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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

TWITTER INC.'S REPLY IN SUPPORT OF MOTION TO TRANSFER UNDER 28 U.S.C. § 1404 & FRCP 21
Date: December 13, 2021
Judge: Hon. Thomas J. Whelan
Place: Courtroom 3C
Action filed: August 31, 2021

NO ORAL ARGUMENT PURSUANT TO LOCAL RULE

INTRODUCTION

Defendant Twitter, Inc. ("Twitter") moved to transfer this action to the Northern District of California pursuant to the mandatory Forum-Selection Clause consented to by Plaintiff. *See* Dkt. 34 ("Motion" or "Mot.").[1] Plaintiff's Opposition (Dkt. 36 ("Opposition" or "Opp'n")) fails to articulate any basis for denying transfer.

Plaintiff offers no answer to the fact that all parties have consented to litigate in the Northern District of California, including himself when he admittedly agreed to Twitter's Forum-Selection Clause. Congress expressly amended Section 1404 in 2011 to allow transfer "to *any* district or division to which all parties have consented." 28 U.S.C. § 1404(a) (emphasis added). Plaintiff nevertheless contends that the Court cannot transfer the action because that district does not fall within the FOIA venue statute. That is wrong. Plaintiff has not—because he cannot—identify support for his position, given Congress' express approval of transfer based on parties' consent. His reliance on outdated law and treatise has no effect here.

Plaintiff must, but has failed to, show "extraordinary circumstances" that would justify denying transfer based on the Forum-Selection Clause. *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 59–60 (2013) (forum-selection clause must be "given *controlling weight* in all but the most exceptional cases") (emphasis added). He does not address any public-interest factors, and thus concedes that those factors—the only ones relevant to avoiding transfer—do not preclude transfer here. Instead, the Opposition focuses on private-party factors that are irrelevant as a matter of law. The other arguments on which Plaintiff relies to nullify the Forum-Selection Clause, namely that it is unenforceable because of his purported lack of bargaining power and personal inconvenience, are precluded by well-established precedent and contrary to the facts as pleaded.

In sum, Court should grant Twitter's Motion.

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[1] The capitalized terms in this Reply correspond to the defined terms in the Motion.

ARGUMENT

I. PLAINTIFF'S CORE OPPOSITION TO TRANSFER IS BASED ON OUTDATED LAW.

Plaintiff's core argument is that Twitter's Motion should be denied because "the Northern District of California is not an available venue for the FOIA claim" and the Forum-Selection Clause "do[es] not transcend federal venue statutes." Opp'n at 4–7. Plaintiff's argument is wrong because it misstates the law.

In 2011, Congress amended 28 U.S.C. § 1404(a) to permit transfer to "*any* district or division to which all parties have consented." *See* Pub. L. No. 112-63 § 204 (2011) (emphasis added). The pre-2011 version of Section 1404(a) only permitted transfer to any district or division "where [the action] might have been brought"—i.e., to a sister district court that also had venue. But the post-2011, operative version of Section 1404(a) expands the permissible transferee courts to include "any" federal district court to which the parties consent, even if that transferee court did not originally have venue.[2] In fact, the Supreme Court made clear that such consent can come in the form of pre-dispute forum-selection clauses or post-complaint agreement. *Atl. Marine*, 571 U.S. at 59.

Plaintiff does not cite or analyze the current statute and applicable law. Rather, Plaintiff's argument rests on case law and a treatise that pre-dates the 2011 amendments to Section 1404. In particular, Plaintiff relies on *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), to argue that the specific venue provision in the FOIA statute precludes transfer under the Forum-Selection Clause. Opp'n at 4–7. Plaintiff's reliance on *Stewart* is no longer applicable following Congress'

[2] This is clear from the amended structure of Section 1404, permitting transfer "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) (emphasis added). The 2011 amendment is entirely redundant unless it permits transfer, by consent, to districts where the action could *not* "have been brought."

expansion of the list of permitted transferee courts via the 2011 amendment to Section 1404. Moreover, current controlling law pursuant to *Atlantic Marine* makes clear that transfer is available to any "district or division" under Section 1404 "to which all parties have consented." *Atl. Marine*, 571 U.S. at 59 (quoting Section 1404).

