UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

GENEVIEVE MAHONEY, a/k/a @genmahoney19, an individual, **Plaintiff,** **vs.** **FACEBOOK, INC.,** **Defendant.**	**Case No. 21-CV-00607** **Hon. William L. Campbell, Jr.** **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO TRANSFER VENUE

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Defendant Facebook, Inc. respectfully requests that the Court transfer this case to the Northern District of California pursuant to 28 U.S.C. § 1404(a) and the parties' agreement to a forum-selection clause choosing that venue. Each time plaintiff Genevieve Mahoney registered for an Instagram account, she affirmatively accepted Instagram's terms of use.[1] These terms require Mahoney to litigate all disputes related to Instagram in either federal court in the Northern District of California or the state courts in San Mateo, California, where Facebook is based.

As the Supreme Court has explained, "a forum-selection clause [must] be given controlling weight in all but the most exceptional cases." *Atl. Marine Constr. Co. v. United States Dist. Ct. for the W. Dist. of Texas*, 134 S. Ct. 568, 579 (2013) (internal quotation marks omitted). When a defendant seeks to enforce a valid forum-selection clause by moving to transfer under 28 U.S.C. § 1404(a), "a district court should transfer the case unless *extraordinary circumstances* unrelated to the convenience of the parties *clearly* disfavor a transfer." *Id.* at 575 (emphases added).

No such circumstances exist here. Quite the contrary: Facebook provides Instagram for free to more than one billion people around the globe. The forum-selection clause in Instagram's terms provides for certainty and efficient resolution of disputes related to Instagram's service, which would otherwise have to be litigated around the country. And Mahoney "waive[d] the right to challenge the preselected forum as inconvenient or less convenient" when she agreed to Instagram's terms. *Atl. Marine*, 134 S. Ct. at 582.

[1] Instagram is a photo and video-sharing social networking service "own[ed]" by Facebook, "a global social media platform[.]" Compl. (Dkt. 1) ¶¶ 44-45.

BACKGROUND

I. MAHONEY REPEATEDLY AGREED TO THE CALIFORNIA FORUM-SELECTION CLAUSE WHEN SHE REGISTERED HER TWO INSTAGRAM ACCOUNTS.

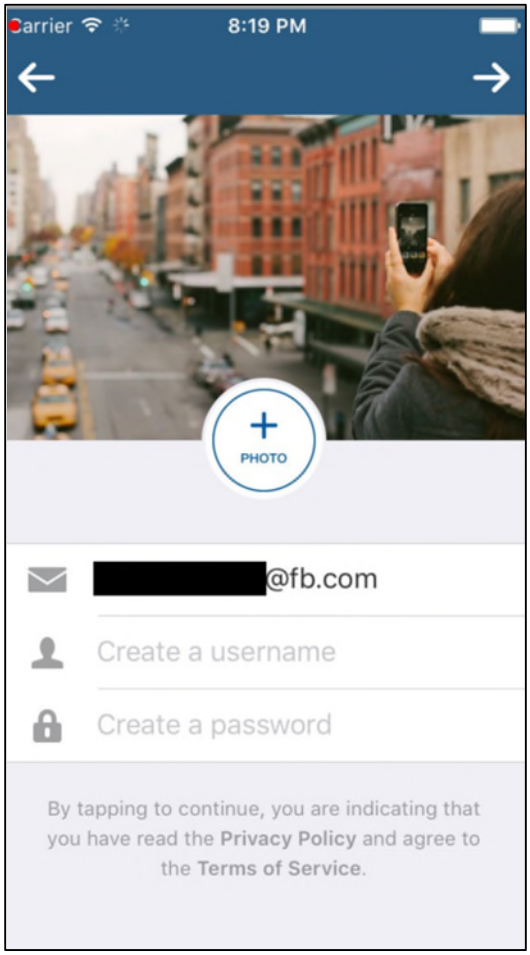
Mahoney alleges that she was a "frequent user of Instagram," "where she interacted, posted, and curated photographs to her Instagram account"—the "@genmahoney19" account—"on a regular basis." Compl. ¶ 13. Facebook's records confirm that Mahoney created the *@genmahoney19* account on [redacted]. Decl. of Jennifer Pricer ¶ 9. Facebook's records show that Mahoney also created a second account—the @[redacted] account—on [redacted]. *Id.* ¶¶ 12-13.

