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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUSTIN HART,

Plaintiff,

vs.

FACEBOOK, INC.; TWITTER, INC.; VIVEK MURTHY in his official capacity as United States Surgeon General; JOSEPH R. BIDEN, JR. in his official capacity as President of the United States; the DEPARTMENT OF HEALTH AND HUMAN SERVICES; and the OFFICE OF MANAGEMENT AND BUDGET,

Defendants.

Case No. 3:21-cv-01543-W-WVG

NOTICE OF MOTION AND MOTION TO TRANSFER UNDER 28 U.S.C. § 1404 & FRCP 21; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF
Date: December 13, 2021
Judge: Hon. Thomas J. Whelan
Place: Courtroom 3C
Action filed: August 31, 2021

NO ORAL ARGUMENT PURSUANT TO LOCAL RULE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on December 13, 2021, before the Honorable Thomas J. Whelan of the United States District Court for the Southern District of California at the San Diego Courthouse, Courtroom 3C, 221 West Broadway, San Diego, California 92101, Defendant Twitter, Inc. ("Twitter") will, and hereby does, move to transfer the action, in whole or in part, to the United States District Court for the Northern District of California. Twitter brings this Motion under 28 U.S.C. § 1404 and, as necessary, Federal Rule of Civil Procedure 21.

The Motion is based on this Notice of Motion and Motion, the following Memorandum of Points and Authorities, Declaration of Jonathan A. Patchen, the pleadings and other papers on file in this action, any oral argument, and any other evidence that the Court may consider in hearing this Motion.

Dated: November 8, 2021

WILLKIE FARR & GALLAGHER LLP

By: */s/ Jonathan A. Patchen*

Jonathan A. Patchen

Attorneys for Defendant Twitter, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to 28 U.S.C. § 1404(a), Twitter respectfully moves the Court to transfer this action to the United States District Court for the Northern District of California, which is the forum where Plaintiff Justin Hart was legally obligated to file any lawsuit relating to Twitter's Terms of Service.

INTRODUCTION

Anyone who creates an account on Twitter, like Plaintiff, must agree to Twitter's Terms of Service ("Terms"). Plaintiff admits he reviewed the Terms; he created a user account; and he continued to use the platform. *See* Compl. ¶¶ 44–46.[1] He is bound by those Terms, including the forum-selection clause therein that requires all disputes regarding Twitter's Terms or services be filed in the state or federal court in San Francisco. Plaintiff's meritless lawsuit against Twitter—based on Twitter's enforcement of its Terms and rules for use of Twitter—should be transferred to the forum he and Twitter agreed would hear such a dispute.

It is well settled that a "valid forum selection clause should be given controlling weight in all but the most exceptional cases." *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 59–60, 62–64 (2013). District courts routinely enforce Twitter's forum-selection clause, and controlling case law dictates such forum-selection clauses should be upheld absent "extraordinary circumstances." There are no extraordinary circumstances here. Therefore, the Court should transfer the instant action to the Northern District of California, pursuant to 28 U.S.C. § 1404(a).

[1] All paragraph references are to Plaintiff's complaint, filed as docket entry number 1 (hereinafter, "Complaint" or "Compl."). Plaintiff's Complaint re-numbers the paragraph numbers starting at the Facts section on Page 5. Where there are duplicative paragraph numbers, Twitter also includes the page number in its pincites to the Complaint.

The fact that Plaintiff appended claims against other defendants does not change the conclusion. Plaintiff's forum selection consent is broad: it covers all disputes that relate to Twitter's Terms or services. Every claim in Plaintiff's complaint is covered by a forum-selection clause and the entire action can be transferred. Alternatively, if there is a claim that does not relate to Twitter's terms, the Court should sever the unrelated claim pursuant to Rule 21 and transfer all remaining claims related to Twitter's Terms or services to the Northern District of California.

