



ATTORNEY GENERAL OF MISSOURI

ERIC SCHMITT

December 9, 2022

VIA ELECTRONIC DELIVERY

Mr. Brian Willen
Wilson Sonsini Goodrich & Rosati
Phone: 650-849-3340
bwillen@wsgr.com

Re: *Preservation of Evidence Relating to Communications Between Twitter and Federal Officials Regarding Misinformation and/or Content Modulation, and Supplementation of Twitter's Response to Third-Party Subpoena*

Dear Mr. Willen:

I write on behalf of the Plaintiffs in *Missouri, et al. v. Biden*, No. 3:22-cv-01213-TAD-KDM (W.D. La.). We applaud Twitter, Inc.'s recent and dramatic efforts to root out unfair censorship on its platforms, increase transparency, and promote public confidence in Twitter's content-modulation practices. Twitter's recent revelations supplement and reinforce the allegations of unconstitutional speech-suppression by federal officials in our Complaint in this case. We enthusiastically welcome Twitter's new commitment to restoring the freedom of speech on its platform.

In this spirit, we write to address three matters of significant concern regarding Twitter's compliance with the third-party subpoena that we served on Twitter on July 18, 2022, when Twitter was under prior management. As noted, we applaud Twitter's recent efforts to increase transparency about its past content-modulation policies, and we are optimistic that we may reach a prompt resolution to the concerns expressed herein, all of which originated under Twitter's prior management:

- We request that Twitter take immediate steps to prevent, and if possible, rectify any destruction of evidence that may have occurred under general counsel James Baker.
- We request that Twitter supplement its disclosure of federal officials who communicate with Twitter about misinformation and content moderation, pursuant to our subpoena.
- We request that Twitter honor the parties' agreement and make a full production of documents under Paragraph 6 of the agreement regarding the third-party subpoena.

We address each of these requests in turn.

First, public reports indicate that Twitter’s recently terminated general counsel, James Baker, and/or those associated with him, may have destroyed and/or may be destroying documents relating to Twitter’s communications with the FBI and other federal agencies regarding misinformation and content moderation on Twitter’s platform. Today’s column by Gregg Jarrett on FoxNews.com aptly summarizes these concerns, which multiple other commentators have also raised:

Musk immediately responded to Dorsey’s salvo by advising that the “most important data was hidden (from you too) and *some may have been deleted*, but everything we find will be released.” ... But it was also a sign that Musk suspects Baker of purging the Twitter Files to conceal the ugly truth. That likely explains why *there’s no mention of the FBI’s machinations anywhere in the files. The documents seemed to have been neatly scrubbed.*

Gregg Jarrett, *Musk’s Twitter bombshells keep coming. Social media company was giant conservative censorship machine*, FOXNEWS.COM (Dec. 9, 2022), at <https://www.foxnews.com/opinion/musks-twitter-bombshells-keep-coming-social-media-company-giant-conservative-censorship-machine> (emphases added).

Any destruction of evidence or documents relating to the FBI’s influence on Twitter’s content-moderation practices would be deeply troubling for at least three reasons. First, such documents are directly responsive to the subpoena we served on you on July 18, 2022. *See* July 18, 2022 Subpoena to Twitter (attached as Ex. A). If documents were deleted or destroyed while Twitter is under subpoena, that situation obviously raises grave concerns.

Second, those documents are directly relevant to the claims regarding which we will be pursuing merits discovery in the near future, and we will certainly seek Twitter’s production of those documents. If Mr. Baker and/or those acting in concert with him have destroyed or are destroying any documents that are relevant to our claims, such actions would impose unfair prejudice on us and our clients. Twitter should take immediate steps to prevent such spoliation activities.

Third, some of the documents in question may also be subject to Twitter’s agreement to produce documents pursuant to the subpoena pursuant to Paragraphs 1 and 6 of our negotiated agreement of August 29, 2022. In particular, Paragraph 1 required Twitter to “produce responsive documents between January 20, 2021 and August 4, 2022 memorializing or reflecting the substance of oral/verbal communications made by federal executive officials: ... (b) in meetings or discussions with the individual Defendants named in the Amended Complaint that involved flagging specific Twitter content for possible removal or requesting that Twitter engage in other specific forms of content moderation.” Likewise, under Paragraph 6, “Twitter agree[d] to produce written communications between January 20, 2021 and August 4, 2022 from the federal executive officials identified under paragraph (5) that involved flagging specific Twitter content for possible removal or requesting that Twitter engage in other specific forms of content moderation.” To the extent that these internal and external communications involved the FBI’s communications with

Twitter, it is possible that materials that Twitter agreed to produce may have been spoliated, deleted, or destroyed under Mr. Baker's watch.

