IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ALEX BERENSON, **Plaintiff,** **v.** **JOSEPH R. BIDEN, JR., et al.,** **Defendants.**	Case No.: 1:23-cv-03048-JGLC **ORAL ARGUMENT REQUESTED**

MEMORANDUM IN OPPOSITION TO DEFENDANTS DR. ALBERT BOURLA AND DR. SCOTT GOTTLIEB'S MOTION TO DISMISS THE PROFERRED AMENDED COMPLAINT

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INTRODUCTION

On August 28, 2021, Twitter permanently suspended Alex Berenson's account, which at the time was among the most widely watched platforms worldwide for reporting that raised serious, fact-based questions about the efficacy and safety of the mRNA COVID-19 vaccines. The suspension followed an unconstitutional conspiracy to pressure Twitter that had begun in the White House at least four months earlier and escalated through the summer of 2021.

But the conspiracy extended past the federal government. Its final act was led by Dr. Scott Gottlieb. Dr. Gottlieb served as the Commissioner of the Food and Drug Administration before taking his expertise as a pharmaceutical regulator to the drugmaker Pfizer to serve as a senior member of the company's board. Even after joining Pfizer in 2019, Dr. Gottlieb retained close relationships with the Trump and then the Biden White House.

In the summer of 2021, Mr. Berenson drew on Pfizer's own clinical trial data and many other sources to raise questions about the mRNA Covid vaccines. For Pfizer, keeping public confidence in the vaccines high was a business imperative. Pfizer's BNT162b2 COVID-19 shot was by far the company's best-selling product in 2021. And, in August 2021, Dr. Gottlieb acted to protect it from Mr. Berenson's questions, and unvaccinated Americans from themselves. He approached Todd O'Boyle—the *same* Twitter executive whom the White House had approached about Mr. Berenson—to raise spurious concerns that Mr. Berenson's reporting might somehow be dangerous to Dr. Anthony Fauci. Days later, he forwarded a tweet Mr. Berenson had posted calling vaccine mandates, which would be highly profitable for Pfizer, "insanity." In turn, Mr. O'Boyle personally walked Dr. Gottlieb's complaints to the company's supposedly independent content moderation team and insisted that a junior member of the team act—to ban Mr. Berenson—in violation of Twitter's internal operating procedures.

Dr. Gottlieb's contact with Mr. O'Boyle was not an accident. It came about through his co-conspirator and co-Defendant Andrew Slavitt, who connected Dr. Gottlieb to Mr. O'Boyle in July 2021. (Like the Federal Defendants and Mr. Slavitt himself, Dr. Gottlieb and Dr. Bourla argue that Mr. Slavitt—who had left the White House weeks before this contact—was a private party not acting under color of law at this time. As Mr. Berenson argues in his other responses, which he incorporates here, Mr. Slavitt was in fact a "state actor" at all times during the summer of 2021 for the purposes of this conspiracy.) Twitter's senior government affairs employees reacted quickly, linking Dr. Gottlieb's contact with the overall pressure the company was facing from the federal government, fearing Twitter "could be next." Four days before Mr. O'Boyle personally oversaw Mr. Berenson's ban, the lobbyist internally wrote of his efforts to "keep the target off our backs," meaning the federal government's ire, a threat Mr. O'Boyle reported he reduced by communicating with the White House, Mr. Slavitt, and Dr. Gottlieb.

Now Mr. Berenson has sued the conspirators, including Dr. Gottlieb and Dr. Albert Bourla. As chairman of Pfizer, Dr. Bourla had more to lose if Twitter allowed Mr. Berenson's investigative reporting to continue than almost anyone else. Astonishingly, Drs. Gottlieb and Bourla have responded by claiming that in trying to hold them accountable for their censorship, Mr. Berenson is violating *their* First Amendment rights. This defense is hypocrisy in the purest form, a civil version of the apocryphal story of the boy who killed his parents and then pleaded for mercy as an orphan. This Court should reject this defense and move this case forward.

FACTUAL BACKGROUND

I. Alex Berenson and his reporting on COVID-19 and the vaccines on Twitter.

Alex Berenson is an independent journalist and former *New York Times* reporter who previously broke multiple front-page stories about questionable practices in the pharmaceutical industry. (Dkt. 80-1 ¶¶ 53-54.) Pharmaceutical and vaccine manufacturer Pfizer, Inc. was among

the subjects of Mr. Berenson's *Times* coverage. He reported on the company's marketing, corporate whistleblowers, and changes in Pfizer's management team. (*Id.* ¶ 55.) As such, Pfizer was well aware of Mr. Berenson before the COVID-19 pandemic. (*Id.* ¶ 56.) Pfizer government affairs employees subscribe to Mr. Berenson's *Unreported Truths* Substack. (*Id.* ¶ 192.)

Using his training and experience, Mr. Berenson became a prominent critic of the public policy response to COVID-19, reporting and asking questions about school and business closures and then later about the COVID-19 vaccines, with a focus on the mRNA vaccines from Pfizer and Moderna. (*E.g.*, *id.* ¶¶ 73-74, 87-90.) Mr. Berenson used Twitter as his primary outlet, and his following on the platform increased from around 7,000 followers in January 2020 to more than 229,000 in March 2021. (*Id.* ¶¶ 71, 112.) In 2021 alone, Mr. Berenson's Twitter feed received more than one billion impressions. (*Id.* ¶ 9.)

Regarding the COVID-19 vaccines, in November 2020, Mr. Berenson welcomed reporting from clinical trials on the Pfizer and BioNTech shot as well as the Moderna vaccine as "legitimately good news" and "good topline vaccine news," respectively. (*Id.* ¶¶ 84-85.) Nevertheless, he raised questions about the vaccines, and a Twitter executive who had previously told Mr. Berenson that the company was committed to support his COVID-19 reporting assured Mr. Berenson in December 2020 the points he was raising about the vaccines "should not be an issue at all." (*Id.* ¶ 79.) Mr. Berenson posted that correspondence, publicly lauding Twitter's commitment to free speech. Alex Berenson (@AlexBerenson), Twitter (Dec. 17, 2020, 5:15 PM), https://twitter.com/AlexBerenson/status/1339695810204880900. When Twitter announced its five-strike COVID-19 misleading information policy in March 2021, the executive told Mr. Berenson "your name has never come up in the discussions around these policies." (*Id.* ¶ 83.)