BACKGROUND

Twitter is a private social-media company headquartered in San Francisco. Compl. at 3 ¶ 14. It operates a popular platform that allows its users to "post messages, photos, and weblinks" on their personal feed—called "tweets"—for others to comment on and share. *Id*. ¶¶ 41–42. Twitter requires users of its platform to comply with Twitter's User Agreement, which includes Twitter's Terms and various incorporated rules and policies, all of which are available on Twitter's website. *See* Declaration of Jonathan Patchen ("Patchen Decl.") Ex. 1 at 1 (the "Terms of Service [] govern your access to and use of [Twitter's] services"). By signing up for and using Twitter's services, a user "agree[s] to be bound by these Terms" and Rules. *Id*.; *see* Compl. ¶¶ 44–46 (acknowledging limitations imposed by Twitter's Terms). Users agree to be governed by the most current version of the Terms, which are available on Twitter's website, by continuing to "access or use the Services after those revisions become effective." Patchen Decl. Ex. 1 ¶ 6.

The Terms require that disputes relating to the use of Twitter's service must be resolved in federal or state court in San Francisco, California. Specifically, the Terms provide:

> The laws of the State of California, excluding its choice of law provisions, will govern these Terms and any dispute that arises between you and Twitter. All disputes related to these Terms or the Services will be brought solely in the federal or state courts located in San Francisco

> County, California, United States, and you consent to personal jurisdiction and waive any objection as to inconvenient forum.

(*Id*. ¶ 6, "Forum-Selection Clause").[2]

Plaintiff concedes that Twitter uses its Terms and various rules to impose "limitations" on its users. Compl. ¶¶ 45–46.[3] A citizen of California, Plaintiff has been a user of "Twitter's services since 2007." *Id*. at 3, ¶ 12; ¶ 47. Plaintiff admits that he purchases advertisements on Twitter to promote his business and uses Twitter "as a feeder for his other social media accounts, as a networking tool for his consulting business, and as a promotion of his online website, RationalGround.com, where he sells subscriptions to his articles and research on COVID-19 and the government's response to it." *Id*. ¶¶ 48–49. Plaintiff's use of these services requires that he consent to Twitter's current Terms. Patchen Decl. Ex. 1 ¶ 1 ("You may use the Services only if you agree to form a binding contract with Twitter"), ¶ 6 ("By continuing to access or use the Services after those revisions become effective, you agree to be bound by the revised Terms").

On or around July 18, 2021, Plaintiff published the following tweet:

> So the CDC just reported that 70% of those who came down with #COvId19 symptoms had been wearing a mask. We

---

[2] The Terms define Services as including Twitter's "websites, SMS, APIs, email notifications, applications, buttons, widgets, ads, commerce services," and other services linked on the webpage for the Terms. Patchen Decl. Ex. 1.

[3] Plaintiff's allegations in the Complaint are binding judicial admissions. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) ("Factual assertions in pleadings . . . unless amended, are considered judicial admissions conclusively binding on the party who made them."). Although Twitter relies on Plaintiff's admissions in this Motion, Twitter does not thereby, or otherwise, admit any of the material facts in the Complaint. Twitter reserves all rights relating to future motions, including pursuant to Federal Rule 12 of Civil Procedure and California Civil Procedure Code § 425.16, which the Court permitted Twitter to file after this Motion is decided.

> know that masks don't protect you . . . but at some point you have to wonder if they are PART of the problem.

Compl. at 6 ¶ 5 (ellipses in original). The same day, Twitter provided him with the following notice:

> "**Hi Justin Hart,**
>
> **Your Account, @justin_hart has been locked for violating the Twitter Rules.**
>
> Specifically for: Violating the policy on spreading misleading and potentially harmful information related to COVID-19."

Id. ¶ 6 (emphasis in original).

Plaintiff filed this lawsuit on August 31, 2021, alleging that Twitter violated his free speech under the U.S. Constitution (Count I) and the California Constitution (Count III) and was liable for damages under a promissory estoppel theory (Count IV) by enforcing its "policy on spreading misleading and potentially harmful information related to COVID-19." *Id*. ¶¶ 51–65, 75–87.[4] Plaintiff filed those claims in this Court, despite their express reliance on the Terms, which include the forum-selection clause.