On the dates that Mahoney registered her accounts, any user who completed the registration process to create an Instagram account was required to assent to Instagram's Terms of Service. *Id.* ¶ 2; Decl. of Will Camp ("Camp Decl."), dated August 19, 2021 ¶ 5. The same version of these Terms—the "2013 Terms"—was in effect when Mahoney created her two Instagram accounts in [redacted] and [redacted]. Pricer Decl. ¶¶ 2, 14.

For both of her Instagram accounts, Mahoney signed up for the Instagram application on an [redacted] device (such as an [redacted]). *Id.* ¶¶ 10, 14. A user who registered for the Instagram service on [redacted] and [redacted] using the [redacted] mobile application was shown a screen that allowed users to create an account. Camp Decl. ¶ 3. This screen contained a statement that read: "By tapping to continue, you are indicating that you have read the **Privacy Policy** and agree to the **Terms of Service**." *Id.* ¶ 5.b. To advance past this screen, the user had to first enter their e-mail address and create a password; a user signing up in [redacted] also had to create a user name.[2] *Id.* Ex. 1. Next, the user was required to click an arrow on the top right corner of the

[2] The sign-up screen available to [redacted] users registering for Instagram on both [redacted] and [redacted] was otherwise substantially identical. *See* Camp Decl. ¶ 3.

screen, indicating their assent to the Terms. *Id.* ¶ 5.a. A screenshot of the sign-up screen as it would have appeared in [redacted] is below:



Camp Decl. Ex. 1.

The phrase "Terms of Service" was a hyperlink that, if tapped, would direct users to a copy of the 2013 Terms. Camp Decl. ¶ 5.c. The first section of the 2013 Terms stated that use of the Instagram service would constitute an agreement by users to the Terms:

> By accessing or using the Instagram website, the Instagram service, or any applications (including mobile applications) made available by Instagram (together, the "Service"), however accessed, you agree to be bound by these terms of use ("Terms of Use"). . . . **These Terms of Use affect your legal rights and obligations. If you do not agree to be bound by all of these Terms of Use, do not access or use the Service.**

Pricer Decl. Ex. 1 at 1. (emphasis added).

In a separate section titled "Governing Law & Venue," the Terms provided the following:

> These Terms of Use are governed by and construed in accordance with the laws of the State of California, without giving effect to any principles of conflicts of law AND WILL SPECIFICALLY NOT BE GOVERNED BY THE UNITED NATIONS CONVENTIONS ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, IF OTHERWISE APPLICABLE. For any action at law or in equity relating to the arbitration provision of these Terms of Use, the Excluded Disputes or if you opt out of the agreement to arbitrate, **you agree to resolve any dispute you have with Instagram exclusively in a state or federal court located in Santa Clara, California, and to submit to the personal jurisdiction of the courts located in Santa Clara County for the purpose of litigating all such disputes**.

Id. at 6-7. (emphasis added; capitalization in original).

Finally, the 2013 Terms provided that Facebook was permitted to make changes to the Terms upon "reasonable advance notice" to users, and that by using the Instagram service after the effective date of the revised terms, users would agree to the modifications:

> **We reserve the right, in our sole discretion, to change these Terms of Use (“Updated Terms”)** from time to time. Unless we make a change for legal or administrative reasons, we will provide reasonable advance notice before the Updated Terms become effective. You agree that we may notify you of the Updated Terms by posting them on the Service, and that **your use of the Service after the effective date of the Updated Terms (or engaging in such other conduct as we may reasonably specify) constitutes your agreement to the Updated Terms.** Therefore, you should review these Terms of Use and any Updated Terms before using the Service.

Id. at 2. (emphases added).