Twitter's handling of third-party complaints about Mr. Berenson was consistent with these assurances. As early as March 2020, one prominent third party, the Imperial College London, complained about Mr. Berenson's speech "putting lives at risk," but Twitter refused to censor the journalist. (*Id.* ¶¶ 75-76.) As late as March 2021, Twitter internally concluded that Mr. Berenson "avoids making demonstrably false or misleading claims about COVID-19 vaccines." (*Id.* ¶¶ 94.) Though Twitter contemporaneously issued a "strike" against Mr. Berenson's account for stating his opinion that the technology for the mRNA shots is "more properly described as a gene therapy," the company gave him no notice of the action and did not lock him out of his account. (*Id.* ¶ 95.)

II. Pfizer's COVID-19 vaccine receives regulatory authorization as company board member and former FDA Commissioner Dr. Scott Gottlieb promotes the shots while remaining in contact with White House officials.

Pfizer, along with its corporate partner BioNTech, makes and sells the Comirnaty (or BNT162b2) mRNA vaccine, which first received the FDA's authorization for use in ages 16 and over on December 2020. (*Id.* ¶ 163.) Pfizer claimed that the vaccine was 95% effective at reducing infections from SARS-Co-V-2, more commonly known as COVID-19. (*Id.*) Comirnaty quickly became Pfizer's top-selling product, garnering sales of more $36.8 billion, the highest annual sales of any drug or vaccine ever. (*Id.*) Indeed, through 2022, Pfizer made more than $70 billion selling COVID-19 vaccines. (*Id.* ¶ 2.)

Dr. Scott Gottlieb served as Commissioner of the Food and Drug Administration from 2017 to 2019. (*Id.* ¶ 44.) After stepping down from his post at the FDA, Dr. Gottlieb joined Pfizer's board on June 27, 2019, serving on the company's executive committee alongside Pfizer Chief Executive Officer Dr. Albert Bourla. (*Id.* ¶ 159.) During the early days of the COVID-19 pandemic, Dr. Gottlieb became a frequent guest on talk shows and CNBC where he is a

contributor. (*Id.* ¶ 160.) Dr. Gottlieb was a vocal advocate for COVID-19 shots, calling for action to "get as many shots in arms as possible, right away." (*Id.* ¶ 164.)

Dr. Gottlieb lauded his co-Defendant and co-author Mr. Slavitt's appointment to the White House as a Senior Advisor on COVID-19, focusing on Mr. Slavitt's ability to "improv[e] vaccine access and opportunity." (*Id.* ¶ 161.) During an edition of his podcast in which Dr. Gottlieb was his featured guest, Mr. Slavitt confirmed Dr. Gottlieb was in "pretty regular" contact with him and the White House throughout winter and spring 2021. (*Id.* ¶ 162.)

III. As the efficacy of the vaccines wane, the federal government's push to censor skepticism of the COVID-19 shots online increases in the summer of 2021. In July 2021, Andrew Slavitt connects Dr. Scott Gottlieb to one of Mr. Slavitt's Twitter contacts.

The vaccines themselves seemed to be working during the spring of 2021. (*Id.* ¶ 134.) However, in July 2021, the vaccines abruptly began to show signs of failure. (*Id.* ¶ 135.) Coronavirus infections soared in Israel, the first country to mass vaccinate its adult population. (*Id.*) While cases had dropped in Israel to near zero in the spring, between June 15 and July 15, the numbers soared 75-fold. (*Id.* ¶¶ 134-35.) Deaths and hospitalizations also rose, causing health officials to contemplate boosters and the Biden Administration to consider vaccine mandates, a move which the administration knew would be both legally controversial and anger many Americans. (*Id.* ¶ 16.)

In April 2021, the White House, through Dr. Gottlieb's contact Mr. Slavitt, previously targeted Mr. Berenson's speech about the COVID-19 vaccines, calling the journalist "ground zero for covid misinformation." (*Id.* ¶ 108.)[1] The federal government's pressure increased during

[1]In the Factual Background section of his opposition to the Federal Defendants' renewed motion to dismiss (the "Government Opposition"), Mr. Berenson details the actions the Federal Defendants took to target his speech and relationship with Twitter, beginning with a White House meeting in April 2021 and culminating in the journalist's ban from the platform. Similarly, in the Factual Background to his Memorandum in Opposition to Andrew M. Slavitt's Renewed Motion to Dismiss (the "Slavitt Opposition"), Mr. Berenson details actions Mr. Slavitt took to interfere with his relationship with Twitter after Mr. Slavitt left the White House. Mr. Berenson incorporates this

a particular week in July 2021, which was punctuated by Mr. Berenson getting locked out of his Twitter account for the first time only hours after President Biden said social media companies were "killing people" for not censoring speech about the vaccines. (*Id.* ¶¶ 148-49.)

On July 18, two days after Mr. Berenson was locked out of his account, Mr. Slavitt e-mailed Twitter's Todd O'Boyle, a contact from his White House days, to see if Mr. O'Boyle "would be open to a 20 minute call with Scott Gottlieb and me about a policy matter." (*Id.* ¶ 166.) The next day, Dr. Gottlieb contacted Mr. O'Boyle, writing that "I am growing very concerned about a handful of accounts on Twitter that are fueling dangerous and false narratives on key public health issues related to the pandemic." (*Id.* ¶ 167.) Dr. Gottlieb singled out "a subset of accounts that are frequently being cited to me as authoritative sources by conservatives, even members of Congress, because they are verified accounts—even if they are spreading clearly false information." (*Id.*) Though Dr. Gottlieb did not name Mr. Berenson, the journalist's account fit this description more closely than nearly any other. (*Id.* ¶ 168.) Dr. Gottlieb continued on, arguing that "verified" Twitter accounts "have been granted a special franchise by your platform," and "should be held to some appropriately higher standard." (*Id.* ¶ 169.)

Mr. O'Boyle quickly responded to Dr. Gottlieb, and forwarded the communication to his supervisor Lauren Culbertson, the head of Twitter's U.S. lobbying function. (*Id.* ¶¶ 115, 170.) Ms. Culbertson forwarded Mr. O'Boyle and Dr. Gottlieb's correspondence further on, to Twitter's Vice President of Public Policy for the Americas. (*Id.*) "Heads up that we **could be next**," Ms. Culbertson wrote. (*Id.* (emphasis in original).) Ms. Culbertson stated that she and Mr. O'Boyle "are triaging" and "we're on much better footing than FB [(Facebook)] but need to keep up the responsiveness." (*Id.*) By that time, the federal government had been pressuring Facebook

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background information from the Government Opposition and Slavitt Opposition here. As noted elsewhere, Mr. Berenson also argues that Mr. Slavitt was a state actor at all times relevant to his case.

