

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

MARK CHANGIZI, et al.,

Plaintiffs,

v.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, et al.,

Defendants.

CASE NO: 2:22-cv-1776

**MOTION TO FILE AN AMENDED COMPLAINT AND MEMORANDUM IN
SUPPORT THEREOF**

Plaintiffs respectfully move to file an amended complaint (attached hereto as Exhibit 1) naming additional defendants, including President Joseph Biden and the newly-formed Disinformation Governance Board (DGB), which is part of the Department of Homeland Security (DHS), an additional Plaintiff (Amanda Jane [A.J.] Kay), and supplementary information about the DGB's role and the involvement of members of Congress and the Biden administration in silencing non-government approved viewpoints about COVID-19 through threats of regulation and other adverse legal consequences on social media platforms. *See* Fed. R. Civ. P. 15. Much of the additional information about the DGB included in the amended complaint surfaced after filing the original complaint through newly declassified documents and whistleblower allegations made public just last week. This Court should grant the motion because it is brought in good faith, will not prejudice Defendants, and is not futile. *See id.* Moreover, it contains substantial, crucial information that

Plaintiffs did not know and could not have known when the original complaint was filed. *See Human Rights Def. Ctr. v. Bezotte*, No. 11-CV-13460, 2016 WL 1258992 (E.D. Mich. Mar. 31, 2016) (leave to amend complaint was granted in the interest of justice after new allegations surfaced that could not have been known before).

PROCEDURAL POSTURE

Plaintiffs filed suit in the United States District Court for the Southern District of Ohio on March 24, 2022, against the Department of Health and Human Services (HHS), Surgeon General Vivek Murthy, and Secretary of HHS Xavier Becerra. They moved for a preliminary injunction shortly thereafter, on March 30, 2022. Defendants filed a combined response to the preliminary injunction and a motion to dismiss on April 15, 2022, and Plaintiffs filed a combined reply to the preliminary injunction opposition and opposition to the motion to dismiss on April 22, 2022, to which Defendants replied on April 27, 2022.

Exactly a week after an April 28, 2022 hearing was held on the preliminary injunction, the court granted Defendants' motion to dismiss pursuant to Fed. R. Civ. P. (12)(b)(1) and (12)(b)(6).

ARGUMENT

Under Federal Rule of Civil Procedure 15(a), “[a] party may amend its pleading once as a matter of course within ... 21 days after serving it” or within twenty-one days after service of a responsive pleading or certain motions. “In all other cases, ... [t]he court should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(1)-(2). *See Foman v. Davis*, 371 U.S. 178 (1962).

“[T]he thrust of Rule 15 is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings.” *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986) (quoting *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982)). In the absence of any apparent or declared reason, such as undue delay, bad faith on the part of the moving party, repeated failure to cure

deficiencies by amendments previously allowed, undue prejudice to Defendants, or futility, leave to amend should be granted. *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 591 (6th Cir.1990); *Weisbord v. Michigan State Univ.*, 495 F. Supp. 1347 (W.D. Mich. 1980). None of these exceptions exist here. Accordingly, the Court should grant Plaintiffs' motion to file their amended complaint.

First, and perhaps most crucially, Plaintiffs seek to amend their complaint to incorporate information that came to light just *last week* about the DGB and its documented instrumentalization of social media companies—especially Twitter—to combat “misinformation.” The declassified memoranda specifically discuss attempts to stifle “misinformation” about COVID-19, the material at issue here.

The DGB's existence was unknown to the American public until its creation was announced by the Biden Administration April 27, 2022 (the day preceding the hearing in this case). Likewise, DHS's involvement in driving social media censorship came to light at that time. Before last week, when a number of documents were declassified and publicized, there was no direct evidence that President Biden's executive agencies had been meeting with social media companies and using them to further their aim of silencing those spreading “misinformation” (although Plaintiffs maintain that they presented enough circumstantial evidence to survive a motion to dismiss). These documents establish that DHS officials met *in secret* with Twitter executives to coordinate online censorship of perspectives such as those offered by Plaintiffs, who had been suspended on Twitter for saying, *inter alia*, masks were ineffective. The declassified documents showed that DHS considered “disinformation relating to the origins and effects of Covid-19 vaccines or the efficacy of masks” a “serious homeland security risk.” This was not information that Plaintiffs knew or could have known until last week. *See Human Rights Def. Ctr. v. Bezotte*, No. 11-CV-13460, 2016 WL 1258992 (E.D. Mich. Mar. 31, 2016) (leave to amend complaint was granted in the interest of justice after new allegations surfaced that could not

have been known before). They could not have known about the DGB, or the role it played, when they filed the original complaint, as that also remained a government secret until April 27, 2022.