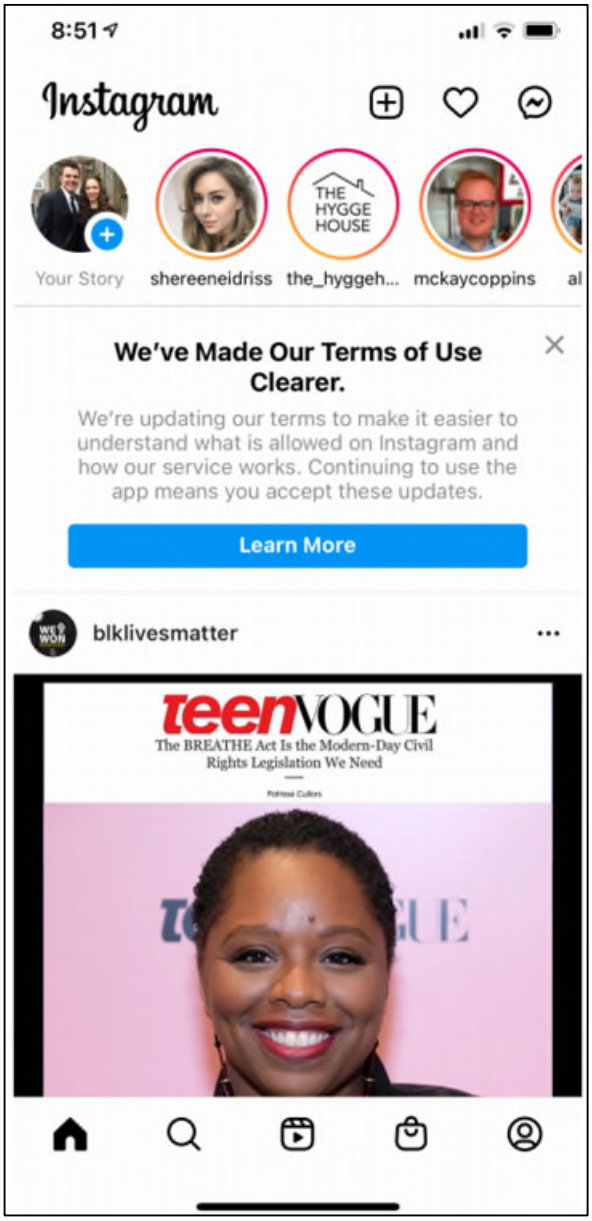
II. MAHONEY AGREED TO A CALIFORNIA FORUM-SELECTION CLAUSE AGAIN IN 2020.

In December 2020, Facebook updated Instagram's Terms, with the changes effective on December 20, 2020 (the "2020 Terms"). Pricer Decl. ¶ 4. The 2020 Terms (which remain in place today) contain a forum-selection clause similar to the one Mahoney accepted when she previously registered her two accounts. Pricer Decl. Ex. 3 at 7. The section titled "How We Will Handle Disputes" includes the following provision:

> For any claim that is not arbitrated or resolved in small claims court, **you agree that it will be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County**. You also agree to submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim.

Id. (emphasis added).

Facebook sent all Instagram users, including Mahoney, up to two separate notifications of the update to its Terms. Pricer Decl. ¶ 5. Mahoney received both notifications. *Id.* ¶ 11. First, in November 2020, Facebook sent Mahoney an email notification about the update, stating that Instagram was "making a few updates to [its] Terms of Use," that the "terms will be effective on December 20, 2020," and that "continuing to use the app will mean you accept them"; the blue phrase contained a hyperlink to the 2020 Terms, including the California forum-selection clause. Pricer Decl. Ex. 4 at 1. Second, that same month, Mahoney received a direct notice of the update that she received by logging onto the app. *Id.* ¶ 11; *id.* Ex. 5. At the top of her Instagram feed, the notice reiterated that "[c]ontinuing to use the app means you accept these updates." *Id.* Ex. 5. A screenshot of this notice as it would have appeared on Mahoney's Instagram feed is below:



Pricer Decl. Ex. 5.

A user could respond to this notice by (1) pressing a button at the bottom that said "Learn More," which would direct them to the 2020 Terms; (2) dismissing the notice by pressing the "X" located at the top-right corner of the notice; or (3) declining to interact with the notice, in which case it would appear at the top of the user's Instagram feed three times before being taken

down. Pricer Decl. ¶ 6-7. Mahoney received this notification in her Instagram feed, viewed the notice on [redacted], and dismissed it. *Id.* ¶ 11.

Shortly before filing this lawsuit, Mahoney further confirmed that she was on notice of the 2020 Terms. On January 14, 2021, her counsel mailed a letter to Facebook on her behalf indicating that she was opting out of Instagram's arbitration provision. Pricer Decl. ¶ 16 & Ex. 6. The arbitration provision is contained in the same section—entitled "How We Will Handle Disputes"—as the California forum-selection clause. Pricer Decl. Ex. 3 at 7. Mahoney's letter to Facebook attached a copy of the 2020 Terms—making clear that she and/or her counsel had an opportunity to review those terms. Pricer Decl. Ex. 6 at 3-10.