"for months," according to its founder and chief executive Mark Zuckerberg. (*Id.* ¶ 129.) "Hopefully," she concluded, "we can keep us in a good place." (*Id.*)

On July 23, Dr. Gottlieb followed up on his July 19 message to Mr. O'Boyle. "I am likely to be discussing some of my perspectives below on TV this weekend and wanted to see if you still wanted to connect so I may have the benefit of your views," Dr. Gottlieb wrote. (*Id.* ¶ 172.) Mr. O'Boyle responded quickly again. (*Id.*) The same day, Mr. O'Boyle recounted that he spoke with the White House's Rob Flaherty regarding COVID-19 misinformation. (*Id.* ¶ 173.)

On July 24 or July 25, Mr. Slavitt interviewed Dr. Bourla. (*Id.* ¶ 175.) Later, on July 28, around the same time as Mr. Berenson's third strike, Dr. Bourla held a meeting at the White House, presumably about COVID-19 vaccine matters. (*Id.* ¶ 178.) Of note, Dr. Bourla was accompanied to the White House not by a senior Pfizer scientist or medical officer, but the company's general counsel. (*Id.*) Given the concerns the White House raised about COVID-19 misinformation throughout that month, it is reasonable to infer that the issue was discussed during Dr. Bourla's July 28 meeting. For his part, in November 2021, echoing President Biden's claim social medial companies were "killing people" by platforming voices like Mr. Berenson's, Dr. Bourla accused COVID-19 vaccine skeptics of being "criminals because they have cost literally millions of lives." (*Id.* ¶ 151.)

Twitter issued its third strike against Mr. Berenson's account on July 27. (*Id.* ¶ 174.)

IV. Dr. Gottlieb utilizes Mr. Slavitt's White House contact to push Mr. Berenson off the Twitter platform.

On July 28, the same day as Dr. Bourla's meeting at the White House, Pfizer released a "preprint" update to its pivotal clinical trial results for its COVID-19 vaccine. (*Id.* ¶ 179.) Mr. Berenson's previous strikes had not come for tweets specifically addressing Pfizer. His fourth strike did. On July 29, Mr. Berenson tweeted the following regarding the preprint:

> The pivotal clinical trial for the @pfizer #COVID-19 vaccine shows it does nothing to reduce the overall risk of death. ZERO.
>
> 15 patients who received the vaccine died; 14 who received placebo died.
>
> The end.
>
> The trial blind is broken now. This is all the data we will ever have.

(*Id.* ¶ 180.) The tweet received more than 2,000 retweets and more than 2.3 million views. (*Id.*) Although the tweet was factually accurate, and neither false or misleading, on July 30, Twitter gave Mr. Berenson his fourth COVID-19-related strike for the tweet about the preprint, which resulted in a one-week suspension and final warning before a permanent suspension. (*Id.* ¶ 182.) Twitter's Todd O'Boyle, Mr. Slavitt's contact from the White House, informed Mr. Slavitt of the strike and that "[f]urther violations of the rules will result in permanent suspension." (*Id.* ¶ 182.) Two days after that e-mail, on August 1, Dr. Gottlieb wrote to Mr. O'Boyle to complain about Mr. Berenson's tweet of the German phrase "[i]mpfung macht frei" or "vaccines make free," (*id.* ¶ 189), the same content Mr. Slavitt complained about the day before, (*id.* ¶ 188). In a since deleted tweet of his own, Dr. Gottlieb screenshotted Mr. Berenson's tweet. (*Id.* ¶ 190.)

Mr. Berenson returned to Twitter on August 6, but the company did not sanction his account for the next three weeks. (*Id.* ¶ 191.) On August 24, Mr. O'Boyle wrote to Ms. Culbertson regarding "Recent Covid outreach." (Dkt. 80-4 at 26.) Mr. O'Boyle described communication steps he took "when news came that the FDA had fully approved the Pfizer vaccine," noting he "fielded inquiries from the WH as well as former WH advisor (and frequent cable talker Andy Slavitt about our approach." (*Id.*) After listing how "[t]he team sprang into action," Mr. O'Boyle stated he "sent the WH, Andy [Slavitt], and Scott Gottlieb . . . notes to this effect." (*Id.*) In another internal Twitter reference to Facebook, Mr. O'Boyle concluded "[t]his Administration has said repeatedly they feel FB under communicates and has been less than

forthcoming when they talk. I'm leaning into overcommunicating Twitter's covid work *to keep the target off our back.*" (*Id.* (emphasis added).)

The same day, Dr. Gottlieb contacted Mr. O'Boyle to complain about one of Mr. Berenson's Substack articles criticizing Dr. Anthony Fauci. (*Id.* ¶¶ 194.) "This is whats [sic] promoted on Twitter," Dr. Gottlieb complained. "This is why Tony needs a security detail." (*Id.*) Mr. O'Boyle responded to schedule a conference call. "We look forward to updating you on our approach and hearing your thoughts," Mr. Boyle said. (*Id.* ¶ 196.) Three days later, on August 27, Dr. Gottlieb and Twitter held a call with Dr. Gottlieb. (*Id.* ¶ 197.) The discussion turned to Mr. Berenson quickly, and an internal Slack channel from the call contains a reference to "Berenson 4th COVID-19 strike as of 7/27" approximately eleven minutes into the discussion. (*Id.* ¶ 198.) There is no record that Dr. Gottlieb explained how Mr. Berenson violated any Twitter rule during that discussion. (*Id.*)

On Saturday, August 28, with discussion of COVID-19 vaccine mandates ongoing, Mr. Berenson tweeted the following about the shots:

> It doesn't stop infection. Or transmission.
>
> Don't think of it as a vaccine.
>
> Think of it—at best—as a therapeutic with a limited window of efficacy and terrible side effect profile that must be dosed IN ADVANCE OF ILLNESS.
>
> And we want to mandate it? Insanity. *Id.*

(*Id.* ¶ 200.) Dr. Gottlieb became aware of the tweet. Upon information and belief, he did not use the company's standard reporting mechanisms to raise concerns about it. (*See* Dkt. 43-2 (providing a copy of Twitter's reporting policy as of August 13, 2021).) Instead, Dr. Gottlieb e-mailed the above-quoted tweet to Twitter's Todd O'Boyle. (Dkt. 80-1 ¶ 200.) (*Id.*) This tweet, which was not false or misleading, became Mr. Berenson's fifth, ban-inducing strike. (*Id.* ¶ 205.)

Asked about his efforts to censor Mr. Berenson, Dr. Gottlieb reiterated the purported concerns in his August 24 e-mail to Twitter about "threats" to the safety of others. (*Id.* ¶ 216.) Like the Substack article Dr. Gottlieb sent to Twitter on August 24, Mr. Berenson threatened no one.

