

No. 21-16210

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CHILDREN’S HEALTH DEFENSE,
a Georgia non-profit organization,
Plaintiff-Appellant,

v.

META PLATFORMS, INC., a Delaware corporation;
MARK ZUCKERBERG, a California resident;
SCIENCE FEEDBACK, a French corporation;
THE POYNTER INSTITUTE FOR MEDIA STUDIES, INC.,
a Florida corporation; and DOES 1-20,
Defendants-Appellees.

Appeal from the Judgment of the United States District Court
for the Northern District of California, Case No. 3:20-cv-05787-SI
Honorable Susan Illston, United States District Judge

APPELLANT’S FOURTH MOTION FOR JUDICIAL NOTICE

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OVERVIEW

Once again, substantial new revelations have emerged of judicially-noticeable material further cementing the plausibility of Plaintiff-Appellant Children Health Defense's ("CHD's") claims of state action and fraud. With apologies for the additional burden, CHD respectfully submits this motion to bring the new material to the Court's attention.

DESCRIPTION OF JUDICIALLY NOTICEABLE MATERIAL

On March 30, 2023, Louisiana Special Assistant Attorney General John Sauer testified before a committee of the United States House of Representatives. His astonishing written testimony, together with its exhibits, offers almost 500 pages of copiously documented evidence of a massive, coordinated, multi-agency partnership between federal actors and the nation's major social media companies, including Defendant-Appellee Meta Platforms, Inc. ("Facebook"), to censor constitutionally protected speech. (For the Court's convenience, Mr. Sauer's written testimony, without its exhibits, is attached hereto. *See* Exh. 1; complete submission available at <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/2023-03/Sauer-Testimony.pdf> (hereafter "Complete Sauer Testimony").

Included in Mr. Sauer's testimony are several references to (and copies of) judicially-noticeable communications between Facebook, the White House and

others specifically discussing Facebook’s censorship of posts directly related to CHD—posts by CHD itself, by Robert F. Kennedy, Jr. (CHD’s founder, chief executive, and chief spokesman), and by a group of individuals referred to as the “Disinformation Dozen” (one of whom is Mr. Kennedy)—under pressure from, and under policies and directives established through Facebook’s partnership with, federal actors. *See* Exh. 1 at 5-6, 9, 12-13; Complete Sauer Testimony, *supra*, at 32, 42, 53, 64, 69, 76, 93, 96-97, 397-98, 421-22, 437-38.

In addition, Mr. Sauer’s testimony includes numerous emails by or between Facebook and government agents in which both sides refer to their close collaboration, “partnership,” and “joint efforts” in censoring disfavored COVID-related information.¹ For example:

- On May 28, 2021, Nick Clegg, Facebook’s Head of Global Governance (and a former deputy Prime Minister of the U.K.), sent a lengthy email to the White House’s Andrew Slavitt and to Vivek Murthy, the U.S. Surgeon General. In this email, Clegg says: “**We think there’s considerably more we can do *in partnership with you and your teams to drive behavior. We’re committed to addressing the defensive work around misinformation that you’ve called on us to address. ... We’re eager to find additional ways to partner with you.***” Exh. 2-C, May 28, 2021 (emphasis added).
- On July 16, 2021, Clegg sent another email to Surgeon General Murthy: “Reaching out after what has transpired over the past few days following

¹ CHD seeks declaratory judgment of its right to post articles and opinion pieces about the harms of Covid-19 vaccines, *inter alia*. 1-ER-6-7. CHD and Mr. Kennedy were both terminated from Facebook in August 2022, and Mr. Kennedy was terminated from Instagram in February 2021 for posting about Covid-19. *See* Dkt. #68.