LEGAL STANDARD

District courts have the discretion to transfer actions pursuant to 28 U.S.C. § 1404(a), which provides that "a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a).

In deciding whether to transfer, the district court normally considers "(1) the relative convenience of the selected forum and the proposed forum; (2) the possible

[4] The Federal Government defendants and Facebook are also named in Count I; the Federal Government defendants are solely named on a FOIA claim (Count II); Facebook is an additional named defendant on the California Constitution and promissory estoppel claims (Counts III & IV); and Facebook alone is named in Count V (Intentional Interference with Contract) and Count VI (Negligent Interference with Contract).

hardship to the plaintiff if the court grants the motion; (3) the interests of justice; and (4) the deference to be accorded the plaintiff's choice of forum." *Cont'l Indus. Cap., L.L.C. through Cohen Asset Mgmt., Inc. v. Davey Tree Expert Co.*, No. 05-cv-1214 W (LSP), 2005 WL 8173354, at *1 (S.D. Cal. Sept. 7, 2005).

Where there is a valid forum-selection clause, Plaintiff's choice of forum "merits no weight." *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1087 (9th Cir. 2018). Instead, the plaintiff bears the burden "of showing why the court should not transfer the case to the forum to which the parties agreed." *Id*. (cleaned up); *see also Sam Kholi Enters., Inc. v. Comsys Servs. LLC*, No. 11-cv-970 W (NLS), 2011 WL 13257533, at *6 (S.D. Cal. Oct. 3, 2011) (Whelan, J.) ("there is no [] deference to the plaintiff's choice of forum where the plaintiff has freely agreed to litigate disputes in another forum"). In addition, "all factors relating to the private interest of the parties . . . weigh[] entirely in favor of the preselected forum." *Sun*, 901 F.3d at 1087–88 (cleaned up).

The district court may transfer to a forum that would originally have had proper jurisdiction and venue, or to which all parties have consented. 28 U.S.C. § 1404(a).

ARGUMENT

The Court should transfer this action to the Northern District of California because the Plaintiff agreed to and is bound by a valid and enforceable forum-selection clause. Courts routinely enforce a forum-selection clause through a motion to transfer under 28 U.S.C. § 1404(a). *Atl. Marine*, 571 U.S. at 59; *Sun*, 901 F.3d at 1087. "As a general rule, 'when the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause.'" *Sun*, 901 F.3d at 1087 (citing *Atl. Marine*, 571 U.S. at 62) (brackets omitted). "Only under *extraordinary circumstances* unrelated to the convenience of the parties should a motion to enforce a forum-selection clause be denied." *Id*. at 1088 (cleaned up) (emphasis added) ("a forum-selection clause 'should control except in unusual cases'" (citation omitted)).

The forum-selection clause encompasses Plaintiff's claims. Further, Plaintiff concedes that he is subject to Twitter's Terms, including the forum-selection clause. Finally, there are no public interest factors or "extraordinary circumstances" that warrant denial of transfer and the Northern District of California is a proper transferee court.

Plaintiff's view that his FOIA claim precludes transfer is wrong—he consented to the Northern District of California for all disputes *related* to Twitter's Services. Alternatively, if the Court determines his FOIA claim is not related to Twitter's Services, then the claim should be severed under Rule 21, and the remaining non-FOIA claims transferred to the Northern District of California.

I. The Forum-Selection Clause Governs Plaintiff's Complaint and Requires Transfer to Northern District of California

A. Plaintiff Agreed to Twitter's Forum-Selection Clause

Plaintiff cannot dispute that he is subject to the Terms and the forum-selection clause contained therein. Plaintiff agreed to Twitter's Terms as an ongoing condition of using Twitter's services when he signed up for and continued to use Twitter to promote himself. *See* Patchen Decl. Ex. 1 ¶ 6; Compl. ¶¶ 48–49; *Trump v. Twitter, Inc.*, No. 21-cv-22441-RNS, Dkt. No. 87, at *1–2, 4–9 (S.D. Fla. Oct. 26, 2021) ("Each user is required to assent to the [Twitter] User Agreement and acknowledge that by continuing use of Twitter's services, the user agrees to be bound by the current version of its Terms.").[5] The Complaint implicitly concedes that Plaintiff knew about and reviewed Twitter's Terms by referring to them directly, Compl. ¶ 46, and "Twitter Rules" by citing them repeatedly, *id*. ¶¶ 44–46. In short, Plaintiff's use of Twitter's platform binds him to the Terms of Service.