At the same time, this evidence goes to the heart of Plaintiffs' contentions that government involvement in social media censorship violated their First Amendment rights to free speech and expression. Granting Defendants' motion to dismiss, this Court determined that there was insufficient evidence from which to conclude that Defendants' actions caused Twitter to censor Plaintiffs or that it had a chilling effect. On that basis, it dismissed Plaintiffs' complaint both for lack of standing and for failure to state a claim. But this new information constitutes direct evidence of the government's involvement in social media censorship that this Court found lacking in the original complaint. To summarize, it demonstrates that the government considered "misinformation" on social media a national security threat, that it met with Twitter executives to address that threat, and that it intended to use social media companies to accomplish its aim of silencing non-government approved views on the subject of COVID-19. *See Ward v. NPAS, Inc.*, No. 3:19-cv-00484, 2021 WL 5041281 (M.D. Tenn. Oct. 29, 2021) (granting motion to amend complaint, after dismissal of lawsuit, because newly discovered facts amplified factual allegations that sufficed to establish standing); *Shumway v. Mira & Jenshi, LLC*, No. 121CV01063STAJAY, 2021 WL 3354845 (W.D. Tenn. Aug. 2, 2021) (granting Plaintiff's motion to amend complaint to cure standing issue); *Marchese v. Milestone Systems Inc.*, No. 12-12276, 2013 WL 12182680 (E.D. Mich. June 21, 2013) (granting leave to amend to provide additional factual allegations that buttressed standing).

Indeed, assuming *arguendo* that Plaintiffs' suspensions on Twitter and censorship on other social media platforms could not be tied to state action before, given this new knowledge that the government is directly involved in such censorship now, they certainly have standing to bring this suit at the present time. At the very least, this previously undisclosed information warrants permitting Plaintiffs to move forward with the lawsuit and obtain discovery. *See Consumers Petroleum Co. v. Texaco*,

Inc., 804 F.2d 907 (6th Cir. 1986) (“We can not [*sic*] conclude from reviewing the record that [Plaintiff] could not have developed facts to support its assertion ...”). After all, Plaintiffs do not need to prove their case at this juncture. They only need to provide sufficient facts which, *viewed in the light most favorable to them*, could support a claim that would entitle them to relief. *DirectTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).

Second, Plaintiffs added Defendants to the amended complaint, including President Joseph Biden, DHS, Secretary Alejandro Mayorkas, the Cybersecurity and Infrastructure Security Agency, and the DGB. They did so in order to address an alleged deficiency in the original complaint: when granting Defendants’ motion to dismiss, this Court disregarded statements made by Biden and his press secretary, Jennifer Psaki, on the grounds that the President was not named as a defendant. Had the Court taken these statements into consideration—among which were direct threats to take regulatory or other legal action—perhaps it would have reached a different conclusion, especially with respect to the First Amendment claim. By adding the President, Plaintiffs seek to cure that alleged defect.¹ *See Siedlik v. Stanley Works, Inc.*, 205 F.Supp.2d 762, 764 (E.D. Mich. 2002) (granting motion to amend complaint and add a defendant). Because they added Biden, Mayorkas, DHS, and the DGB, Plaintiffs included in the amended complaint threatening statements directed at tech companies from Mayorkas and Bruce Reed, Biden’s former chief of staff, as well as a letter from congressional Democrats to President Biden from December of 2020, calling on the administration to create task forces designed to increase censorship of “misinformation” on social media.

Plaintiffs could not have named DHS and the DGB as Defendants when they filed the lawsuit in late March for the reasons discussed above—namely, that the DGB’s creation was announced in late April, and the nature of its role kept secret until revealed through the declassification of certain

¹ Plaintiffs maintain that, since the President controls his executive agencies, his statements (and those of his press secretary) ought to be imputed to those agencies when assessing motivation.

documents last week. However, as mentioned, it is readily apparent that DHS and the DGB have played a significant role in the commandeering of technology companies to quell the dissemination of COVID-19 “misinformation,” and thus it is appropriate to include them as Defendants in this lawsuit.

Third, the amended complaint adds Amanda Jane (A.J.) Kay as Plaintiff in this matter. *See Yoder v. City of Bowling Green, Ohio*, No. 3:17 CV 2321, 2018 WL 1900460 (N.D. Ohio Apr. 20, 2018) (permitting amendment of complaint to add Plaintiff). Ms. Kay was suspended for the first time on Twitter on May 4, 2022. The undersigned counsel, Ms. Younes, decided to speak with her after hearing about this incident, at which time she learned about the erasure of Ms. Kay’s entire Medium account—including dozens of articles she had written over years that had nothing to do with the subject of COVID-19—in September of 2021 (notably, this was the same month and year that DHS deemed COVID-19 “misinformation” a homeland security threat).

To summarize, in light of the fact that the amendments to the complaint are based on: (1) the release of declassified information just last week; (2) the addition of several defendants in an attempt to address a defect that the Court identified in the original complaint and based on new information about DHS involvement in government-sponsored censorship; and (3) the addition of Plaintiff A.J. Kay, who was suspended on Twitter after the initial filing of the lawsuit, this Court should permit Plaintiffs to file the amended complaint. Plaintiffs filed as expeditiously as possible after learning each of these pieces of information. Indeed, every time Plaintiffs were ready to seek leave to file the amended complaint, new evidence surfaced that required yet another revision. Defendants will suffer no undue prejudice from Plaintiffs’ filing and amended complaint and, for the reasons discussed throughout this memorandum, the amendments directly address the Court’s grounds for dismissal by amplifying Plaintiffs’ factual allegations with information they could not previously have known, and by adding the requisite Defendants to establish standing. Accordingly, the amended complaint will not be futile.

Dated: June 14, 2022

Respectfully,

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