- the publication of [Dr. Murthy’s] misinformation advisory, and culminating today in the President’s remarks about us. I know the teams met today *to better understand the scope of what the White House expects from us on misinformation going forward.*” Clegg added that Facebook still considers itself “*to be partners*” with the Administration, but also noted “I thought the way we were singled out over the past few days has been both surprising and misleading, and I believe unproductive to *our joint efforts* too.” Exh. 2-G, July 16, 2021 (emphasis added).
- Two days later, on July 18, 2021, Clegg texted Murthy: “I’m keen to find a way to deescalate and *work together collaboratively.*” Exh. 2-H, July 18, 2021 (emphasis added).
 - On July 23, 2021, Clegg wrote again to Murthy, saying, “*we hear your call to do more*” and stating that “it was very helpful to take stock after the past week and *hear directly from you and your team and to establish our next steps.*” Clegg goes on: “*I wanted to make sure you saw the steps we took just this past week to adjust what we are removing with respect to misinformation, as well as steps taken to further address the disinfo dozen (so a total of 39 Profiles, Pages, Groups and IG [Instagram, owned by Facebook] accounts deleted thus far, resulting in every member of the disinfo dozen having had at least one such entity removed).*” Further, Clegg expresses Facebook’s desire to engage in “regular” meetings with “your team” to keep Murthy “informed” of Facebook’s “progress” in responding to Murthy’s “specific recommendations”: “We’d also like to begin a regular cadence of meetings with your team so that we can continue to update you on our progress. *You have identified 4 specific recommendations for improvement and we want to make sure to keep you informed of our work on each.*” Exh. 2-I, July 23, 2021 (emphasis added).
 - On October 29, 2021, Facebook sent a long email to Rob Flaherty and other White House officials reporting to the White House and the Office of the Surgeon General (“OSG”) a “detailed description of [Facebook’s] plans for the approval of vaccines for children.” The plan included immediately updating policies to censor claims relating to such vaccinations, noting that Facebook was relying directly on the CDC to decide what to censor: “*We were able to make this change based on the conversation we had last week with the CDC.... There are several claims we will be able to remove as soon as the CDC debunks them.*”

Facebook then asked federal officials to provide a federal health authority to dictate the content to be censored on Facebook's platforms: "We expect the approval of COVID vaccines for kids aged 5-11 will be another significant peak of new misinformation claims.... ***Our policy allows us to take action against this content once those claims have been debunked and confirmed harmful by a public health authority. We're committing to addressing these quickly; to do so effectively, we will need channel to a health expert with whom we can discuss these claims in real time. Is this something we could partner on, and if so, would your team be able to connect us with a point person?***" Exh. 2-J, Oct. 29, 2021 (emphasis added).

- On November 4, 2021, Facebook wrote to the White House and OSG: "Last Friday, we updated our misinformation policies for COVID-19 vaccines to make clear they apply to claims about children." This email indicates that the CDC was serving as the "health expert" dictating what could be said on Facebook's platforms: "***We're grateful to our partners at the CDC for helping get these debunked in advance of the announcement [of approvals of vaccines for children], and we look forward to staying connected on emerging COVID misinformation trends.***" Exh. 2-J, Nov. 5, 2021 (emphasis added).²

Moreover, Mr. Sauer's testimony includes communications from the White House to Facebook using language so peremptory (and profane) as to suggest that the White House was in a position to make censorship demands (rather than mere arms-length suggestions), adding to the plausibility of CHD's claim that Facebook complied with government censorship directives under pressure of implicit government threats. For example, on July 15, 2021, White House officer Rob

² CHD also provides this Court with a list, compiled by the Federal Government, of over 50 federal employees who had contacts with social media platforms regarding content moderation and/or so-called misinformation. Exh. 2-K, Mar. 4, 2023.

Flaherty emailed Facebook using the following language demanding to know why Facebook hadn't censored content the government wanted censored: "***Are you guys fucking serious? I want an answer on what happened here and I want it today.***" Exh. 2-D, July 15, 2021 (emphasis added).

Finally, Mr. Sauer's testimony includes communications in which Facebook admits that it is secretly censoring COVID-related content even when that content does not "violate our terms of service," including content that is "true" but that might cause readers to question the safety or efficacy of the COVID vaccines. *See, e.g.*, Exh. 1 at 6; Complete Sauer Testimony, *supra*, at 93. These communications support the plausibility of CHD's claims of fraud because Facebook was at the same time communicating publicly that it censored COVID-related content (like CHD's and Mr. Kennedy's) only when that content was "false."

ARGUMENT

In order to defeat the Defendants' 12(b)(6) motion for dismissal, CHD needs to show only that the allegations in the second amended complaint, together with its supplements and the judicially noticeable material, as well as all reasonable inferences drawn in CHD's favor, plead a "plausibly suggestive" claim. *Disability Rights Mont., Inc. v. Batista*, 930 F.3d 1090, 1096 (9th Cir. 2019) (quoting *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009)). CHD has met and exceeded that standard here.