Plaintiff provides no other statutory or case law support for his position that transfer is improper based on the FOIA venue provision. Rather, Plaintiff improperly relies on a quotation from the Third edition of Wright & Miller (copyright 2002) to support his argument that *Stewart* dictates that a forum selection clause cannot render venue improper where venue would otherwise be proper under federal law. Opp'n at 4–5. This argument lacks merit. Congress has expressly addressed the question and permits transfer to *any* district, based on consent, even to a district where venue is otherwise improper. Additionally, the cited Third edition of Wright & Miller predates the 2011 amendment; and notably the operative (Fourth) edition replaces Plaintiff's quoted language with a discussion of *Atlantic Marine*.[3] Thus, Plaintiff's reliance on this authority should be rejected.

Contrary to Plaintiff's argument, the Supreme Court in *Atlantic Marine* made clear that Section 1404 allows transfer to a district where, as here, the parties "have agreed by contract or stipulation." *Atl. Marine*, 571 U.S. at 59; Mot. at 12–13. Accordingly, the Court may transfer the entire action—including the FOIA claim—to the Northern District of California. 28 U.S.C. § 1404(a).

II. PLAINTIFF FAILS TO MEET HIS "HEAVY BURDEN" TO AVOID TRANSFER OF THE ACTION.

Plaintiff argues that his private interests prevent enforcement of Twitter's Forum-Selection Clause and warrant denying transfer in this case. Plaintiff's argument is without merit and fails to demonstrate any of the factors required to meet

[3] Twitter was unable to locate an electronic copy of the cited edition of Wright & Miller, but was able to obtain a hard copy. Twitter will submit a copy should the Court so desire.

the heavy burden Plaintiff must show in order to avoid enforcement of the Forum-Selection Clause to which he consented.

A. The Forum-Selection Clause is Enforceable Notwithstanding Plaintiff's Alleged Lack of Bargaining Power.

Plaintiff concedes that he checked "the box agreeing to the Terms of Service" and that he did so in order "to continue using the services provided by" Twitter. Opp'n at 5–6. Accordingly, Plaintiff cannot dispute, and concedes, that he agreed to the Term's Forum-Selection Clause. Opp'n at 2–9; Mot. at 6–7 (citing, *inter alia*, *Trump v. Twitter, Inc.*, No. 21-cv-22441-RNS, Dkt. No. 87, at *1–2, 4–9 (S.D. Fla. Oct. 26, 2021)); *see Kroeger v. Vertex Aerospace LLC*, No. CV 20-3030-JFW (AGRx), 2020 WL 3546086, at *8 (C.D. Cal. June 30, 2020) (failure to address argument in opposition concedes argument) (collecting cases).

Despite clearly consenting to the Clause, Plaintiff asserts that he should not be bound by his agreement because he had no "bargaining power." Opp'n at 5–6. This argument should be rejected. Binding precedent upholds the enforceability of non-negotiated, online user agreements, including forum-selection clauses. *See In re Holl*, 925 F.3d 1076, 1084–85 (9th Cir. 2019) (noting that federal courts "have recognized the general enforceability of [] online agreements that require affirmative user assent," and holding that plaintiff was bound by online terms of service that he admittedly agreed to); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1028 (9th Cir. 2016) ("A forum selection clause within an adhesion contract will be enforced as long as the clause provided adequate notice to the [party] that he was agreeing to the jurisdiction cited in the contract." (citation omitted)); *accord Wingo v. Twitter, Inc.*, No. 14-2643, 2014 WL 7013826, at *3–4 (W.D. Tenn. Dec. 12, 2014) (plaintiff "agreed to Twitter's Terms of Service when he initially registered to use Twitter and

each time he accessed the service," and thus is bound by the Forum-Selection Clause); Mot. at 6–7 (citing cases).[4]

