YouTube disclaims any express or implied warranties for its services and is not liable for any damages resulting from errors, mistakes, or inaccuracies of content based on any legal theory, including tort.

After the trial court failed to issue a written order on these grounds for dismissal, appellees filed a limited motion for summary judgment focusing on the contractual enforceability of the YouTube Terms of Service. Based on facts asserted by appellees that appellant failed to dispute, the trial court found the contractual provisions enforceable because appellant had been free to accept or decline them when she signed up for YouTube and again when she enrolled in YouTube's Partner Program. Furthermore, it found that these terms were not outrageously unfair since it is not unreasonable for appellees to protect themselves from liability for inadvertent or isolated transcription errors like the one at issue.

On appeal, appellant argues that the trial court erred because there was sufficient evidence to find appellees liable for defamation, libel, and negligence. She also argues that summary judgment was improperly granted because appellees' names on the docket were changed from Google, Inc. and YouTube, Inc. to Google, LLC and YouTube, LLC, counsel for appellees did not appear in court on a given date, and there was allegedly collusion between appellees and the government of the District of Columbia to interfere with the lawsuit. Because appellant raises these last claims for the first time on appeal, they are waived. *Hollins v. Federal Nat'l Mortg. Ass'n*, 760 A.2d 563, 572 (D.C. 2000) ("Ordinarily, arguments not made in the trial court are deemed waived on appeal."). Therefore, our analysis will be limited to the first issue raised.

II.

"Whether summary judgment was properly granted is a question of law, and we review de novo a decision granting such relief." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 591 (D.C. 2000) (brackets omitted). "In order to be entitled to summary judgment[,] the moving party must demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Id.* at 592 (brackets omitted).

III.

An adhesion contract is a "standard-form contract prepared by one party, to be signed by another party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms." *Andrew v. American Imp. Ctr.*, 110 A.3d 626, 633 n.8 (D.C. 2015) (*citing* ADHESION CONTRACT, Black's Law Dictionary (9th ed. 2009)). We consider the YouTube Terms of Service to be an adhesion contract because they are standard for all consumers, completely determined by YouTube, and offered to consumers like appellant on a take-it-or-leave-it basis. As such, we review them for unconscionability. *Riggs Nat'l Bank of Washington, D.C. v. District of Columbia*, 581 A.2d 1229, 1251 (D.C. 1990) ("Such a contract may be one of adhesion, and is therefore subject to judicial scrutiny for unconscionability.").

A "contract may be unconscionable either because of the manner in which it was made [i.e., procedural unconscionability] or because of the substantive terms of the contract [i.e., substantive unconscionability] or, more frequently, because of a combination of both." *Urban Invs., Inc. v. Branham*, 464 A.2d 93, 99 (D.C. 1983). "Usually, the party seeking to avoid the contract must prove both elements: an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* (quotation marks omitted). "[T]he party seeking to avoid the contract will have to show that the terms are so extreme as to appear unconscionable according to the mores and business practices of the time and place." *Id.* at 100 (quotation marks omitted).

"Here, there was no procedural unconscionability where the conditions for use of YouTube's service were not obscured or hidden, Plaintiffs had a clear opportunity to understand the terms, and they did not lack a meaningful choice."

Song fi, Inc. v. Google Inc., 72 F.Supp.3d 53, 63 (D.C. Cir. 2014). Likewise, appellant in this case had the same opportunity to review the same unobscured language before agreeing to it. Furthermore, it is apparently common practice for companies such as Google or YouTube to include broad liability disclaimers when offering their online services.[1] And appellant has not made a showing sufficient to overcome summary judgment that such disclaimers are so extreme as to appear unconscionable. Therefore, we do not find the disclaimer of liability for inadvertent mistakes occurring in the use of its free video uploading platform so extreme or out of line with today's "mores and business practices" for online platforms as to be substantively unconscionable.

Therefore, we affirm the decision below because, reviewing the grant of summary judgment *de novo*, we conclude that there is no genuine issue of material fact. The YouTube Terms of Service are enforceable, and as such, they bar appellant's claim for damages arising from a transcription error when using the closed-captioning function on YouTube.