Courts routinely find terms of service binding, including when, as here, affirmative consent to those terms is required to create an account. *See generally*

[5] The *Trump v. Twitter* opinion is attached as Exhibit 2 to the Patchen Declaration.

Crawford v. Beachbody, LLC, No. 14-cv-1583-GPC (KSC), 2014 WL 6606563, at *2–4 (S.D. Cal. Nov. 5, 2014) (holding that plaintiff was bound by the forum-selection clause contained in a website's "Terms and Conditions" available as hyperlink above "place order" link); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 911–12 (N.D. Cal. 2011). Plaintiff's admitted acts of affirmatively creating a Twitter account, deliberately and continually using Twitter, and his admitted knowledge of the Terms, confirms that the Terms are binding. *See, e.g., Trump v. Twitter*, No. 21-cv-22441-RNS, Dkt. No. 87 at *1–2, 4–9; *Wingo v. Twitter, Inc.*, No. 14-2643, 2014 WL 7013826, at *3 (W.D. Tenn. Dec. 12, 2014) (Plaintiff "alleges that he is a Twitter user, and as such he agreed to Twitter's Terms of Service when he initially registered to use Twitter and each time he accessed the service after registration"); *Regan v. Pinger, Inc.*, No. 20-cv-02221-LHK, 2021 WL 706465, at *6 (N.D. Cal. Feb. 23, 2021). Accordingly, Plaintiff is subject to the Terms and its forum-selection clause.

B. The Forum-Selection Clause Encompasses Plaintiff's Claims

Plaintiff's Complaint is within the scope of the forum-selection clause, which applies to all disputes "***related to*** [Twitter's] Terms or [its] Services," as it directly challenges how Twitter enforces its Terms and Services. Patchen Decl. Ex. 1 ¶ 6 (emphasis added); Compl. at 6 ¶¶ 5–6; ¶¶ 44–46); *Sun*, 901 F.3d at 1086–87.

The Ninth Circuit has interpreted the phrase "related to" in forum-selection clauses broadly, holding that "forum-selection clauses covering disputes 'relating to' a particular agreement apply to any disputes that reference the agreement or have some 'logical or causal connection' to the agreement." *Sun*, 901 F.3d at 1086; *see also Rahimi v. Mid Atl. Pros., Inc.*, No. 18-cv-00278-CAB-KSC, 2018 WL 3207383, at *3–4 (S.D. Cal. June 29, 2018) ("[W]here the [forum-selection] clause uses broader phrases such as 'relating to' and 'in connection with' the clause should be construed more broadly."). The dispute at issue "need not grow out of the contract or require

interpretation of the contract" to be within the purview of the forum-selection clause. *Sun*, 901 F.3d at 1086.

Plaintiff's claims are "related to" Twitter's Terms and Services. His primary claim alleges that, by enforcing the Terms (and regulating use of its Services), Twitter violated his constitutional rights and breached alleged promises. Courts routinely find similar complaints based on removal of content within the scope of forum-selection clauses—including Twitter's forum-selection clause. *See, e.g., Trump v. Twitter, Inc.*, No. 21-cv-22441-RNS, Dkt. No. 87, at *9–11 (Twitter's "broad" forum-selection clause encompasses complaint challenging "Twitter's application of its policies, rules, standards, which serve to regulate User Content"); *Trump v. YouTube, LLC*, No. 21-cv-22445-KMM, Dkt. No. 70 (S.D. Fla. Oct. 6, 2021) (transfer to forum designated in terms of service in connection with removal of plaintiff's content)[6]; *Domen v. Vimeo, Inc.*, No. 19-cv-01278-SVW-AFM, 2019 WL 4998782, at *1–3 (C.D. Cal. Sept. 4, 2019) (same); *Brittain v. Twitter Inc.*, No. CV-18-01714-PHX-DGC, 2019 WL 110967, at *2 n.2 (D. Ariz. Jan. 4, 2019) (claim based on Twitter's suspension of account, has "logical or causal connection to [his] agreements with Twitter"); *Dolin v. Facebook, Inc.*, 289 F. Supp. 3d 1153, 1161 (D. Haw. 2018). Similarly here, Plaintiff's claims clearly relate to Twitter's Terms and the forum-selection clause squarely controls these claims.