Accordingly, we respectfully request that Twitter take immediate steps to: (1) ascertain whether any spoliation, deletion, or destruction of evidence has occurred and/or is occurring; (2) take all necessary steps to ensure that any such spoliation, deletion, or destruction ceases immediately; (3) ascertain whether any deleted or destroyed materials may be restored, and if so, take immediate steps to restore them; and (4) report back to us within seven days with a full account of Twitter's specific actions taken to address these urgent concerns. In addition, (5) we request that you provide a copy of Twitter's document-retention policies and any preservation instructions provided to Twitter in connection with our third-party subpoena.

Second, based on the recent deposition testimony of FBI Supervisory Special Agent Elvis Chan, we have grave concerns that Twitter may have made an incomplete disclosure in response to Paragraph 5 of the parties' negotiated agreement, and that this omission occurred on Mr. Baker's watch. Paragraph 5 provides that "Twitter will provide a list of federal executive branch officials with whom it has had meetings or discussions between January 20, 2021 and August 4, 2022 about election integrity, vaccine/Covid misinformation, violent extremism, and similar content moderation issues," and that this list "will reflect Twitter's best efforts to identify such officials based on information provided by the Twitter employees known to have had meaningful interactions with those officials about these issues." Pursuant to this Paragraph, Twitter disclosed the following list of nine officials:

- Carol Crawford
- Rob Flaherty
- Alexis Frisbie
- Daniel Kimmage
- Tericka Lambert
- Vivek Murthy
- Jennifer Shopkorn
- Andy Slavitt
- Eric Waldo

Notably absent from this list is any official from the FBI or CISA, including Elvis Chan, Laura Dehmlow, Matt Masterson, and/or Brian Scully. Yet, as Elvis Chan testified on November 29, the FBI conducted bilateral meetings with Twitter on a quarterly, monthly, and then weekly basis during both the 2020 and 2022 election cycles. *See* Deposition Transcript of Elvis Chan (attached as Ex. B). In addition, according to Chan, Twitter participated in monthly and then weekly "USG-Industry meetings" in both the 2020 and 2022 election cycles, which were attended by federal officials from the FBI, the Office of the Director of National Intelligence, the Cybersecurity and Infrastructure Security Agency, and the Department of Justice. These meetings involved discussions of "election integrity ... and similar content moderation issues," and yet Twitter did not identify any federal officials involved in those meetings. This omission raises the concern that Mr. Baker and/or others may have "scrubbed" the list of federal officials that Twitter provided in response to Paragraph 5 of the parties' agreement, just as he appears to have "scrubbed" Twitter's disclosures to independent journalists. Jarrett, *Musk's Twitter bombshells*


keep coming, supra. In addition, our review of the Government's discovery reveals other federal officials—such as Courtney Rowe and Clarke Humphrey, among others—who have engaged in such communications with Twitter, but were omitted from Twitter's disclosure. We request that you investigate these omissions and provide an updated list of officials that reflects Twitter's "best efforts to identify" any and all "federal executive branch officials with whom it has had meetings or discussions between January 20, 2021 and August 4, 2022 about election integrity, vaccine/Covid misinformation, violent extremism, and similar content moderation issues," as required by Paragraph 5 of the parties' agreement. And we request that you provide the updated list within seven days of today's date.

Third, as stated in my email to you of September 14, 2022, *see* Sept. 14, 2022 Email (attached as Ex. C), last September, Twitter refused to honor the plain terms of Paragraph 6 of the parties' agreement under the subpoena, which states: "Twitter agrees to produce written communications between January 20, 2021 and August 4, 2022 from the federal executive officials identified under paragraph (5) that involved flagging specific Twitter content for possible removal or requesting that Twitter engage in other specific forms of content moderation. But Twitter will produce such communications only if: (a) Plaintiffs first request such communications from the Federal Defendants; (b) the Federal Defendants refuse to produce the communications; and (c) the Court rules that the Federal Defendants are not required to produce such communications based on some privilege or protection, provided that the order does not otherwise indicate that communications are not necessary or proper for production generally."

As I explained in my September 14 email, Twitter is required to produce responsive documents under this Paragraph. Plaintiffs first requested these documents from the Federal Defendants; the Federal Defendants refused to produce them; and the Court ruled that the Federal Defendants were not required to produce them based on the protection against unduly burdensome discovery, but the Court did not rule that the documents are not necessary or proper for production generally. It was under prior management, while Mr. Baker was general counsel, that Twitter refused to honor this agreement. Twitter remains obligated to make a full production under Paragraph 6; that production is now long overdue; and the documents may be highly relevant to upcoming depositions in the case. We request that Twitter rectify its failure to comply with the parties' agreement by making a full production under Paragraph 6 of the agreement within seven days of the date of this letter.

Thank you for your prompt attention to these matters. Again, we applaud Twitter's recent commitment to restore freedom of speech on its platform, and we are hopeful that we may work together collaboratively with Twitter to resolve these issues speedily.

Sincerely,



D. John Sauer
Solicitor General
Missouri Attorney General's Office

Encls. A, B, C