Mr. O'Boyle personally shepherded the fifth strike through the process on a Saturday night. Mr. Berenson's third and fourth strike went through a review process which included top company executives, but Mr. O'Boyle did not notify any of those people, routing the complaint to an internal Twitter unit responsible for routine strike determinations. (*Id.* ¶¶ 202-03.) When a junior member of Twitter's "Strategic Response Team" labeled the tweet as misleading, Mr. O'Boyle pressed further, insisting the tweet be given a strike, asking, "was it strike eligible?" (*Id.* ¶ 204.) When the employee did not respond immediately, Mr. O'Boyle pressed again: "Is this not the fifth strike under the policy?" (*Id.*)

After Mr. Berenson briefly activated an alternative Twitter account, Dr. Gottlieb informed Mr. O'Boyle. (*Id.* ¶ 212.) Mr. O'Boyle rapidly forwarded the complaint to Twitter's moderation team. (*Id.* ¶ 213.) When the moderation team did not immediately respond, Mr. O'Boyle brought in a Twitter lawyer to ensure Mr. Berenson's alternative account was censored. (*Id.*)

The morning of August 29, Twitter's general counsel Vijaya Gadde stated that she and the company's chief executive Jack Dorsey had concluded the company banned Mr. Berenson in error. (*Id.* ¶ 210.) Ms. Gadde interpreted the tweet as criticizing COVID-19 vaccine mandates, and not "suggesting that anyone specific not be vaccinated." (*Id.*) She also suggested that Mr. Berenson be reinstated on appeal, (*id.*), but Twitter did not notify Mr. Berenson of that option—or even officially give him notice of his suspension, (*id.* ¶ 211). He later appealed the suspension, but his account was not restored until he resolved his lawsuit against the company. (*Id.* ¶ 221.)

After Mr. Berenson sued the company over his deplatforming, Twitter conceded his "Tweets"—including the ban-inducing strike Dr. Gottlieb flagged—"should not have led to his suspension at that time." (*Id.* ¶ 30.) In other words, Mr. Berenson did nothing wrong. Twitter violated its own its own substantive COVID-19 misleading information policy when it found to the contrary and banned Mr. Berenson from the platform.

Not only was Mr. Berenson's ban against the express wishes of the company's two highest-ranking executives, the process violated Twitter's own internal operating procedures. Yoel Roth, who served as Twitter's Head of Trust and Safety at the time of Mr. Berenson's suspension, wrote that, unlike companies like Meta, Facebook's owner, Twitter "maintained a strict separation between teams responsible for lobbying and government relations and the teams responsible for direct content moderation activities." (*Id.* ¶ 218.) "While members of Twitter's public policy and legal teams are shown receiving a wide range of reports, their actions in every case are to funnel those reports into operational processes that result in independent review and evaluation." (*Id.*) But in Mr. Berenson's case, the wall of separation fell. Mr. O'Boyle did not merely report the ban-inducing strike, he demanded the moderation team deliver the result that the conspirators demanded: Mr. Berenson's deplatforming from Twitter.

Ultimately, Twitter gave Dr. Gottlieb, his Pfizer colleague Dr. Bourla, and the other co-conspirators what they desired, cutting Mr. Berenson off the world's foremost public digital public square all while the White House rolled out a controversial and unprecedented mandate to require two-thirds of working Americans to take one of the COVID-19 vaccines. (*Id.* ¶ 227.)

ARGUMENT

I. The First Amendment does not insulate Dr. Bourla and Dr. Gottlieb from liability.

Dr. Bourla and Dr. Gottlieb maintain the First Amendment blocks Mr. Berenson from holding them to account. (Dkt. 95 at 16-21.) The doctors appear to misapprehend the law. While

they are private parties, the First Amendment does not protect their rights to join a Section 1985(3) conspiracy with state actors to silence Mr. Berenson and violate his own civil and constitutional rights.

The Pfizer defendants attempt to avoid this reality by arguing that the government defendants with whom they conspired did not violate Mr. Berenson's rights. Their primary case citation is *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33 (2d Cir. 1983). In *Hammerhead*, the plaintiff created a board game mocking people using public assistance as "lazy, dishonest and in some cases intoxicated and promiscuous individuals who take unfair advantage of government largesse." *Id.* at 35. A New York official, who lacked any regulatory authority over merchants, sent a letter urging "stores to refrain from carrying" the game. *Id.* at 36-37. The Second Circuit held that the official's letter did not violate the First Amendment, because the official also had the "right to expound his belief that [the game] should be circulated." *Id.* at 40.

Hammerhead is easily distinguishable from Mr. Berenson's claim, and in the 41 years since it was decided, the Second Circuit has repeatedly found government officials violated the First Amendment in cases more comparable to this one. *Hammerhead* contained only one "allegation that" the official in that case "invoked coercive government power" relating to fire inspectors, but there was "[n]o evidence . . . suggest[ing] [the official] ever communicated with the fire department officials or that the inspectors singled out stores carrying the game." *Id.* at 37 n.5. That is not so here, where the state actors in the conspiracy—working out of or alongside the White House—pressured Twitter for several months and Twitter feared that they might target its federal Section 230 liability protection, a crucial legal shield for the company.

These allegations are more akin to what the Second Circuit found actionable coercion based on communications from a borough president, *Okwedy v Molinari*, 333 F.3d 339 (2d Cir. 2003), and village administrator, *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991). Dr. Gottlieb's argument that Mr. Berenson's allegations are "far from threatening government action," (Dkt. 95 at 18), overlook these allegations which must be construed in Mr. Berenson's favor at the Rule 12 stage. *Guterman v. Costco Wholesale Corp.*, 927 F.3d 67, 68 (2d Cir. 2019). Moreover, unlike the public communications in *Hammerhead*, these contacts were secret, "behind closed doors," *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 198 (2024), and outside Twitter's normal reporting channels.