C. No Public Interest Factors Preclude Transfer

Plaintiff cannot meet his "heavy burden of proof" to show that the public-interest factors compel denial of transfer. *Rahimi*, 2018 WL 3207383, at *4; *accord Sun*, 901 F.3d at 1084, 1087. The limited public factors courts consider include "[1] the administrative difficulties flowing from court congestion; [2] the local interest in having localized controversies decided at home; and [3] the interest in having the trial

[6] The *Trump v. YouTube* opinions are attached as Exhibit 3 to the Patchen Declaration.

of a diversity case in a forum that is at home with the law." *Sun*, 901 F.3d at 1088 (brackets and citations omitted). These factors "rarely defeat a transfer motion," and there is no principled basis for applying them here to avoid transferring the instant action to the Northern District of California. *Id*.

First, there is no reason to decline transfer based on any purported court congestion in the Northern District of California. Court congestion statistics show that the Northern and Southern District Courts have comparable caseload profiles. As of June 2021, the median time in the Northern District from a civil case's filing to its disposition is 7.6 months, and from filing to trial is 26.9 months. Patchen Decl. Ex. 4 at 66. Similarly, the median time in this District between a civil filing to disposition is 7.7 months, and from filing to trial is 28.3 months. *Id*. at 69. Both districts also have comparable total actions per judge. This factor thus does not weigh against transfer. *Cf. Bromlow v. D & M Carriers, LLC*, 438 F. Supp. 3d 1021, 1030 (N.D. Cal. 2020) (examining court congestion statistics and finding that transfer was appropriate); *Sam Kholi Enters., Inc.*, 2011 WL 13257533, at *8 (Whelan, J.) (finding court congestion to be a neutral factor where both forums have approximately similar rates of disposition and caseload).

No other public factors favor maintaining the suit here. There is no identifiable localized interest here as both the Northern District of California and this Court would be resolving a California-based dispute and relying on the same principles of Federal and California law. Indeed, even where a forum-selection clause designates an out-of-state forum and California has an "interest in the outcome" of the dispute, such an interest "is not so overwhelming or unusual that this should be an exception to the general rule that a valid forum-selection clause should be honored." *Huddleston v. John Christner Trucking, LLC*, No. 17-cv-00925-LJO-SAB, 2017 WL 4310348, at *10 (E.D. Cal. Sept. 28, 2017). Further, the last factor is inapplicable because this is not an exclusively diversity-jurisdiction case. Compl. at 4 ¶ 19 (alleging federal-question jurisdiction under 28 U.S.C. § 1331); *Moretti v. Hertz Corp.*, No. C 13-

02972 JSW, 2014 WL 1410432, at *4 (N.D. Cal. Apr. 11, 2014) ("Because this is not strictly a diversity case, the third factor is not applicable here"). Accordingly, Plaintiff is unable to demonstrate any public interest factors that disfavor transfer.

D. There is No Exception that Precludes Enforcement of the Forum Selection Clause

Plaintiff cannot make any showing, let alone a "strong" one as required, that "(1) the clause is invalid due to fraud or overreaching[;] (2) enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision[;] or (3) trial in the contractual forum will be so gravely difficult and inconvenient that the litigant will for all practical purposes be deprived of his day in court." *Sun*, 901 F.3d at 1088 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (2018)).