As CHD has noted in earlier submissions, the legal tests for state action are additive and overlapping. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Among other tests, it is well established that private party conduct is state action when it results from “willful participa[tion] in joint activity with the State or its agents.” *Brentwood*, 531 U.S. at 296. Further, this Court has held that a claim of state action can be stated when there is “active participation or encouragement” by the government. *United States v. Rosenow*, 250 F.4th 715, 733 (9th Cir. 2022) (search by private party); *see also Crowe v. County of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010) (state action stated if evidence suggests even a “tacit ‘meeting of the minds’”); *Rimac v. Duncan*, 319 F. Appx. 535, 537 (9th Cir. 2009) (unpubl. decision) (state action claim stated where plaintiff “alleged that [private party and government official] met, agreed to remove the trees, and came to a plan”); *United States v. Davis*, 482 F.2d 893, 898 (9th Cir. 1973) (state action shown where FAA and the airlines “worked together to put the system into operation at the nation’s airports” as part of a “cooperative effort”).

While proof is not required, the materials presented here (and those previously submitted) nonetheless come close to proving “joint activity,” “active participation or encouragement,” a “meeting of the minds,” and a “cooperative effort.” Without doubt, they raise a plausible inference thereof. Indeed, in the

communications cited above, Facebook repeatedly admits that it is “collaborating” with federal actors and working in “partnership” with them. Moreover, these communications manifestly show the government’s “active participation and encouragement” of Facebook’s censorship of COVID-related content disfavored by federal agents.

All the materials referenced above are subject to judicial notice. Courts routinely take judicial notice of congressional testimony. *See, e.g., Rojas v. FAA*, 927 F.3d 1046, 1051 n.1 (9th Cir. 2019) (“In general, we may take judicial notice of publicly available congressional records, including transcripts of congressional hearings.”), *vacated in part on other grounds*, 989 F.3d 666 (9th Cir. 2021); *Muller-Paisner v. TIAA*, 289 Fed. Appx. 461, 466 (2d Cir. 2008) (“[C]ongressional testimony is an appropriate subject for judicial notice as a public record for the fact that the statements were made.”) (citing cases).

None of the communications cited above is being offered for the truth of the matter asserted. Rather, it’s the *existence* of these communications and *what* the parties are saying to each other—not whether what they say is true—that shows “joint activity” between Facebook and federal actors as well as “active participation and encouragement” by the government. *See Kurtz v. Goodyear Tire & Rubber Co.*, No. 19-16544, 2020 U.S. App. LEXIS 27059, at *2 (9th Cir. Aug. 25, 2020) (judicial notice proper “for purposes of establishing when and by whom

certain contentions” were made, as opposed to “the truth of the matters discussed in the documents”).

Further, *DeGroot v. United States*, 786 Fed. Appx. 638 (9th Cir. 2019), an unpublished decision, offers an example of how this Court may, on appeal, take judicial notice of *factual allegations* from other proceedings that “may be presented to a jury” in order to defeat a motion for pre-trial judgment. DeGroot had been indicted, tried and acquitted of assaulting an officer under 18 U.S.C. § 111(a)(1). In his civil suit for arrest without probable cause, the district court issued summary judgment against him on the ground that the indictment was conclusive evidence of probable cause to arrest. This Court reversed, taking notice of the underlying criminal trial transcripts, not for their “accuracy or merit,” but rather simply to “note *the existence of facts that may be presented to a jury* to rebut the presumption of probable cause.” 786 Fed. Appx. at 642 (emphasis added). Finding the factual allegations in the trial transcripts to be “more than mere bald assertions,” the *DeGroot* panel held that these allegations helped show the existence of disputed issues of material fact precluding summary judgment. If this Court finds *DeGroot* persuasive, the Court can by analogy take notice of the comprehensive factual allegations in Mr. Sauer’s testimony, which are also far “more than mere bald assertions,” for “the existence of facts that may be presented to a jury” in this case, precluding a Rule 12(b)(6) dismissal.

CONCLUSION

The materials CHD has put before the Court support a plausible inference of state action – whether based on joint activity, government pressure, entwinement, inducement through immunity, symbiotic relationship, knowing acceptance of benefits, or a combination of some or all of these factors. Based on this plausible inference of state action, CHD should be allowed to proceed with its action and to take discovery of Facebook in conjunction with injunctive relief and damages claims for fraud.

For all of these reasons, CHD respectfully requests that this Court grant its fourth motion for judicial notice and reverse the district court’s dismissal of this action.

Dated: April 10, 2023

Respectfully submitted,



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