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24 **UNITED STATES DISTRICT COURT**
25 **NORTHERN DISTRICT OF CALIFORNIA**
26 **SAN FRANCISCO DIVISION**

27 DONALD J. TRUMP, et al.,

28 Plaintiffs,

v.

TWITTER, INC. et al.,

Defendants.

Case No: 21-cv-08378-JD

**PLAINTIFFS' MOTION FOR
INDICATIVE RULING**

Hon. James Donato
Courtroom: 11, 19th Floor
Hearing Date: June 22, 2023
Time: 10:00 A.M.

1 PLEASE TAKE NOTICE THAT on June 22, 2023, at 10:00 a.m., or as soon thereafter as
2 the matter may be heard, in the Courtroom of the Honorable James Donato, Courtroom 11, 19th
3 floor of the United States District Court, Northern District of California, San Francisco Division,
4 this Motion for Indicative Ruling will be heard.

5 Pursuant to Fed. R. Civ. P. 62.1, Plaintiffs Donald J. Trump, American Conservative
6 Union, Rafael Barbosa, Linda Cuadros, Dominick Latella, and Wayne Allyn Root (“Plaintiffs”) request that the Court indicate that it would grant Plaintiffs’ Motion for Relief from Judgment
7 pursuant to Fed. R. Civ. P. 60(b)(2), attached hereto as Exhibit 1, if the Court of Appeals were to
8 remand the case for this purpose.
9

10 I. INTRODUCTION

11 In a truly unique turn of events, after prevailing on its motion to dismiss (“Motion to
12 Dismiss”), Defendant Twitter was acquired by Elon Musk, who promptly opened up Twitter’s
13 records for review and publication by journalists (“Twitter Files”). In addition to the Twitter
14 Files, and also post-dating the entry of the judgment entered by this Court on June 7, 2022
15 (“Judgment”), the FBI’s liaison with the social media industry, Agent Elvis Chan, was deposed in
16 an action brought by the Attorneys General of Louisiana and Missouri. Combined, the Twitter
17 Files and Chan deposition confirm the core allegation in the First Amended Complaint (“FAC”) that Twitter unlawfully took adverse action against the Plaintiffs in collaboration with, and as a
18 result of coercion from, agents of the federal government, rather than (as it claimed) for violation
19 of its Terms of Service (“TOS”). These events occurred after Plaintiffs had filed a Notice of
20 Appeal, divesting this Court of jurisdiction; that appeal is still pending. Notice of Appeal, 1, ECF
21 169. Plaintiffs are therefore unable to file a motion pursuant to Rule 60(b)(2) within the one-year
22 time allowed by Rule 60(c)(1). *Nevitt v. United States*, 886 F.2d 1187, 1188 (9th Cir. 1989) (time
23 for filing 60(b) motion not tolled by pendency of an appeal). Accordingly, Plaintiffs, follow the
24 process mandated by the Ninth Circuit in *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir.
25 2004) by filing a motion pursuant to Federal Rule of Civil Procedure 62.1(a)(3) (“Rule 62”),
26 requesting that this Court make an indicative ruling stating that it is willing to consider a motion
27 for relief from the Judgment pursuant to Rule 60(b)(1). Such a motion is attached to this motion.
28

1 Exhibit 1.

2 Federal Rule of Civil Procedure 60(b)(2) authorizes this Court to grant relief from a final
3 judgment based on “newly discovered evidence that, with reasonable diligence, could not have
4 been discovered in time to move for a new trial under Rule 59(b).” Neither the Twitter Files nor
5 the evidence disclosed in the Chan deposition could have been uncovered through reasonable
6 diligence prior to the entry of the Judgment.

7 If the Court were to issue an indicative ruling pursuant to Rule 62, and jurisdiction were
8 returned to this Court to rule substantively on the attached Rule 60 motion, the Plaintiffs would
9 seek to file a Second Amended Complaint incorporating these new facts.