First, "a plaintiff must show that the forum selection itself, as opposed to the entire contract in which the clause is set forth, is the product of fraud or overreaching." *Washington v. Cashforiphones.com*, No. 15-cv-0627-JAH (JMA), 2016 WL 6804429, at *5 (S.D. Cal. June 1, 2016). Plaintiff has not alleged, and cannot show, that Twitter's Forum-Selection Clause—or any part of the Terms—is the product of fraud or overreaching. *See generally* Compl. Further, the multiple decisions enforcing the same Forum-Selection Clause, defeat any such claim. *See, e.g., Trump v. Twitter*, No. 21-cv-22441-RNS, Dkt. No. 87; *Brittain*, 2019 WL 110967, at *2–4; *Doshier v. Twitter, Inc.*, 417 F. Supp. 3d 1171, 1179–80 (E.D. Ark. 2019); *Wingo*, 2014 WL 7013826, at *2–4; *cf. Twitter, Inc. v. Skootle Corp.*, No. C 12-1721 SI, 2012 WL 2375486, at *6 (N.D. Cal. June 22, 2012) (denying a defendant-user's motion to dismiss Twitter's suit for improper venue where Twitter filed suit in the Northern District of California as required under the mandatory forum-selection clause).

Second, public policy interests actually support enforcing the Forum-Selection Clause and requiring the Plaintiff to litigate in the Northern District. Both this Court and the Northern District of California are located in California. Plaintiff's claims

consist of federal and state constitutional claims, a FOIA claim, and various California state law claims, all of which courts in the Northern District of California can readily consider and adjudicate under the same body of federal and state law that this Court would apply, and its decisions will be reviewed on appeal (if at all) by the same Court of Appeals. *Cf., e.g., Daniels v. Alphabet Inc.*, No. 20-cv-04687-VKD, 2021 WL 1222166, at *5–7 (N.D. Cal. Mar. 31, 2021) (examining First Amendment claim against online platform); *Zimmerman v. Facebook, Inc.*, No. 19-cv-04591-VC, 2020 WL 5877863, at *2 (N.D. Cal. Oct. 2, 2020) (analyzing free-speech claim brought under California Constitution); *Ctr. for Investigative Reporting v. FBI*, No. 19-cv-04541-LB, 2021 WL 633867, at *3–5 (N.D. Cal. Feb. 18, 2021) (adjudicating FOIA claims); *Distance Learning Co. v. Silly Monkey Studios, LLC*, No. 16-cv-06943-SK, 2017 WL 9613958, at *1–2 (N.D. Cal. Feb. 14, 2017) (deciding promissory estoppel claim).

Finally, Plaintiff cannot show that litigating in the Northern District is "so gravely difficult and inconvenient" for him to justify overriding the forum selection clause. This last factor is "difficult to satisfy" because, where, as here "the parties have agreed to a forum-selection clause, they have waived the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Sun*, 901 F.3d at 1091 (cleaned up). Indeed, Twitter's forum-selection clause expressly provides that Plaintiff, by using Twitter's services, agrees to "waive any objection as to inconvenient forum." Patchen Decl. Ex. 1 ¶ 6. As a citizen of California, Plaintiff also cannot claim that travel from San Diego to San Francisco would be "gravely difficult." Notably, as the Northern District's General Order 78 provides, courts continue to allow remote hearing via telephone or videoconference. Patchen Decl. Ex. 5 at 1. Accordingly, Plaintiff cannot show that litigating in the agreed-upon forum would be "gravely difficult and inconvenient."

II. The Northern District is An Available Forum For Transfer

Plaintiff's primary opposition to transfer is his claim that his FOIA claim precludes transfer. Plaintiff is wrong. It is proper to transfer an action to "any district or division to which all parties have consented." 28 U.S.C. § 1404(a). All parties have consented to transfer, including Plaintiff's FOIA claim. Alternatively, if Plaintiff's FOIA claim is not subject to transfer, this Court should sever the FOIA claim under Rule 21 and transfer the remaining action.