Affirmed.

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[1] "Judicial notice may be taken at any time, including on appeal." *Christopher v. Aguigui*, 841 A.2d 310, 311 n.2 (D.C. 2003). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* (*citing* Fed. R. Evid. 201(b)). That disclaiming errors is common practice for online video platforms may accurately and readily be determined by looking at comparable services. *See, e.g.*, Tik Tok Terms of Service, Section 9 – Exclusion of Warranties, https://www.tiktok.com/legal/terms-of-use?lang=en https://perma.cc/JEG8-QEVC ("IN PARTICULAR WE DO NOT REPRESENT OR WARRANT TO YOU THAT . . . YOUR USE OF THE SERVICES WILL BE . . . FREE FROM ERROR."): Twitch Terms of Service, Section 15 – Disputes, https://www.twitch.tv/p/legal/terms-of-service/#15-disputes https://perma.cc/RE5A-C9HT ("TWITCH DOES NOT REPRESENT OR WARRANT THAT THE CONTENT OR MATERIALS ON THE TWITCH SERVICES ARE . . . ERROR-FREE."); *and* Vimeo Terms of Service, Section 9 – Disclaimers, https://vimeo.com/terms#disclaimers https://perma.cc/88DY-D92X (". . . Vimeo makes no representations or warranties . . . [t]hat our Services . . . will be . . . error-free . . . .").

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Anthony C. Epstein

Director, Civil Division

Copies e-served to:

Mindy Hill

Roy L. Austin, Jr.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MINDY HILL	:	
	:	
v.	:	Case No. 2017 CA 003678 B
	:	
GOOGLE LLC., *et al.*	:	

JUDGMENT

For the reasons explained in the order dated January 16, 2019, the Court enters judgment against plaintiff Mindy Hill and in favor of defendants Google LLC and YouTube, LLC.

Anthony C Epstein

Anthony C. Epstein
Judge

Date: January 16, 2019

Copies to:

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Roy L. Austin, Jr.
Jack Mellyn
Kristin J. Sourbeer
Counsel for Defendants

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MINDY HILL	:	
	:	
v.	:	Case No. 2017 CA 003678 B
	:	
GOOGLE LLC, *et al.*	:	

ORDER

The Court grants the original summary judgment motion of defendants Google LLC ("Google") and YouTube, LLC ("YouTube"). The Court is entering a separate judgment in favor of Defendants.

I. BACKGROUND

On December 8, 2016, plaintiff Mindy Hill uploaded a video to YouTube. She used an automated video closed-captioning service provided by YouTube, and this service corrupted her intended message.

On December 20, 2016, Ms. Hill, then representing herself, sued Google's holding company for defamation and tortious interference with business expectations. On May 26, 2017, the Court dismissed the case because the holding company was not a proper defendant.

On the same day, Ms. Hill filed a new complaint against Defendants. On October 6, 2017, she filed an amended complaint for negligence and defamation. She alleges that her opening statement "What's up DC, this is your girl Mindy Jo with the DC Voice dot com" was mistakenly translated as "What's up DC bitch girl maybe gel with."

On July 17, 2017, Defendants filed a motion to dismiss and a request for judicial notice of documents attached to a declaration of Katherine Mansfield ("Mansfield Declaration").

On June 2, 2018, the Court issued a written order denying Defendants' motion to dismiss, ruling that (1) Ms. Hill's factual allegations support a plausible inference that Defendants

negligently breached a duty to her and defamed her and (2) the forum selection clause in the YouTube Terms of Service ("Terms of Service") requiring any user to bring suit in California is not enforceable. The Court did not address Defendants' argument that Ms. Hill's claim is barred by the provision in the Terms of Service limiting Defendant's liability for damages caused by error.

On July 2, 2018, Defendants filed a limited motion for summary judgment on the grounds that both of Ms. Hill's claims are contractually barred ("First MSJ"), with a Statement of Undisputed Material Facts ("First SOMF"). On July 16, Ms. Hill filed her opposition ("First Opp."). On July 23, Defendants filed a reply ("First Reply").