Dr. Gottlieb was an eager participant in this conspiracy, and four days before Twitter lobbyist Mr. O'Boyle forced Mr. Berenson's ban from the platform, Mr. O'Boyle grouped his communications with Dr. Gottlieb alongside the White House and Mr. Slavitt, noting his efforts to "keep the target off [Twitter's] back." (*Id.* ¶ 193.) Dr. Gottlieb followed up with Mr. O'Boyle four days later, knowing that a fifth strike would lead Twitter to ban Mr. Berenson by flagging Mr. Berenson's ban-inducing tweet to Mr. O'Boyle. (*Id.* ¶ 200.)[2]

To be clear, Mr. Berenson is not trying to hold Dr. Gottlieb liable for his "protected speech"—not even his potentially defamatory claim that Mr. Berenson was responsible for threats to Dr. Fauci's life. Nor is he suing Dr. Gottlieb because the Pfizer board member

[2] Dr. Gottlieb cites a CNBC appearance from July 19, 2021 to diminish the impact of his July 23 e-mail where he told Mr. O'Boyle about the potential of him "discussing some of my perspectives on TV this weekend." (Dkt. 80-1 ¶ 172.) In that CNBC report, Dr. Gottlieb is quoted as saying "the line is [crossed] when you're information that's knowingly false, and "when you're putting out fake scientific data, fake information in a way that's highly misleading, that's clearly a line." CNBC, *Dr. Scott Gottlieb urges social media platforms to curb Covid vaccine misinformation*, July 19, 2021, https://www.cnbc.com/2021/07/19/scott-gottlieb-social-media-must-act-to-curb-covid-vaccine-misinformation.html. Notably, on August 28, Dr. Gottlieb offered no explanation of how or why Mr. Berenson's tweet crossed "the line."

disagreed with his views about the COVID-19 vaccines. At all relevant times, Dr. Gottlieb was free to challenge Mr. Berenson's perspectives, including on Twitter.

Nor, as the doctors suggest, is Mr. Berenson disguising a defamation claim as a cause of action for tortious interference with contract. (Dkt. 95 at 18-20.) The cases they cite relevant to tortious interference relate to general publications, *see Farah v. Esquire Mag.*, 736 F.3d 528 (D.C. Cir. 2013) (describing claim predicated on satirical publication); *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 857 (10th Cir. 1999) (describing claim predicated on "publication of the article in Rating News"); *Owens v. Lead Stories, LLC*, No. CV S20C-10-016 CAK, 2021 WL 3076686, at *9 (Del. Super. Ct. July 20, 2021) (rejecting claims based on published fact checks), *aff'd*, 273 A.3d 275 (Del. 2022), public economic boycotts, *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1986), or the plaintiff's claims otherwise lacked an evidentiary foundation, *Delano Vill. Companies v. Orridge*, 147 Misc. 2d 302, 307 (N.Y. Sup. Ct. 1990) (holding plaintiff's claims of "a campaign of harassment and intimidation" were "not supported by the record"). By contrast, Mr. Berenson's claims are about deliberate, secret, targeted, government-connected interference with an ongoing contractual relationship—interference that caused him significant harm.

II. Mr. Berenson states a claim under 42 U.S.C. § 1985(3).

Many of Dr. Gottlieb and Dr. Bourla's arguments in support of their motion to dismiss Mr. Berenson's Section 1985(3) claim are duplicative of the Federal Defendants' arguments. As such, Mr. Berenson incorporates and adopts the arguments in the Government Opposition, while addressing the additional points and authorities Dr. Gottlieb and Dr. Bourla raise in their briefing.

A. Mr. Berenson pled a cognizable class under Section 1985(3).

Dr. Gottlieb and Dr. Bourla contend that "courts in this Circuit have rejected proffered § 1985(3) 'classes' defined by reference to individuals' choices." (Dkt. 95 at 22.) But *Dolan v.*

Connolly, 794 F.3d 290 (2d Cir. 2015), on which they rely, (Dkt. 95 at 21-22), recognizes that political affiliation represents a cognizable class, *Dolan*, 794 F.3d at 294. Political affiliations change. For some people, unvaccinated status has political implications or at least "may be political." (Dkt. 80-1 ¶ 101.) Like the class of street artists in *Lederman v. Giuliani*, No. 98 Civ.2024LMM/JCF, 2007 WL 1623103 (S.D.N.Y. June 5, 2007), a group at least arguably "defined by reference to individual choices," there is a jury question as to whether Mr. Berenson's proposed class is "merely 'a group of individuals who share a desire" as opposed to "a political group with an agenda disapproved of by Defendants." *Id.* at *5. Those political overtones did not exist in *Dolan* itself or in *Levine v. New York State Police*, No. 121CV503GLSDJS, 2022 WL 4465588 (N.D.N.Y. Sept. 26, 2022), and *Reid v. City of New York*, No. 20 CIV. 9243 (KPF), 2022 WL 2967359 (S.D.N.Y. July 27, 2022), two other cases they cite.

Dr. Gottlieb and Dr. Bourla's other authorities are inapposite. (Dkt. 95 at 22.) The district court in *Ford v. Northam*, No. 7:22-CV-00122, 2023 WL 2767780 (W.D. Va. Mar. 31, 2023), rejected "vaccination status" as a Section 1985(3) class, but was applying Fourth Circuit precedent limiting the statute's scope to classes sharing "discrete, insular, and immutable" qualities. *Id.* at *9 (quoting *Buschi v. Kirven*, 775 F.2d 1240, 1258 (4th Cir. 1985)). The other district court decisions from the Ninth Circuit apply a narrower class standard than the Second Circuit. *Moriarty v. Port of Seattle*, No. 2:23-CV-01209-TL, 2024 WL 4290279, at *14 (W.D. Wash. Sept. 25, 2024) ("Generally, the rule in the Ninth Circuit is that Section 1985(3) is extended beyond race only where the class in question can show that there has been a governmental determination that its members require and warrant special federal assistance in protecting their civil rights." (internal quotation marks omitted)).[3]

[3] The plaintiff in *Brink v. Bormann*, No. 3:23-CV-00497 (ZNQ) (DEA), 2023 WL 6213167 (D.N.J. Sept. 25, 2023), simply did not "allege *any* class- or ace-based discriminatory animus." *Id.* at *7. That is not the case here.

The other in-circuit cases Dr. Gottlieb and Dr. Bourla cite considered whether vaccination status is a suspect class for Equal Protection Clause purposes. *Abadi v. City of New York*, No. 21 CIV. 8071 (PAE), 2022 WL 347632, at *7-8 (S.D.N.Y. Feb. 4, 2022) (considering the question under the Equal Protection Clause); *Brock v. City of New York*, No. 121CV11094ATSDA, 2022 WL 479256, at *5-6 (S.D.N.Y. Jan. 28, 2022) (same); *Iosilevich v. City of New York*, No. 21 CV 4717 (RPK)(LB), 2022 WL 19272855, at *4 n.14 (E.D.N.Y. Aug. 10, 2022) (same). By contrast, Mr. Berenson's statutory, class-based claim is based on the Second Circuit's conclusion that Section 1985(3) extends "beyond" inherent or immutable categories like race, *Dolan*, 794 F.3d at 296, and thus has a wider berth than the Equal Protection Clause. Underscoring this point, in 2018 a district court in the Second Circuit even extended Section 1985(3) protection to members of the Falun Gong religious cult, which was founded in 1982—nearly a century after Congress enacted the predecessor to the Section 1985(3) statute. *Zhang Jingrong v. Chinese Anti-Cult World Alliance (CACWA)*, 287 F. Supp. 3d 290 (E.D.N.Y. 2018).