A. All Parties Have Consented to the Northern District of California

Transfer to the Northern District of California is proper because all parties consented to litigating in the Northern District. Undoubtedly Twitter and Facebook consent by virtue of the instant transfer motions. The Federal Government defendants do not object to transfer of the action to the Northern District of California. *See* Dkt. No. 25-1 ¶ 6. And Plaintiff's consent to the Forum Selection Clause provides the final requisite consent.

The Supreme Court in *Atlantic Marine* made clear that a forum selection clause operates as consent under Section 1404(a). *See Atl. Marine*, 571 U.S. at 59 (Section 1404(a) "permits transfer . . . to any other district to which the parties have agreed by contract or stipulation"). Obviously, that consent extends to all of the claims naming Twitter: Counts I, III, and IV. Plaintiff separately consented to transfer of his claims against Facebook, *see* Dkt. No. 29 at 2:20-26 (noting Facebook's separate forum selection clause), which covers Counts V and VI.

Plaintiff's only potential argument against transfer of the entire action is that his FOIA claim (Count II) brought solely against the Federal Government defendants should be heard by this Court. Dkt. No. 27 at 2:8–3:5. This argument should be rejected because Plaintiff's consent to Twitter's forum selection clause necessarily encompasses his FOIA claim. Applying the Ninth Circuit's decision in *Sun*, the Twitter Forum Selection Clause here encompasses "[a]ll disputes" that "have some 'logical or causal connection' to" the Terms or Twitter's "websites,

SMS, APIs, email notifications, applications, buttons, widgets, ads, or commerce services." Patchen Decl., Ex. 1 ¶ 6; *Sun*, 901 F.3d at 1086. Although Plaintiff does not allege the content of his FOIA request, Compl. ¶¶ 66–74, he argued that the FOIA requests asked "for communications between the federal government and Twitter and Facebook regarding the censorship of social media posts related to COVID-19." Dkt. No. 27 at 3:19-26. He also argues that the FOIA requests are consistent with his discovery requests served on the Government. *Id*. And those discovery requests are undeniably related to Twitter's enforcement of its Terms and rules—the very acts Plaintiff complains about in this lawsuit. *See* Dkt. No. 31-1 at 6 (RFP No. 1, seeking Federal Government Defendants' communications with Twitter related to removal or flagging of social media posts; RFP No. 3, seeking Federal Government Defendants' communications with Twitter regarding Plaintiff or his social media posts). Plaintiff's FOIA claim has much more than the requisite "logical" connection to Twitter's Terms and its service; it falls within the scope of the forum-selection Clause; and thus Plaintiff consented to transfer of this action to the Northern District of California.

B. Alternatively, the Court Should Sever the FOIA Claim and Transfer the Remaining Action

If the Court determines that the FOIA claim should not be transferred to the Northern District, the Court should sever the FOIA claim and transfer the substantive action to the Northern District of California. *See* Fed. R. Civ. P. 21; *Pinson v. U.S. Dep't of Justice*, 74 F. Supp. 3d 283, 287–88, 290–95 (D.D.C. 2014) (severing and transferring claims that "bear[] no logical relation to the FOIA claim"); *Harrison v. Fed. Bureau of Prisons*, No. 16-819 (RDM), 2019 WL 147720, at *4 (D.D.C. Jan. 9, 2019) (severing First Amendment retaliation claim from FOIA claim; "the two claims do not share any common questions of law or fact").

Plaintiff consented to resolve "all disputes" related to Twitter, its Terms, or its Services in the Northern District of California. If the FOIA claim is truly unrelated,

then there is no basis to deny severance of the FOIA claim under Rule 21. *See Pinson*, 74 F. Supp. 3d at 290 (severing claims that involve "distinct factual events" and no "common issues of law or fact" from FOIA claim); *cf. Am. Small Bus. League v. U.S. Office of Mgmt. & Budget*, No. 20-cv-07126-DMR, 2021 WL 4459667, at *3–4 (N.D. Cal. Apr. 21, 2021).