On August 31, Defendants filed a broader motion for summary judgment on additional grounds, including lack of a duty to provide error-free captions, lack of any defamatory meaning, lack of proximate cause, and failure to mitigate damages. On September 14, Ms. Hill filed her opposition ("Second Opp."). On September 21, Defendants filed their reply.

On December 31, 2018, Defendants filed a motion to continue the pretrial conference scheduled for January 29. On January 2, Ms. Hill filed her opposition.

II. SUMMARY JUDGMENT STANDARD

Rule 56(a) provides in relevant part, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [Superior Court rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Mixon v. Washington Metropolitan Area Transit Authority*, 959 A.2d 55, 58 (D.C. 2008) (quotations and citations

omitted). "Summary judgment may have once been considered an extreme remedy, but that is no longer the case," and indeed District of Columbia courts have "recognized that summary judgment is vital." *Doe v. Safeway, Inc.*, 88 A.3d 131, 133 (D.C. 2014) (citations omitted).

The moving party has the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1324 (D.C. 1995). "At this initial stage, the movant must inform the trial court of the basis for the motion and identify 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Paul v. Howard University*, 754 A.2d 297, 305 (D.C. 2000) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Rule 56(c) sets forth the requirements for establishing facts in a form that would be admissible in evidence at trial.

If the moving party carries this burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 901 (D.C. 2013). "A genuine issue of material fact exists if the record contains some significant probative evidence ... so that a reasonable fact-finder would return a verdict for the non-moving party." *Brown v. 1301 K Street Limited Partnership*, 31 A.3d 902, 908 (D.C. 2011) (quotation and citation omitted). "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to defeat a motion for summary judgment." *Smith*, 75 A.3d at 902 (quotation and citation omitted). In addition, a party "cannot stave off the entry of summary judgment through [m]ere conclusory allegations." *Smith*, 75 A.3d at 902 (quotation and citation omitted). Likewise, the non-moving party's "mere speculations are insufficient to create a genuine issue of fact and thus withstand summary judgment." *Hunt v. District of Columbia*, 66

A.3d 987, 990 (D.C. 2013) (quotation and citation omitted). Rather, the "party opposing summary judgment must set forth by affidavit or in similar sworn fashion specific facts showing that there is a genuine issue for trial." *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 950-51 (D.C. 2012) (quotation and citation omitted). Rule 56(c) establishes the requirements for raising a genuine factual dispute in a form that would be admissible in evidence at trial.

Viewing the non-moving party's evidence in the light most favorable to it, the Court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Hunt*, 66 A.3d at 990 (quotation and citation omitted). The Court may grant summary judgment only if no reasonable juror could find for the non-moving party as a matter of law. *Biratu v. BT Vermont Avenue, LLC*, 962 A.2d 261, 263 (D.C. 2008). The Court cannot "resolve issues of fact or weigh evidence at the summary judgment stage." *Barrett v. Covington & Burling, LLP*, 979 A.2d 1239, 1244 (D.C. 2009).

Rule 56(d) provides, "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." To get relief under Rule 56(d), the non-moving party must actually file an affidavit or declaration. *Kibunja v. Alturas, L.L.C.*, 856 A.2d 1120, 1125-26 (D.C. 2004) (failure to file affidavit required by Rule 56 waives claim that trial court should have deferred ruling to allow further discovery). The Court has discretion under this Rule not to authorize additional discovery. *See Drake v. McNair*, 993 A.2d 607, 617 n.15 (D.C. 2010). "To invoke the protection of Rule 56 ([d]), a party must have been diligent in

pursuing discovery before the summary judgment motion was made." *Travelers Indemnity Co. v. United Food & Commercial Workers Int'l Union*, 770 A.2d 978, 993 (D.C. 2001).

III. DISCUSSION

The Court grants summary judgment to Defendants because the provisions in the Terms of Service that bar Ms. Hill's claims are enforceable. The Court therefore need not reach the arguments in Defendants' second summary judgment motion, which it denies as moot. With the grant of summary judgment, the Court denies as moot Defendants' motion to continue the pretrial conference, which is cancelled.

