UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DONALD J. TRUMP, et al.,

Plaintiffs,

v.

TWITTER INC., et al.,

Defendants.

Case No. 21-cv-08378-JD

ORDER RE MOTION TO DISMISS

Re: Dkt. No. 138

Former President Donald J. Trump, the American Conservative Union, and five individuals have sued Twitter, Inc., and Jack Dorsey (together, Twitter), on behalf of themselves and a putative class of Twitter users who have been "de-platformed" and "censored by Defendants." Dkt. No. 21 (AC) ¶¶ 8, 18. Plaintiffs alleged claims under the First Amendment and Florida state consumer and "social media" statutes, and seek a declaration that Section 230 of the Communications Decency Act, which states that online service providers like Twitter cannot be held responsible for content posted by others, is unconstitutional. *Id*. ¶¶ 168-233. Twitter has moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 138. The amended complaint is dismissed.

BACKGROUND

As alleged in the amended complaint, which the Court accepts as true for Rule 12(b)(6) purposes, *see In re Capacitors Antitrust Litigation*, 106 F. Supp. 3d 1051, 1060 (N.D. Cal. 2015), Twitter is the well-known "social networking service that allows its Users to post and interact with

each other through short messages known as 'tweets.'" AC ¶ 28. Dorsey co-founded Twitter in 2006, and the company today hosts more than 500 million tweets posted daily by approximately 340 million users worldwide. *Id.* ¶¶ 28-29, 36.

Plaintiff Trump opened a Twitter account in May 2009 and was an active user until January 7, 2021. *Id.* ¶¶ 43-49, 113. On January 8, 2021, Twitter stated that it had "permanently suspended" the account "due to the risk of further incitement of violence." *Id.* ¶ 114.

The amended complaint alleges that the other named plaintiffs also had their Twitter accounts treated unfavorably. Linda Cuadros's account was "permanently banned" in 2020 "due to a post about vaccines." *Id.* ¶ 124. Rafael Barboza's account was "indefinitely suspended" on January 8, 2021, "after retweeting President Trump and other conservatives on January 6, 2021." *Id.* ¶ 137. Dominick Latella's account "was permanently removed from the Defendants' platform during the 2018 election cycle" after he "post[ed] positive messages about Republican candidates and President Trump," although Latella has a "second account [which] is still active" albeit "shadow banned." *Id.* ¶¶ 142-46. Wayne Allyn Root was "banned permanently by Twitter" after "multiple occasions where the Defendants censored his account for messages he posted related to COVID-19 and the 2020 election results." *Id.* ¶¶ 152, 155. Dr. Naomi Wolf's account was "suspended" for "vaccine misinformation." *Id.* ¶¶ 159, 162. The American Conservative Union "started noticing a reduction in engagement in its content" in 2017, and alleges its "followers were purged," dropping from 99,000 followers in June 2020 to 88,000 by January 19, 2021. *Id.* ¶¶ 128-29.

In plaintiffs' view, these account actions were the result of coercion by members of Congress affiliated with the Democratic Party. *Id.* ¶¶ 51-64. Plaintiffs quote Senator Mark Warner (D-VA) as saying on October 28, 2020, that "[w]e can and should have a conversation about Section 230 -- and the ways in which it has enabled platforms to turn a blind eye as their platforms are used to . . . enable domestic terrorist groups to organize violence in plain sight." *Id.* ¶ 55. Section 230 of the Communications Decency Act is said to have "significantly encouraged defendants' censorship of the plaintiff and the putative class members," *id.* ¶¶ 65-77, and the

amended complaint alleges that defendants "willful[ly] participat[ed] in joint activity with federal actors to censor plaintiff and the putative class members." *Id.* ¶¶ 78-112.

Plaintiffs allege: (1) a violation of the First Amendment to the United States Constitution; (2) that Section 230 of the Communications Decency Act is unconstitutional; (3) deceptive and misleading practices in violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), Florida Statutes § 501.201 et seq.; and (4) a violation of the Stop Social Media Censorship Act (SSMCA), Florida Statutes § 501.2041. *Id.* ¶¶ 168-233. In the prayer for relief, plaintiffs seek, among other things, compensatory and punitive damages, and injunctive and declaratory relief, including an order for Twitter to "immediately reinstate the Twitter accounts of" plaintiffs. *Id.* at 56.

This case was originally filed by plaintiffs in the United States District Court for the Southern District of Florida, Dkt. No. 1, and transferred to this District on Twitter's motion, which was made on the basis of a forum selection clause in Twitter's Terms of Service. Dkt. No. 87. The amended complaint, Dkt. No. 21, is the operative complaint. Defendants ask to dismiss all four of the claims in the AC for failure to plausibly state a claim. Dkt. No. 138.

