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9 CHILDREN'S HEALTH DEFENSE

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 CHILDREN'S HEALTH DEFENSE,

14 Plaintiff,

15 v.

16 FACEBOOK, INC., et al.,

17 Defendants.
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Case No. 3:20-cv-05787-SI

**PLAINTIFF'S MOTION PURSUANT TO
FED. R. CIV. P. 15(d) TO SUPPLEMENT
ITS SECOND AMENDED COMPLAINT;
RITA SHREFFLER DECLARATION AND
EXHIBITS THERETO**

F.R.C.P 15(d)

Hearing Date: April 16, 2021

Hearing Time: 10:00 a.m.

1 **NOTICE OF MOTION TO SUPPLEMENT THE SECOND AMENDED COMPLAINT**

2 PLEASE TAKE NOTICE THAT Plaintiff Children’s Health Defense’s (“CHD”) hereby moves
3 for leave to file a pleading supplementing its Second Amended Complaint (“SAC”) pursuant to Fed. R.
4 Civ. P. 15(d).

5 **STATEMENT OF REQUESTED RELIEF**

6 Subsequent to the filing of CHD’s second amended complaint (“SAC”) and to the filing of
7 CHD’s opposition to Defendants’ Motions to Dismiss, Defendants Facebook and Zuckerberg have
8 engaged in significant further acts of retaliation and censorship against CHD and in significant further
9 acts of joint participation with the federal government to suppress CHD’s constitutionally protected
10 speech. Because these new facts are material to this case, CHD respectfully requests, pursuant to Fed.
11 R. Civ. P. 15(d), permission to supplement the pleadings. In addition, by separate motion pursuant to
12 Civil L.R. 6-3(d), CHD is requesting a shortening of time so that this Rule 15(d) motion may be heard
13 along with Defendants’ Motions to Dismiss at the hearing already scheduled on March 23, 2021, at
14 11:00 a.m., in Courtroom 1 of the U.S. District Court for the Northern District of California. The Court
15 may in its discretion set an expedited briefing schedule by which Defendants’ opposition to this motion
16 is due by March 17, 2021, and Plaintiff’s reply, if any, by March 19, 2021.

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18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **FACTUAL STATEMENT**

20 On December 21, 2020, Defendants filed their Motions to Dismiss Plaintiff CHD’s Second
21 Amended Complaint. (Dkts. ##68-69.) On February 5, 2021, CHD filed its Oppositions thereto. (Dkts.
22 ##70-71.) As this Court is aware, CHD’s allegations include claims that Defendants have violated
23 CHD’s free speech rights under the First Amendment; retaliated against CHD for bringing this action;
24 repeatedly made false assertions that CHD posted false information on its Facebook page, while
25 directing users to CHD’s direct competitors; and colluded with the federal government in the above. In
26 recent weeks and days, Defendants Facebook and Zuckerberg have furthered—indeed escalated—all of
27 this conduct. Specifically, as alleged in CHD’s supplemental pleading (Shreffler Dec. Exh. 1):

- 28 On February 10, 2021, five days after CHD filed its Opposition to Defendants’ Motions to

1 Dismiss, Facebook terminated the Instagram account of Robert F. Kennedy, Jr., CHD’s
2 founder and chairman, which at that time had over 800,000 followers. (Ex. 2.)¹