The justification for severance becomes compelling given the forum-selection clause. All but the FOIA count are covered by a forum-selection clause selecting the Northern District of California. Denying severance and transfer of the non-FOIA counts would be inconsistent with the Supreme Court's and Ninth Circuit's clear direction that forum selection clauses be enforced in all but the most extraordinary cases and that public-interest factors (such as judicial efficiency) does not normally trump such clauses. *See, e.g., SocialCom, Inc. v. Arch Ins. Co*., No. 20-cv-04056-RGK-AGR, 2020 WL 6815039, at *2-5 (C.D. Cal. July 7, 2020) (severing claims against one defendant who had a valid and enforceable forum selection clause with the plaintiff, and transferring claims to the designated forum); *B & R Supermarket, Inc. v. Visa, Inc*., No. C 16-01150-WHA, slip. op., at *2–4 (N.D. Cal. June 24, 2016) (severing all claims against one defendant, American Express, and transferring claims against it to Southern District of New York pursuant to American Express's forum-selection clause); *cf. Aimsley Enters. Inc. v. Merryman*, No. 19-cv-02101-YGR, 2020 WL 1677330, at *8 (N.D. Cal. Apr. 6, 2020) (where plaintiff and one defendant agreed to a forum-selection clause designating a foreign forum and non-signatory defendants do not object to enforcing the forum-selection clause, dismissal of claims against the signatory defendant was appropriate under *Atlantic Marine*); *Glob. Quality Foods, Inc. v. Van Hoekelen Greenhouses, Inc.*, No. 16-cv-00920-LB, 2016 WL 4259126, at *5 (N.D. Cal. Aug. 12, 2016) (judicial efficiency concerns resulting from severance generally cannot trump forum selection clause); *United States for Use of D.D.S. Indus., Inc. v. Nauset Constr. Corp.,* No. cv 16-12009-NMG, 2018 WL 5303036, at *4 (D. Mass. Oct. 25, 2018)

(collecting cases and holding that severance follows upon finding a basis to transfer at least part of an action based on a forum selection clause); *Buc-ee's, Ltd. v. Bucks, Inc.*, 262 F. Supp. 3d 453, 464–66 (S.D. Tex. 2017) (granting severance and transfer, and noting "the court must keep in mind the United States Supreme Court's instruction that a contractually valid forum-selection clause should be enforced unless extraordinary circumstances appear to be present in case") (cleaned up).[7] Plaintiff's joinder of a FOIA claim does not make this an "extraordinary" case. Accordingly, severance and transfer of the non-FOIA counts is the proper outcome if the entire action cannot be transferred.[8]

CONCLUSION

For the foregoing reasons, Twitter respectfully requests that this Court grant this motion and transfer this pending action to the Northern District of California.

[7] Twitter acknowledges that courts have invoked more formal analyses to evaluate the severance and transfer question. *See In re Howmedica Osteonics Corp*., 867 F.3d 390 (3d Cir. 2017). Such a framework has not been adopted by the Ninth Circuit and it need not be applied here, because the Federal Defendants do not object to transfer of the action to the Northern District of California.

[8] Twitter recognizes that the preferred procedural vehicle to enforce the Forum Selection Clause is a Section 1404(a) transfer motion. But if this motion is denied—and the forum-selection clause is not enforced—because Plaintiff joined a FOIA claim, then Twitter reserves the right to enforce the clause pursuant to Rule 12(b)(6). *See Verifone, Inc. v. A Cab, LLC*, No. 15-cv-00157-GMN-GWF, 2016 WL 4480686, at *2 (D. Nev. Aug. 24, 2016) (noting that Supreme Court "has not foreclosed" applying Rule 12(b)(6) to a forum-selection clause and considering forum-selection clause under Rule 12(b)(6)); *cf. White Knight Yacht LLC, v. Certain Lloyds at Lloyd's London*, 407 F. Supp. 3d 931, 942 n.2 (S.D. Cal. 2019) (allowing forum-selection clause enforcement brought by Rule 12(b)(6) motion).

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