DISCUSSION

I. TWITTER AND THE FIRST AMENDMENT

Plaintiffs' main claim is that defendants have "censor[ed]" plaintiffs' Twitter accounts in violation of their right to free speech under the First Amendment to the United States Constitution. AC ¶¶ 168-87. Plaintiffs are not starting from a position of strength. Twitter is a private company, and "the First Amendment applies only to governmental abridgements of speech, and not to alleged abridgements by private companies." *Williby v. Zuckerberg*, No. 3:18-cv-06295-JD, Dkt. No. 19 at 1 (N.D. Cal. June 18, 2019), *appeal dismissed as frivolous*, No. 19-16306, 2019 WL 11662186 (9th Cir. Nov. 25, 2019); *see also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) ("the Free Speech Clause prohibits only *governmental* abridgement of speech. The Free Speech Clause does not prohibit *private* abridgment of speech.") (emphases in original).

Plaintiffs' only hope of stating a First Amendment claim is to plausibly allege that Twitter was in effect operating as the government under the "state-action doctrine." This doctrine provides that, in some situations, "governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991); *see also Manhattan Cmty. Access*, 139 S. Ct. at 1928. This is not an easy claim to make, for good reasons. Private entities are presumed to act as such, and maintaining the line "between the private sphere and the public sphere, with all its attendant constitutional obligations," is a matter of great importance, as "[o]ne great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law." *Edmonson*, 500 U.S. at 619. "As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982) (citation omitted). "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Id.*

Plaintiffs say that the question of whether they have a First Amendment claim on the basis of the state action doctrine is a factual matter "ill-suited to a Rule 12(b)(6) motion." Dkt. No. 145 at 7. Not so. It is certainly true that the ultimate determination of state action is a "necessarily fact-bound inquiry," *Lugar*, 457 U.S. at 939, but that does not relieve plaintiffs of their obligation under Rule 8 and Rule 12(b)(6) to provide in the complaint enough facts to plausibly allege a claim against Twitter on the basis of state action. *See, e.g.*, *Heineke v. Santa Clara Univ.*, 965 F.3d 1009, 1015 n.5 (9th Cir. 2020) ("Heineke's contention that it is inappropriate to dismiss his § 1983 constitutional claims at the motion to dismiss stage, is unpersuasive. We have accepted his allegations as true. Because he has failed to plead any allegations sufficient to support his argument that SCU acted under color of state law, however, his § 1983 claims must fail as a matter of law."). To conclude otherwise, as plaintiffs urge, would fly in the face of the pleading

requirements squarely stated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).[1]

The salient question under the state action doctrine is whether "the conduct allegedly causing the deprivation of a federal right" is "fairly attributable to the State." *Id*. at 937; *see also Belgau v. Inslee*, 975 F.4th 940, 946 (9th Cir. 2020) ("The state action inquiry boils down to this: is the challenged conduct that caused the alleged constitutional deprivation 'fairly attributable' to the state?"). The answer is determined by a "two-part approach," which requires that "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible"; and that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937; *see also Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 835 (9th Cir. 1999). These factors "are not the same," and they "diverge when the constitutional claim is directed . . . against a private party." *Lugar*, 457 U.S. at 937.

As the parties noted, different formulations of the factors appear in the case law. *See, e.g.*, *Manhattan Cmty. Access*, 139 S. Ct. at 1928; *Lugar*, 457 U.S. at 939; Dkt. No. 145 at 7-21; Dkt. No. 147 at 1-6. But "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry," *Lugar*, 457 U.S. at 939, is a question that the Court need not resolve for present purposes. That is because there is "no specific formula for defining state action." *Sutton*, 192 F.3d at 836 (quotations and citation omitted). What matters is whether plaintiffs have plausibly alleged facts to "show that there is a sufficiently close nexus between the State and the challenged action of" the private defendants, such that "the action of the latter may be fairly treated as that of the State itself." *Id*. (quotations and citations omitted). The specific question the Court must answer here is: have plaintiffs plausibly alleged

[1] Plaintiffs make the odd assertion that these pleading standards apply only in antitrust conspiracy actions. Dkt. No. 145 at 6 n.7. *Twombly* and *Iqbal* expressed no such limitation, and their standards have been applied to a myriad of Rule 12(b)(6) motions in non-antitrust actions in every federal district and circuit court. A scant minute of online research makes this abundantly clear. *See, e.g., Mendoza v. Amalgamated Transit Union Int'l*, 30 F.4th 879, 886 n.1 (9th Cir. 2022) (labor and employment case); *Hoffman v. Preston*, 26 F.4th 1059, 1063 (9th Cir. 2022) (*Bivens*

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