- 3 On or about February 11, 2021, Facebook issued a widely-circulated press statement
4 purporting to explain its cancelation of Mr. Kennedy’s Instagram account by falsely stating
5 that Mr. Kennedy has “repeatedly shared debunked claims about the coronavirus or
6 vaccines” on Facebook platforms. (*Id.*)
- 7 On or about February 19, Defendant Facebook *admitted* that, just as CHD has claimed
8 throughout these proceedings, it is working hand in hand with the federal government to
9 censor constitutionally protected vaccine-related speech. In particular:
- 10 On or about February 19, a Facebook spokesperson confirmed that “the company has reached
11 out to the White House to offer ‘any assistance we can provide’” to the federal government’s
12 effort to block what it describes as the “spread” of vaccine “misinformation” online. Nandita
13 Bose, *Exclusive: White House working with Facebook and Twitter to tackle anti-vaxxers*,
14 REUTERS (Feb. 20, 2021), [https://www.reuters.com/article/health-coronavirus-white-house-](https://www.reuters.com/article/health-coronavirus-white-house-exclusive-idINKBN2AK0HP)
15 [exclusive-idINKBN2AK0HP](https://www.reuters.com/article/health-coronavirus-white-house-exclusive-idINKBN2AK0HP). (Ex. 3.)
- 16 At the same time, the White House acknowledged its “direct engagement” with social media
17 companies including Facebook in “clamping down” on speech concerning vaccines that the
18 government seeks to suppress. *Id.*
- 19 These revelations marked the first acknowledgment by Big Tech companies such as
20 Facebook and by government sources that “[federal] officials are *directly engaged with*
21 *Silicon Valley in censoring social media users.*” Jesse O’Neil, *White House working with*
22 *social media giants to silence anti-vaxxers*, NEW YORK POST (Feb. 19, 2021) (emphasis
23 added).
- 24 As part of this joint, concerted action, the White House is “specifically pushing” Facebook,
25 Twitter, and Google to suppress or prevent from reaching wide audiences, or both, “chatter
26 that deviates from officially distributed COVID-19 information.” *Id.*

27
28 ¹ Instagram is a Facebook product.

- 1 □ This joint, concerted scheme to censor constitutionally protected speech on medical issues of
2 supreme public concern is confirmed by new reporting that the President’s chief of staff, Ron
3 Klain, had previously said “the administration will try to work with Silicon Valley on the
4 issue.” Bose, *supra*.
- 5 □ On March 5, 2021, Facebook published a “warning label” on a third party user’s Facebook
6 account which included the message: “**Unfollow Children’s Health Defense.**” (Ex. 6.) The
7 warning label also implies that CHD is promulgating false and harmful information on its
8 Facebook page, encourages users to visit the World Health Organization’s COVID pages for
9 accurate information, and allows users to stop seeing posts from CHD by clicking on an
10 accompanying icon. *Id.*
- 11 □ The same day, March 5, 2021, Defendants filed their Replies in support of their Motions to
12 Dismiss (Dkts. ##73-74), making no mention of any of the events and circumstances
13 described above.
- 14 □ Additionally, on January 21, 2021, President Joseph Biden issued an Executive Order on
15 Ensuring a Data-Driven Response to COVID-19. (See [https://www.whitehouse.gov/briefing-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-ensuring-a-data-driven-response-to-covid-19-and-future-high-consequence-public-health-threats)
16 [room/presidential-actions/2021/01/21/executive-order-ensuring-a-data-driven-response-to-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-ensuring-a-data-driven-response-to-covid-19-and-future-high-consequence-public-health-threats)
17 [covid-19-and-future-high-consequence-public-health-threats.](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-ensuring-a-data-driven-response-to-covid-19-and-future-high-consequence-public-health-threats)) The Executive Order directed
18 “the heads of all executive departments and agencies” to assist in an effort “to deter the
19 spread of misinformation and disinformation” related to COVID-19. *Id.*
- 20 □ Finally, on February 19, 2021, Dr. Rochelle Walensky, Director of the Centers for Disease
21 Control and Prevention (“CDC”), publicly stated: “I want to be sure that you know the facts
22 and not the myths about . . . vaccine safety. The fact is they are safe and they will save lives.
23 And that is why we are committed to working with state and local public health partners, *as*
24 *well as partners in the private sector*, to support getting people vaccinated and quickly and as
25 safely as possible.” Press Briefing by White House COVID-19 Response Team and Public
26 Health Officials ([https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/19/](https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/19/press-briefing-by-white-house-covid-19-response-team-and-public-health-officials-5)
27 [press-briefing-by-white-house-covid-19-response-team-and-public-health-officials-5](https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/19/press-briefing-by-white-house-covid-19-response-team-and-public-health-officials-5))
28 (emphasis added).