10 The Rule 60 motion speaks to key points addressed by the Court in its order on the
11 Motion to Dismiss (“Order”). Specifically, a key concern raised by the Court was that Twitter, as
12 a private actor, would not typically be covered by the First Amendment. Order, Dkt. 165, P. 3.
13 The Court emphasized that the ultimate determination rests on whether the Plaintiffs alleged a
14 sufficient nexus showing that the actions of the Defendants can be deemed actions of the
15 government. *Id.* The newly discovered evidence shows that members of the executive and
16 legislative branches, working in cooperation with each other, pressured and urged the Defendants
17 to censor disfavored speakers such as the Plaintiffs, and that as a result Plaintiffs’ First
18 Amendment rights were violated.

19 **II. ORIGIN OF THE NEW EVIDENCE**

20 In October of 2022, after the entry of this Court’s Judgment, Twitter was acquired by Elon
21 Musk. Shortly thereafter, Mr. Musk invited several journalists to review Twitter’s internal
22 records. Allowing these journalists to search for evidence that Twitter censored content that was
23 otherwise compliant with Twitter’s “TOS”, the journalists disclosed their findings in a series of
24 posts on Twitter collectively known as the Twitter Files. As set out in the attached Rule 60
25 motion, the Twitter Files confirm Plaintiffs’ allegations that Twitter engaged in a widespread
26 censorship campaign that not only violated the TOS but, as much of the censorship was the result
27 of unlawful government influence, violated the First Amendment.

28 The Twitter Files show that the FBI and other federal agencies, the White House, leading

1 members of Congress, and congressional staff collaborated with and pressured Twitter to remove
2 politically disfavored content. The information contained in the Twitter Files is corroborated by
3 evidence obtained by the Attorneys General of Missouri and Louisiana. The deposition of the
4 lead FBI agent assigned to work with social media companies, Elvis Chan, was taken in
5 November 2022 in Missouri, et al., v. Biden, et al., 22-CV-1213 (WD LA). Chan testified that
6 law enforcement regularly met with social media companies and forwarded lists of Twitter
7 accounts that law enforcement believed posted content in violation of the TOS. Chan also stated
8 that the FBI and the congressional committee staff members coordinated their oversight of social
9 media companies.

10 **III. THE NEWLY DISCOVERED EVIDENCE DOES NOT PREJUDICE THE** 11 **DEFENDANT**

12 In addition to the statements of the elected officials identified in the complaint, the Twitter
13 Files and Chan deposition reveal massive government influence on Twitter, and all of this was
14 known to Twitter at the time the action was filed and at the time of briefing for the Motion to
15 Dismiss.

16 For at least a year prior to the 2020 presidential election FBI agents and congressional
17 staffers had been pressuring Twitter to censor disfavored content. This fact was unknown, and
18 unknowable, to the Plaintiffs at the time the FAC was filed and the Motion to Dismiss was
19 briefed. However, as demonstrated by the Twitter Files, the Defendants were all too aware of this
20 concerted pressure from members of both the executive and legislative branches.

21 While detailed more fully in the attached Rule 60 motion, some of the pressure Twitter
22 faced included:

- 23 ■ The FBI and other agencies sent lists of User accounts that law enforcement believed
24 were publishing content in violation of the Twitter TOS, (Exhibit 1, pg. 10-11);
- 25 ■ Twitter officials understood that these lists were assembled, in part, by dedicated FBI
26 teams, “in the Baltimore field office and at [FBI] HQ . . . doing keyword searches for
27 violations [of the TOS],” (Exhibit 1, pg. 12); and,
- 28 ■ In December 2022, Twitter’s Head of U.S. Public Policy drafted a summary of the

1 company’s meetings with the Biden White House describing how “the Biden Team
2 was not satisfied with Twitter’s enforcement approach, as they wanted Twitter to do
3 more and to deplatform several accounts,” further describing the team as “very angry
4 in nature,” (Exhibit 1, pg. 16).

5 Moreover, after publication of the Twitter Files, Defendant Dorsey issued a statement
6 which stated in part that social media companies must on principle, “be resilient to . . .
7 government control,” and that, “Twitter when I led it . . . [did] not meet . . . [that] principle”
8 (Exhibit 1, pg. 18). This is an admission from one of the Defendants that Twitter acted under
9 “government control.” Additionally, Twitter made the issue of compliance with the Terms of
10 Service central to its Motion to Dismiss; in fact, the very first sentence in Twitter’s argument is
11 that the “Plaintiffs – like all Twitter account holders – agreed to abide by Twitter’s Rules, and yet
12 proceeded to repeatedly violate those Rules.” Dkt. 138, page 1, lines 11-12. Nevertheless, the
13 Twitter Files reveal that the Plaintiffs’ content in fact *did comply* with the TOS, and that their
14 content was censored as part of a larger scheme of government pressure.