B. Mr. Berenson established sufficient discriminatory animus for his Section 1985(3) claim to proceed against Dr. Gottlieb and Dr. Bourla.

Dr. Gottlieb and Dr. Bourla argue Mr. Berenson fails to plead discriminatory animus. (Dkt. 95 at 23-24.) The Pfizer defendants claim that their efforts to suppress the First Amendment rights of Mr. Berenson to speak and other unvaccinated class members to hear him were motivated by "concern for, and attempts to advance, class members' well-being, the opposite of invidiously discriminatory animus." In doing so, they acknowledge the existence of a cognizable class. Yet their professed motives for their acts, even if true, are irrelevant. The Supreme Court found in *Bray v. Alexandria Clinic*, 506 U.S. 263, 270 (1993) that "benign" motives could still produce actionable "objectively invidious" discrimination.

Further, Section 1985(3) conspirators do not have to "possess the same motives." *Hobson v. Wilson*, 737 F.2d 1, 51 (D.C. Cir. 1984) (internal quotation marks omitted). Conspirators might even have "commingled motives," *id.* at 51, but that does not defeat application of the statute. If it did, Section 1985(3) defendants could evade the statute by conjuring any number of other motives to explain their conduct.

As Mr. Berenson details elsewhere, at least some conspirators did act with class-based animus—specifically attempting to prevent Mr. Berenson, who is unvaccinated against Covid, to speak to other Americans who are similarly unvaccinated and wished to hear his views. (*See* Government Opposition, Argument, § V.B.2; Slavitt Opposition, § III.B.) That is enough here. This construction is consistent with the breadth of Section 1985(3) claims the Second Circuit has allowed to move forward. The plaintiff in *Keating v. Carey*, 706 F.2d 377 (2d Cir. 1983), sued more than a dozen officials asserting discrimination based on his political affiliations. Those defendants undoubtedly had mixed motives, but the plaintiff's Section 1985(3) case moved ahead anyway.

Even so, Dr. Gottlieb and Dr. Bourla's class-based animus can be reasonably inferred from their public statements. Like Mr. Slavitt, they wanted to prevent Mr. Berenson from reaching unvaccinated people with his reporting. During his interview with Mr. Slavitt in July 2021, Dr. Bourla agreed with Mr. Slavitt's assertion that "you could take the best vaccine, but if you shove yourself into a room for a month with 50 unvaccinated people," then "all you're doing is challenging the vaccine to perform." Andy Slavitt, *EXCLUSIVE: Pfizer CEO Albert Bourla on the Delta Variant, Boosters and Masks Indoors (Part 1)*, July 28, 2021, https://lemonadamedia.com/podcast/exclusive-pfizer-ceo-albert-bourla-on-the-delta-variant-boosters-and-masks-indoors-part-1/ (cited at Dkt. 80-1 ¶ 175). In Dr. Bourla's view, then,

unvaccinated people directly threatened the efficacy of the COVID-19 vaccine itself, unnecessarily putting lives at risk. Later on, Dr. Bourla called those like Mr. Berenson spreading "misinformation" about his company's COVID-19 shots "criminals because they have cost millions of lives" (Dkt. 80-1 ¶ 176.) Such "criminals" discouraged unvaccinated people from taking Pfizer's highly profitable mRNA vaccine. In the views of the conspirators, the unvaccinated needed to be protected from Mr. Berenson's reporting *because they are unvaccinated*. *Cf. Bray* 506 U.S. at 270 (holding actionable under Section 1985(3) to "sav[e] women" from the practice of law). All this is sufficient to establish animus against the class.

C. Mr. Berenson's pleading of a Section 1985(3) conspiracy is adequate.

Like the Federal Defendants and Mr. Slavitt, Dr. Gottlieb and Dr. Bourla argue that the allegations in Mr. Berenson's complaint fail to establish a conspiracy to deprive the journalist of his constitutional rights. (Dkt. 95 at 24.) But Mr. Berenson has alleged that Mr. Slavitt—the linchpin of the conspiracy, and a state actor at all times for its purposes, even after he nominally left the White House—*introduced* Dr. Gottlieb to Mr. O'Boyle, and that the two men continued to coordinate their efforts. He has also alleged that both Mr. O'Boyle and his superior, Lauren Culbertson, Twitter's top United States lobbyist, viewed their efforts as coordinated—with each other and with the Biden Administration. As for Dr. Bourla, Mr. Berenson has alleged that Mr. Slavitt had a meeting with him as the conspiracy took full shape in July 2021 (Dkt. 80-1 ¶¶ 162, 166-173, 175), only days before Dr. Bourla's late-scheduled meeting with the White House, (*id.* ¶ 178). What Mr. Berenson has alleged is "a factual backdrop that explains both the motivation and occasion for such a conspiracy," which is all he is required to do at this stage. *Glacken v. Inc. Vill. of Freeport*, No. 09 CV 4832 DRH AKT, 2012 WL 894412, at *9 (E.D.N.Y. Mar. 15, 2012). Relevant to Dr. Gottlieb and particularly to Dr. Bourla, the Second Circuit has also defined liability broadly in civil rights conspiracies, explaining in 2001 that someone who "participates

in bringing about a violation of the victim's rights but does so in a matter that might be said to be 'indirect'—such as ordering or helping others to do the unlawful acts, rather than doing them him—or herself" may be liable. *Provost v. City of Newburgh*, 262 F.3d 146, 155 (2d Cir. 2001).

Mr. Berenson's knowledge of the details and inner workings of the conspiracy are imperfect at this time, which is to be expected, as courts in this district have recognized. *See, e.g.*, *Haughey v. Cnty. of Putnam*, No. 18-CV-2861 (KMK), 2020 WL 1503513, at *7 (S.D.N.Y. Mar. 29, 2020) (holding allegations of "specific communications" sufficient to "suggest an agreement between a state actor and a private party" even though "Plaintiff has not alleged the specific content of the communications"); *Fisk v. Letterman*, 401 F. Supp. 2d 362, 376 (S.D.N.Y. 2005) ("A plaintiff is not required to list the place and date of defendants meetings and the summary of their conversations when he pleads conspiracy.")

Dr. Gottlieb and Dr. Bourla's suggestion that no conspiracy exists because Mr. Berenson enjoys the "benefit of extensive discovery" is incorrect. (Dkt. 95 at 24.) Mr. Berenson has received no discovery in this case. His own investigation has produced some communications between the co-conspirators and Twitter. But he does not have correspondence between or among the co-conspirators themselves. Neither Twitter's corporate successor nor the other federal litigation or congressional investigation have produced those communications, leaving questions that only discovery in this case can answer.