Even accepting *arguendo* Plaintiff lacked "bargaining power," that is insufficient to demonstrate that the Forum-Selection Clause should not be enforced. Further, Plaintiff has failed to articulate any of the recognized exceptions to the Forum-Selection Clause's enforcement, namely that: it should be "invalid due to fraud or overreaching"; its enforcement would "contravene a strong public policy"; or the transferee court would be "so gravely difficult and inconvenient." Mot. at 10.[5] To the extent Plaintiff is asserting a quasi-procedural unconscionability argument, that too fails. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (a "nonnegotiated forum-selection clause in a form ticket contract" is not unenforceable "simply because it is not the subject of bargaining"); *Crawford v. Beachbody, LLC*, No. 14-cv-1583-GPC (KSC), 2014 WL 6606563, at *5 (S.D. Cal. Nov. 5, 2014) (holding that "Plaintiff's argument that the Terms and Conditions was not negotiable cannot rebut the presumption in favor of the forum selection clause" and rejecting that the terms were unconscionable because they was "presented on a 'take it or leave it' basis"). Even if Plaintiff's claim of lack of bargaining power was apposite as a legal matter, his argument still would fail because Plaintiff was required to show that one of the narrow exceptions applied to the Forum-Selection Clause

[4] *See also, e.g.*, *Thomas v. Facebook, Inc.*, No. 18-cv-00856-LJO-BAM, 2018 WL 3915585, at *4 (E.D. Cal. Aug. 15, 2018) ("Courts routinely uphold forum selection clauses in form contracts between consumers and businesses[,]" including those contained in "click through user agreements on websites") (citing cases); *Dolin v. Facebook, Inc.*, 289 F. Supp. 3d 1153, 1159 (D. Haw. 2018) (collecting cases); *Washington v. Cashforiphones.com*, No. 15-cv-0627-JAH (JMA), 2016 WL 6804429, at *1 (S.D. Cal. June 1, 2016).

[5] Plaintiff's sole argument relating to any of these exceptions is that he "is not in a regular habit of traveling to other courts in California." Opp'n at 7. This is not sufficient to meet the heavy burden required to demonstrate that transfer is "so gravely difficult and inconvenient."

itself, not to the Terms generally. Mot. at 10 (citing cases). Plaintiff does not make any such argument.

Plaintiff has failed to carry his "heavy burden" to show that "exceptional circumstances" requires disregarding the Forum-Selection Clause. *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1084 (9th Cir. 2018). Thus, the Court must accord the Forum-Selection Clause its controlling weight.

B. Plaintiff Improperly Cites Private Factors, Including Convenience, In Seeking To Defeat The Effect of the Forum-Selection Clause.

Plaintiff urges the Court to consider private convenience factors and argues that transfer would "needlessly inconvenience him." Opp'n at 2–3, 6. He faults Twitter for not examining all eight factors typically considered by courts for transfer motions. Plaintiff ignores that clear binding legal authority rejects this argument.

The Supreme Court has held that a forum-selection clause modifies the factors considered on a Section 1404(a) transfer motion by excluding consideration of any private interests of the parties, including convenience, that weigh against transfer. Only public-interest factors can serve as the possible "extraordinary circumstances" basis to deny transfer. *Atl. Marine*, 571 U.S. at 62–64; *Sun*, 901 F.3d at 1087–88; Mot. at 4–5 (citing cases). Plaintiff does not identify any relevant public interest factors; rather, Plaintiff focuses solely on irrelevant private interest factors. *E.g.*, Opp'n at 2–3, 6–7 ("needlessly inconvenience him").