15 **IV. THE MATTER IS NOT MOOT AND RELIEF FROM JUDGMENT IS**
16 **APPROPRIATE**

17 This Court’s Order on the related motion filed by co-plaintiff Naomi Wolf holds that that
18 case is moot because Twitter had reinstated Wolf’s account. Order Re: Rule 60(b) Mot., 5, Dkt.
19 190. That is not the case as to Plaintiffs Latella¹ and Barbosa,² whose accounts were not
20 reinstated, so as to them the motion for an indicative ruling and 60(b) motion unquestionably
21 present a live controversy.

22 Nor is the case moot as to the remaining Plaintiffs. A party asserting mootness bears the
23 “formidable burden” of establishing this element. *Friends of the Earth, Inc. v. Laidlaw Env’tl.*
24 *Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). *See also City of Mesquite v. Aladdin’s Castle, Inc.*,
25 455 U.S. 283, 289 (1982); *Brach v. Newsom*, 6 F.4th 904, 919 (9th Cir. 2021); *Rosebrock v.*
26 *Mathis*, 745 F.3d 963, 971 (9th Cir. 2014). Mere voluntary cessation of the offending conduct is

27 _____
28 ¹ <https://twitter.com/dljrmia>

² <https://twitter.com/RB18>

1 not enough. *Friends of the Earth*, 528 F.2d at 189 (“It is well settled that a defendant's voluntary
 2 cessation of a challenged practice does not deprive a federal court of its power to determine the
 3 legality of the practice.”) (internal quotation marks omitted). The Supreme Court has held that a
 4 defendant satisfies this heavy burden when, for example, it enters into an “unconditional and
 5 irrevocable” agreement that prohibits it from returning to the challenged conduct. *Already, LLC*
 6 *v. Nike, Inc.*, 568 U.S. 85, 93 (2013); *see also Am. Diabetes Ass’n v. United States Dep’t of the*
 7 *Army*, 938 F.3d 1147, 1152 (9th Cir. 2019) (“defendant may satisfy this heavy burden by
 8 persuading court that “the change in its behavior is ‘**entrenched**’ or ‘**permanent.**’”) (citing *Fikre*
 9 *v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018)) (emphasis added). Defendants have not alleged any
 10 agreement not to repeat their wrongful conduct, much less an irrevocable one. Indeed, nothing
 11 precludes them from permanently suspending Plaintiffs’ accounts anytime Mr. Musk, or whoever
 12 owns Twitter in the future, chooses to do so.

13 V. CONCLUSION

14 The Twitter Files and Chan deposition support the claims alleged in the FAC and address
 15 the issues raised in the Court’s Order. The facts were not discoverable prior to entry of the
 16 Judgment and, had they been presented to the Court, the volume of unlawful activity would have
 17 led this Court to deny the Motion to Dismiss. Accordingly, Plaintiffs respectfully submit that
 18 these dramatic developments entitle them to relief from Judgment, and that the Court allow the
 19 Plaintiffs to file an amended complaint incorporating these new allegations.

20 Dated: May 3, 2023

Respectfully submitted,

21 RICHARD POLK LAWSON (*pro hac vice*)
 22 GARDNER BREWER HUDSON

23
 24 By: /s/ Richard Polk Lawson
 25 Richard Polk Lawson

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ATTORNEY ATTESTATION

I, Andrei D. Popovici, am the ECF user whose user ID and password are being used to file these documents, including Plaintiffs’ Motion for Indicative Ruling. Pursuant to N.D. Cal. Civil L.R. 5-1(h)(3), I attest that concurrence in the filing of these documents has been obtained from each of the other signatories.

Dated: May 3, 2023

/s/ Andrei D. Popovici

Andrei D. Popovici