D. Mr. Berenson adequately pleads necessary government action.

Mr. Berenson addresses at length many of the arguments Dr. Gottlieb and Dr. Bourla raise regarding government action in the Government Opposition. The doctors contend that Mr. "Berenson's allegations confirm that the decision to suspend his account was Twitter's." (Dkt. 95 at 25). To the contrary, Mr. Berenson's pleading establishes that a sustained pressure campaign ultimately led to his deplatforming over the objections of Twitter's own two highest-ranking

executives. (Dkt. 80-1 ¶ 210.) The process that led to his permanent suspension also violated Twitter's own professed "separation" between government relations and content moderation, underscoring the coercive nature of what happened in the journalist's case. (*Id.* ¶¶ 217-20.) *Vullo*, which requires coercion claims to be read "in context," 602 U.S. at 191, supplies the appropriate standard, which Mr. Berenson's allegations meet.

The doctors point to Ms. Gadde's reference to an appeal as evidence there was no coercion. (Dkt. 95 at 26.) But Twitter never officially notified Mr. Berenson of his suspension, and it did not notify Mr. Berenson of his rights to appeal until months later, after he initially threatened a lawsuit. It was not until he sued Twitter and resolved his case that he was ultimately reinstated to the platform. (Dkt. 80-1 ¶ 221.) By definition, a litigation-induced reinstatement does not reflect Twitter "independently" managed its relationship with Mr. Berenson.

III. Mr. Berenson's tortious interference claim is actionable.

Much of Dr. Gottlieb and Dr. Bourla's argument is duplicative of the rationale for dismissal presented in Mr. Slavitt's motion to dismiss. As such Mr. Berenson incorporates the arguments from Section IV of the Slavitt Opposition here.

Relevant here, in New York, "[t]ortious interference with contract requires [(1)] the existence of a valid contract between the plaintiff and a third party, [(2)] defendant's knowledge of that contract, [(3)] defendant's intentional procurement of the third-party's breach of the contract without justification, [(4)] actual breach of the contract, [(5)] and damages resulting therefrom." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424, 668 N.E.2d 1370, 1375 (N.Y. 1996). Connecticut law is substantively similar. *See Appleton v. Bd. of Educ. of Town of Stonington*, 254 Conn. 205, 212–13, 757 A.2d 1059, 1063 (Conn. 2000).

The fact that Mr. Berenson and Twitter were in a contractual relationship is not in dispute.[4] Nor do Dr. Gottlieb and Dr. Bourla claim Mr. Berenson did not suffer damages. The doctors deny three aspects of Mr. Berenson's claim: (1) that they engaged in tortious conduct; (2) that Mr. Berenson plausibly alleged breach of his contract with Twitter; and (3) that the doctors lacked knowledge of the personal assurances Mr. Berenson received from Twitter.

A. Dr. Gottlieb tortiously interfered with Mr. Berenson's Twitter contract.

For there to be a claim for tortious interference with contract, a defendant must "intentionally procure[] . . . the third-party's breach of contract without justification." *Lama Holding*, 88 N.Y.2d at 424, 668 N.E.2d at 1375. "[W]here there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior." *NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp., Inc.*, 87 N.Y.2d 614, 621, 664 N.E.2d 492 (N.Y. 1996). Connecticut appellate courts follow the *Restatement (Second)* on tortious interference with contract claims. *Waste Conversion Techs., Inc. v. Midstate Recovery, LLC*, No. AANCV044000948, 2008 WL 5481231, at *6.

Under New York law and the *Restatement (Second)*, all Mr. Berenson must show is that Dr. Gottlieb acted "without justification" or "improperly." *Guard-Life*, 50 N.Y.2d at 189, 406 N.E.2d at 448. The *Restatement (Second)* notes that "[t]here is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of contract," and that even "a simple request or persuasion exerting only moral pressure" and/or a "statement

[4] Nor could Dr. Gottlieb and Dr. Bourla be unaware of Mr. Berenson's contract with Twitter. Both are Twitter users, (Dkt. 80-1 ¶ 61), and thus both agreed to Twitter's User Agreement, which the company called a "binding contract." (Dkt. 43-3 at 4). The company also conceded this in litigation against Mr. Berenson. (Dkt. 43-7 at 40:11-13 ("Twitter admits that its Terms and the Rules incorporated therein, including the COVID-19 misleading information policy, constitute a binding contract between [Mr. Berenson] and Twitter.").)

unaccompanied by any specific request but having the same effect as if the request were specifically made" is enough. Restatement (Second) of Torts § 766, cmt. k (1979).

Dr. Gottlieb's conduct here meets this requirement. As noted above, he leaned on Mr. Slavitt's contact at Twitter, and the company perceived Dr. Gottlieb's entreaties as connected to the overall pressure being placed on the company by the federal government. Then, in August 2021, Dr. Gottlieb contacted Twitter under false pretenses that Mr. Berenson was inciting physical threats against Dr. Fauci. Twitter's log of its August 27 phone call with Dr. Gottlieb shows that he discussed those concerns with Twitter's senior government lobbyists. The following day, Dr. Gottlieb flagged the tweet that led to Mr. Berenson's suspension while offering no rationale as to why it was false or misleading or otherwise violated the platform's rules. Dr. Gottlieb went beyond a mere request, but exerted pressure on Twitter to suspend Mr. Berenson. And Dr. Gottlieb's contact, Todd O'Boyle, pressed the company's content moderation team to deliver the result the doctor wanted.

The doctors deny what happened here is tortious, citing *Zilg v. Prentice-Hall, Inc.*, 717 F.2d 671 (2d Cir. 1983). (Dkt. 95 at 28.) But that case is distinguishable in several ways. First, the ruling came as an appeal from a bench trial, providing a full evidentiary record of the defendants' conduct. *Zilg*, 717 F.2d at 673. This case is at the Rule 12 stage, and no discovery has occurred. The *Zilg* court also found that the defendant in that case acted "good faith and in a non-coercive way." *Id.* at 679. Mr. Berenson's allegations are to the contrary. The doctors' related claim that Dr. Gottlieb had the "right to report potentially violative content," (Dkt. 95 at 29), ignores his backchannel discussions with Twitter—this was no ordinary course flag.