Plaintiff appears to suggest that *Stewart* permits this Court to discount the effect of the Forum-Selection Clause, relegating it to just one of many factors for this Court to weigh. *Id.* at 2, 4–5. But *Atlantic Marine* expressly limited the application of *Stewart* in this regard by recognizing that the presence of a forum-selection clause forecloses the consideration of contrary private-party factors and nearly invariably results in transfer:

> As a consequence, **a district court may consider arguments about public-interest factors only**. Because those factors

> will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases. **Although it is "conceivable in a particular case" that the district court "would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause," such cases will not be common**.

Atl. Marine, 571 U.S. at 64 (quoting *Stewart*, 487 U.S. at 30–31) (citations omitted) (emphasis added). Accordingly, Plaintiff's suggestion should be rejected. *See Ponomarenko v. Shapiro*, 287 F. Supp. 3d 816, 838 (N.D. Cal. 2018) (rejecting plaintiff's argument that "the forum selection clause should only be considered as one factor in the § 1404(a) analysis" based on *Stewart*, because *Stewart* is a "pre-*Atlantic Marine* case" that provides an "outdated legal standard . . . that has since been clarified by the Supreme Court").

C. Plaintiff's FOIA Claim and Joint Action Allegation Fall Within the Scope of Twitter's Forum Selection Clause.

Plaintiff's final argument attempts to assert that transfer is not permissible in this matter because the Federal Government is a party, both as to FOIA and the "allegation of joint action." Opp'n 6–7. This assertion is also without merit. The presence of the Federal Government defendants is irrelevant to the enforceability analysis of the Forum-Selection Clause. Rather, the analysis rests on whether Plaintiff's claims fall within the scope of the Clause. As set forth in Twitter's Motion, the Forum-Selection Clause here is broad—it applies to any and all disputes that "relate" to the Terms or Twitter's Services. Mot. at 7–8 (citing, *inter alia*, *Trump v. Twitter, Inc.*, No. 21-cv-22441-RNS, Dkt. No. 87, at *9–11). All that is required is "some 'logical or causal connection'" between the claim and Twitter's Terms or Services. *See Sun*, 901 F.3d at 1086. Plaintiff does not dispute the breadth of the Forum-Selection Clause and he admits that the FOIA claim and the "allegations of joint action" are directly related to Twitter's Terms or Services.

As to FOIA, Plaintiff *expressly admits* that the FOIA claim "share[s] common questions of both law and fact" with his other claims, which "bear a logical relation to the FOIA claim because the requested records serve the purpose of showing how the Defendants colluded to violate Plaintiff's First Amendment and contractual rights." Opp'n at 8 (cleaned up). And, as to "joint action" allegations—that Twitter, Facebook and the Federal Government "acted jointly" (*Id*. at 6) in suppressing Plaintiff speech—such allegations necessarily require action taken by Twitter, pursuant to its Terms (e.g., removing Plaintiff's post and suspending his account). Compl. at 6 ¶¶ 5–6; ¶¶ 51–65. The Forum-Selection Clause obviously is logically or causally connected to those alleged acts, *Sun*, 901 F.3d at 1086, and Plaintiff does not make any argument otherwise. The Forum-Selection Clause applies to the FOIA claim and the joint action allegations; the entire action can and should be transferred to the Northern District of California.[6]

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.

DATED: December 13, 2021 WILLKIE FARR & GALLAGHER LLP

By: */s/ Jonathan A. Patchen*

Jonathan A. Patchen
Attorneys for Defendant Twitter, Inc.

[6] Plaintiff cites no authority that this Court, if it determines the FOIA claim precludes transfer, lacks the power to sever the FOIA claim and transfer the non-FOIA action to the Northern District. Plaintiff merely cites cases confirming that an entire action must be transferred under Section 1404; he offers no case rejecting the well-established procedural approach of a Rule 21 severance followed by transfer. Plaintiff also offers no good reason why the Court should not do so, if necessary, to honor the Forum-Selection Clause. Plaintiff's only argument is that severance is improper because the FOIA claim is related to the remainder of the action. Twitter agrees; but that now-undisputed fact results in the FOIA claim falling within the broad scope of the Forum-Selection Clause.