A. Facts

Through evidence that meets the standards of Rule 56(c), Defendants establish the following facts:

1. Ms. Hill created a YouTube account on October 10, 2009. *See* First SOMF ¶ 1.

2. YouTube has Terms of Service ("Terms of Service"). *See* First SOMF ¶ 3.

3. The Terms of Service include a warranty-disclaimer clause in which YouTube in capital letters disclaims any express or implied warranties for its service and "ASSUMES NO LIABILITY OR RESONSIBILITY FOR (I) ERRORS, MISTAKES, OR INACCURACIES OF CONTENT ... AND/OR (V) ANY ERRORS OR OMISSIONS IN ANY CONTENT OR FOR ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF ANY CONTENT POSTED, EMAILED, TRANSMITTED, OR OTHERWISE MADE AVAILABLE VIA THE SERVICES." *See* First SOMF ¶ 14.

4. The Terms of Service include a limitation-of-liability clause providing in capital letters that YouTube is not liable to users for any "DAMAGES WHATSOEVER RESULTING FROM ANY (I) ERRORS, MISTAKES, OR INACCURACIES OF CONTENT ... AND/OR

(V) ANY ERRORS OR OMISSIONS IN ANY CONTENT OR FOR ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF ANY CONTENT POSTED, EMAILED, TRANSMITTED, OR OTHERWISE MADE AVAILABLE VIA THE SERVICES, WHETHER BASED ON WARRANTY, CONTRACT, TORT, OR ANY OTHER LEGAL THEORY." *See* First SOMF ¶ 15.

5. Ms. Hill accepted the Terms of Service in order to create the YouTube account she needed to upload video content to YouTube. *See* First SOMF ¶¶ 2-3.

6. Ms. Hill had the option to accept or decline the Terms of Service. *See* First SOMF ¶ 4.

7. Ms. Hill exercised her option to accept the Terms of Service. *See* First SOMF ¶ 5.

8. Ms. Hill also chose to join the YouTube Partner Program, which enabled her to monetize her uploads and which incorporates the Terms of Service. *See* First SOMF ¶ 7.

9. When Ms. Hill joined the YouTube Partner Program, she again accepted the Terms of Service. *See* First SOMF ¶ 8.

10. On December 8, 2016, Ms. Hill uploaded a video to YouTube using her YouTube account and YouTube's automatic captioning software service to provide captions. *See* First SOMF ¶¶ 9-10.

11. The Terms of Service provide that by using any broadly defined YouTube products or services, a user accepts the Terms of Service. *See* First SOMF ¶¶ 11-13.

12. Ms. Hill graduated from the University of the District of Columbia with a strong record, and she has experience as a journalist. *See* First SOMF ¶¶ 16-19.

Ms. Hill does not dispute any of these facts, except that she asserts that Defendants have not offered evidence of YouTube's processes and procedures sufficient to carry their initial burden under Rule 56. *See* First Opp. at 5-6. The Mansfield Declaration establishes, as Rule 56(c)(4) requires, that Ms. Mansfield made her declaration on personal knowledge, set out facts that would be admissible in evidence, and is competent to testify on the matters stated. To create a genuine dispute about these facts, Ms. Hill had the burden to offer contrary evidence that meets the standards of Rule 56(c), and she did not do so. It is therefore immaterial whether the Court can take judicial notice of the facts set out in the Mansfield Declaration.

B. Discovery

Ms. Hill contends that Defendants' motion is premature because she is entitled first to conduct discovery. *See* First Opp. at 8-9. The Court disagrees for two reasons. First, Ms. Hill has not submitted an affidavit or declaration showing that the lack of discovery prevents her from presenting facts essential to justify her opposition. *See Kibunja*, 856 A.2d at 1125-26. If the non-moving party "merely asserts that she was unable to effectively oppose the summary judgment motion because she was denied discovery," summary judgment may be proper. *See Briscoe v. District of Columbia*, 62 A.3d 1275, 1280 (D.C. 2013) (quotation, brackets, and citation omitted). Second, Ms. Hill does not offer a reason to believe that discovery would be likely to produce admissible evidence sufficient to show that the Terms of Service are unconscionable.