The doctors also claim Dr. Gottlieb's contacts with Twitter were "incidental" to his "concerns about public health and safety." (Dkt. 85 at 29.) But in the case they cite, *Conte v.*

Emmons, 895 F.3d 168 (2d Cir. 2018), the court found "the destruction of [plaintiff's] contracts was simply incidental to [law enforcement's] intent to get to the bottom of widely reported allegations of fraudulent conduct." *Id.* at 173. Mr. Berenson's contract was not "incidental" to Dr. Gottlieb's efforts—the journalist's relationship with Twitter was the target. Dr. Gottlieb's related argument that his conduct was not coercive has been addressed above. (Dkt. 95 at 29.) And like many other cases the Pfizer defendants cite, *Conte* was at a very different procedural stage than this action, allowing the court a fuller evidentiary base to judge motive.

Finally, this case is distinguishable from *Illoominate Media, Inc. v. CAIR Found.*, No. 19-CIV-81179-RAR, 2019 WL 13168767 (S.D. Fla. Nov. 19, 2019), which found that "[a] cause of action for tortious interference simply cannot exist each time an individual reports another Twitter user." *Id.* at *3. Mr. Berenson is not suggesting such a cause of action exists or should exist. Dr. Gottlieb made his reports to Mr. O'Boyle as part of the wider conspiracy.

B. Mr. Berenson adequately alleges breach of his contract with Twitter.

In *Berenson v. Twitter, Inc.*, No. C 21-09818 WHA, 2022 WL 1289049 (N.D. Cal. Apr. 29, 2022), the court acknowledged that "Twitter's terms of service stated at all relevant times that it could suspend user accounts for 'any or no reason'," *id.* at *1, but found "that Twitter's conduct here modified its contract with plaintiff and then breached that contract by failing to abide by its own five-strike policy and its specific commitments set forth through its vice president," *id.* at *2. The "conduct at issue" included not just the "*direct* assurances" the executive made to Mr. Berenson about the company's COVID-19 misleading information, but also the fact that the company had promulgated "a specific, detailed five-strike policy regarding COVID-19 misinformation." *Id.* (emphasis in original). Under the rule in *Berenson*, once Twitter promulgated its specific policy, the company was bound to follow it. And ultimately, Twitter

conceded it did not follow its own terms when it publicly acknowledged Mr. Berenson's tweets should not have led his suspension. (Dkt. 80-1 ¶ 225.)

Dr. Gottlieb and Dr. Bourla advance three arguments in support of their argument that Mr. Berenson "fails to allege an actionable breach." (Dkt. 95 at 31.) They maintain that Twitter' s "any or no reason" clause from its August 19, 2021 terms of service applied. (*Id.*) But the *Berenson* court acknowledged that "any or no reason" language, 2022 WL 1289049, at *1, and found modification anyway. The doctors also maintain Mr. Berenson should have contacted Brandon Borrman regarding his suspension, (Dkt. 95 at 31), but Mr. Borrman left by then, leaving the journalist no appeal right that way. Finally, the doctors point to the generic appeal right Twitter offered. But the company did not notify Mr. Berenson of that right, and in fact affirmatively spoke publicly about his "permanent" suspension. (Dkt. 80-1 ¶ 208.)

Defendants successfully forced Mr. Berenson off Twitter on the night of August 28, 2021. The fact that senior Twitter executives immediately realized the company should not have acted against Mr. Berenson but *took no action* to restore his account is not evidence that Twitter acted independently. It shows the opposite, the power of the coercive forces the company faced.

C. Dr. Gottlieb knew the Mr. Berenson was on his fourth strike under Twitter's COVID-19 misleading information policy, which the company was actively applying to the journalist.

"[U]nder New York law, a [defendant] must have some knowledge of the terms and conditions of the allegedly-interfered-with contract but perfect or precise knowledge is not required." *State St. Glob. Advisors Tr. Co. v. Visbal*, 431 F. Supp. 3d 322, 349 (S.D.N.Y. 2020).[5]

[5] The court in *Taboola, Inc. v. Ezoic Inc.*, No. 17CIV9909PAEKNF, 2020 WL 1900496 (S.D.N.Y. Apr. 17, 2020), which Dr. Gottlieb and Dr. Bourla cite, acknowledges knowledge does not require "perfect knowledge." *Id.* at *10. Mr. Berenson has provided "specific allegations of the defendant's knowledge of the contract here." *Id.* (internal quotation marks omitted). Connecticut, where "the Connecticut appellate courts have adopted the rules of the Restatement (Second) of Torts," *Waste Conversion Techs., Inc. v. Midstate Recovery*, *LLC*, No. AANCV044000948, 2008 WL 5481231, at *6 (Conn. Super. Ct. Dec. 3, 2008), is not to the contrary. *See* Restatement (Second) of Torts §

Here, both Dr. Gottlieb and Dr. Bourla are Twitter users. (Dkt. 80-1 ¶ 61.) As such, they agreed to Twitter's operative terms of service, which included "Twitter Rules and Policies," (Dkt. 43-1 at 7), and the company's five-strike COVID-19 misleading information policy, (Dkt. 43-3). Mr. Berenson has plausibly alleged that Twitter informed Dr. Gottlieb that Mr. Berenson was on his fourth strike under the policy on August 27, 2021. (Dkt. 80-1 ¶¶ 198.) That Dr. Gottlieb lacked knowledge of the assurances a Twitter executive gave Mr. Berenson, which is an open question at the pleadings stage of this litigation, does not negate the fact that Dr. Gottlieb knew generally about the COVID-19 misleading information policy and knew the company was applying it to Mr. Berenson. (*See id.*) Armed with this knowledge, the very next day, Dr. Gottlieb reported the tweet that led to Mr. Berenson's deplatforming. (*Id.* ¶ 200.)

Mr. Berenson's allegations regarding Dr. Bourla's involvement with what happened here are not just "upon information and belief" conclusory assertions. (Dkt. 95 at 32.) Mr. Berenson alleges that Dr. Bourla and Dr. Gottlieb maintained a close working relationship, serving as two of the seven members of Pfizer's executive committee. (Dkt. 80-1 ¶ 159.) The doctors both shared concerns about COVID-19 misinformation, with Dr. Bourla himself calling such speakers "criminals because they have cost literally millions of lives." (*Id.* ¶ 17.) Given Dr. Bourla's views, and his connection to Dr. Gottlieb, it would be odd if Pfizer's Chief Executive Officer did not know about or support Dr. Gottlieb in his efforts to deplatform the journalist the White House considered "ground zero for covid misinformation" and roadblock to vaccination efforts.

CONCLUSION

For the foregoing reasons, Mr. Berenson respectfully prays that this Court denies Dr. Gottlieb and Dr. Bourla's motion to dismiss.

766, cmt. i (1979) (requiring "knowledge of the contract," but "it is not necessary that the actor appreciate the legal significance of the facts giving rise to the contractual duty, at least in the case of an express contract").

Respectfully submitted, this 15th day of November, 2024.

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