ARGUMENT

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2 Federal Rule of Civil Procedure 15(d) “permit[s] a party to serve a supplemental pleading setting
3 out any transaction, occurrence, or event that happened after the date of the pleading to be
4 supplemented.” While a motion pursuant to Rule 15(d) is “addressed to the sound discretion of the
5 District Court,” *United States v. Reiten*, 313 F.2d 673, 675 (9th Cir. 1963), “leave to permit
6 supplemental pleading is ‘favored.’” *Verinata Health, Inc. v. Sequenom, Inc.*, No. C 12-00865 SI, 2014
7 U.S. Dist. Lexis 67221 at * 6 (N.D. Cal. May 14, 2014) (Illston, J.) (quoting *Planned Parenthood of*
8 *So. Ariz. v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997)). In general, Rule 15(d) motions “should be
9 granted ‘[u]nless undue prejudice to the opposing party will result.’” *LaSalvia v. United Dairywomen of*
10 *Ariz.*, 804 F.2d 1113, 1119 (9th Cir. 1986) (citation omitted).

11 The allegations set forth in a Rule 15(d) supplemental pleading need not arise from the same
12 “transaction” or facts set forth in the original pleading; instead, all that is required is a “relationship”
13 between the subject of the original pleading and the subsequently occurring facts. *Keith v. Volpe*, 858
14 F.2d 467, 474 (9th Cir. 1988) (“While some relationship must exist between the newly alleged matters
15 and the subject of the original action, they need not all arise out of the same transaction.”); *Verinata*
16 *Health, Inc., supra* at * 6.

17 The new facts alleged in CHD’s supplemental pleading readily pass this test, bearing a direct
18 relationship to the claims made in the SAC. The new facts: (1) add to and make more plausible CHD’s
19 original allegations of joint participatory action by Facebook in concert with the federal government to
20 censor so-called “vaccine misinformation”; (2) constitute additional acts in furtherance of Defendants’
21 efforts, alleged in detail in the SAC, to suppress CHD’s constitutionally protected speech; (3) constitute
22 additional acts of retaliation by Defendants against CHD, both directly and indirectly, by attacking its
23 founder and chairman and preventing him from communicating to his 800,000 Instagram followers, and
24 warning third-party users to “unfollow CHD”; and (4) constitute further efforts to falsely disparage CHD
25 content and to direct Facebook users toward a direct CHD competitor (here, the World Health
26 Organization, which competes with CHD for philanthropic dollars from donors interested in supporting
27 the publication of truthful vaccine information). In all of these ways, the new facts are directly related to
28 “the subject of the original action.” *Keith*, 858 F.2d at 474.

1 That the new matter involves not only Facebook and CHD, but also Instagram and Mr. Kennedy,
 2 cannot and does not alter the fact that the new matter bears a direct relationship to the subject of this
 3 case. Facebook owns Instagram, and Mr. Kennedy is CHD's founder and chairman. An attack on Mr.
 4 Kennedy's vaccine-related posts is an attack on CHD's credibility and reliability. Moreover, Mr.
 5 Kennedy's Instagram account and CHD's Facebook page are often cross-linked and cross-accessed;
 6 indeed, at least one of the falsely "fact-checked" posts described in the SAC originated on Mr.
 7 Kennedy's Instagram account. (*See, e.g.*, SAC ¶¶ 68-69, 125.) And Facebook itself, not Instagram,
 8 issued the press statement, which purports to explain why it removed Mr. Kennedy's Instagram account.
 9 Most importantly, the new matter confirms and adds to the already-alleged collusion between Facebook
 10 (not Instagram) and the federal government to suppress disfavored vaccine-related speech, an allegation
 11 at the heart of the SAC.

12 Nor can Defendants claim surprise or prejudice. The new facts involve actions taken by
 13 Defendants themselves and are thus within Defendants' knowledge. Defendants have voluntarily
 14 chosen to escalate their targeting and suppression of CHD and its chairman. There can be no
 15 "prejudice" to Defendants in the legal sense when their new acts furthering the very same illegal courses
 16 of conduct originally pleaded are brought before the Court.

CONCLUSION

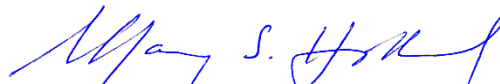
18 Accordingly, for the reasons stated above, Plaintiff CHD respectfully requests that the Court
 19 grant its motion to supplement the pleadings pursuant to Fed. R. Civ. P. Rule 15(d).

20 Dated: March 8, 2021

Respectfully submitted,



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 23 Founder and Chairman, Children's Health Defense



24 MARY S. HOLLAND
 25 General Counsel, Children's Health Defense



26 ROGER I. TEICH

27 Counsel for Plaintiff Children's Health Defense