C. Unconscionability

The only issue with respect to the warranty-disclaimer and limitation-of-liability provisions in the Terms of Service is whether they are enforceable. Ms. Hill does not dispute

that the plain language of these provisions bars her claims. Rather, she contends that these provisions are not enforceable because they are unconscionable. The Court concludes otherwise.

For purposes of this motion, the Court assumes without deciding that the Terms of Service are a contract of adhesion. *See Proulx v. 1400 Pennsylvania Avenue, SE, LLC*, 2019 D.C. App. LEXIS 12, at *5 (D.C. Jan. 10, 2019) (discussing the characteristics of a contract of adhesion). A contract of adhesion is enforceable unless unconscionability or another factor makes it unenforceable, and the party claiming unconscionability "must prove not only that one of the parties lacked a meaningful choice but also that the terms of the contract are unreasonably favorable to the other party." *Riggs National Bank of Washington, D.C. v. District of Columbia*, 581 A.2d 1229, 1251 (D.C. 1990); *Smith, Bucklin & Associates v. Sonntag*, 83 F.3d 476, 480 (D.C. Cir. 1996) (as a general rule, "contract of adhesion is fully enforceable according to its terms," unless an exception like unconscionability applies). "Under D.C. law, a court can void a contract on the grounds that it is unconscionable if the party seeking to avoid the contract proves that the contract was both procedurally and substantively unconscionable." *Fox v. Computer World Services Corp.*, 920 F. Supp. 2d 90, 97 (D.D.C. 2013) (citing *Urban Investors, Inc. v. Branham*, 464 A.2d 93, 99 (D.C. 1983)). "Thus a contract may be unconscionable either because of the manner in which it was made or because of the substantive terms of the contract or, more frequently, because of a combination of both." *Urban Investors,* 464 A.2d at 99 (quotation and citation omitted).

The Court agrees with the analysis in *Song Fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 61-64 (D.D.C. 2014), that the Terms of Service are not unconscionable: "there was no procedural unconscionability where the conditions for use of YouTube's service were not obscured or hidden, Plaintiffs had a clear opportunity to understand the terms, and they did not lack a

meaningful choice;" and the Terms of Service, individually and collectively, are not "so outrageously unfair as to shock the judicial conscience." The warranty-disclaimer and limitation-of-liability provisions are clear and unambiguous, and Ms. Hill is an educated person who had the ability and opportunity to decide whether to accept the Terms of Service. Ms. Smith could have created her own website to disseminate her content, and she could and did use other video-sharing websites. *See* First MSJ at 14-15. The same popularity that attracted Ms. Hill to its services also makes it impracticable for YouTube to negotiate on a user-by-user basis any limitations on liability – and makes occasional errors inevitable. Ms. Hill concedes that Defendants did not promise her "error free closed captioning services" and that errors are foreseeable, but she proposes to draw a line between errors that are defamatory or insulting and errors. *See* Second Opp. at 12. However, this line is unworkable, and Ms. Hill does not demonstrate that it was unreasonable for Defendants to protect themselves from liability for the kind of inadvertent and isolated transcription error alleged by Ms. Hill.

The result is the same under District of Columbia and California law. Ms. Hill does not demonstrate that any substantive difference exists between the law in these two jurisdictions that is material to this case. *See Riggs National Bank*, 581 A.2d at 1251 (following California law); First MSJ at 20; First Reply at 10-16.

IV. CONCLUSION

Accordingly, the Court orders that:

1. Defendants' July 2, 2018 limited motion for summary judgment is granted.
2. Defendants' August 31, 2018 motion for summary judgment is denied as moot.
3. The pretrial conference scheduled for January 29, 2019 is canceled.
4. Defendants' motion to continue the pretrial conference is denied as moot.

Anthony C Epstein

Anthony C. Epstein
Judge

Date: January 16, 2019

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