III. NOTWITHSTANDING THE FORUM-SELECTION CLAUSE, MAHONEY FILED THIS LAWSUIT IN TENNESSEE STATE COURT.

Despite her assent to Instagram's Terms, including the forum-selection clause, Mahoney filed this action on July 1, 2021 in the Davidson County Circuit Court for the State of Tennessee. Dkt. 1-1. Facebook was served with the Summons and Complaint on July 6, 2021. On August 4, 2021, Facebook removed the action to this Court. Dkt. 1.

In her Complaint, Mahoney asserts claims against Facebook for defamation and negligent infliction of emotional distress. Compl. ¶¶ 84-109. She alleges that she participated in "protest[s]" (*id.* ¶ 28) outside the U.S. Capitol building on January 6, 2021, but says that she did not enter the Capitol building or its "premises." *Id.* ¶ 33. She alleges that at approximately 2:00 p.m. EST on January 6, she posted a photograph to her @genmahoney19 Instagram account showing the activity in front of the Capitol, which she captioned "Our Capitol." *Id.* ¶ 29.

Mahoney alleges that on the same day, Facebook "published [on] Facebook's Newsroom an emergency written news statement"—"entitled 'Our Response To The Violence in Washington.'" *Id.* ¶ 60. The statement explained that Facebook was "searching for and

removing" certain "content" from its platforms, including "[p]raise and support of the storming of the [U.S.] Capitol" and "[i]ncitement or encouragement of the events at the Capitol, including video and photos from the protestors." https://about.fb.com/news/2021/01/responding-to-the-violence-in-washington-dc (as originally published on January 6, 2021 at 4 pm PST) (emphasis omitted); *see also* Compl. ¶ 61 (quoting this language). Mahoney does not allege that the statement identified her or any other individual.

Nevertheless, Mahoney alleges that this press release defamed her and caused her emotional distress. Compl. ¶¶ 84-109. She demands $168 million in "compensatory and punitive damages." *Id.* at 38.

ARGUMENT

Under 28 U.S.C. § 1404(a) and Supreme Court precedent, federal courts must enforce a valid forum-selection clause when a party moves to transfer venue to the chosen forum. Because Instagram's forum-selection clause is both mandatory and enforceable, this case should be transferred to the U.S. District Court for the Northern District of California.

I. A VALID FORUM-SELECTION CLAUSE ORDINARILY MUST BE ENFORCED WHEN A PARTY MOVES TO TRANSFER VENUE TO THE DESIGNATED FORUM.

Section 1404(a) provides: "For the convenience of the parties and witnesses, in the interest[s] of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

The requirements of Section 1404(a) are satisfied here. In considering a request to transfer venue, "[t]he threshold consideration under § 1404(a) is whether the action might have been brought in the transferee court." *In re Aredia & Zometa Prod. Liab. Litig.*, 2008 WL 686213, at *1 (M.D. Tenn. Mar. 6, 2008). This depends on whether venue is proper in that forum—a question that "is generally governed by 28 U.S.C. § 1391." *Atl. Marine*, 134 S. Ct. at

577; *see also Hoffman v. Blaski*, 363 U.S. 335, 344 (1960). Under Section 1391, venue is proper in (among other places) "a judicial district in which any defendant resides." 28 U.S.C. § 1391(b)(1). Facebook's headquarters are in Menlo Park in San Mateo County, California (Pricer Decl. ¶ 1), which is within the Northern District of California. 28 U.S.C. § 84(a).

The Supreme Court's decision in *Atlantic Marine* substantially narrows the remainder of this Court's inquiry. "In the typical case *not* involving a forum-selection clause, a district court considering a § 1404(a) motion . . . must evaluate both the convenience of the parties and various public interest considerations," and then "weigh the relevant factors [to] decide whether, on balance, a transfer would serve 'the convenience of parties and witnesses' and otherwise promote 'the interest of justice.'" *Atl. Marine*, 134 S. Ct. at 581 (emphasis added) (quoting 28 U.S.C. § 1404(a)). But this analysis must give way when a forum-selection clause is involved, because "[t]he enforcement of valid forum-selection clauses . . . protects [the parties'] legitimate expectations and furthers vital interests of the justice system." *Id.* (internal quotation marks omitted). Accordingly, "a proper application of § 1404(a) requires that a forum-selection clause be given *controlling* weight in *all but the most exceptional cases*." *Id.* at 579 (emphasis added; internal quotation marks omitted). *See also Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562 (6th Cir. 2019) ("A valid forum-selection clause will have 'controlling weight in all but the most exceptional cases.'") (quoting *Atl. Marine*, 134 S. Ct. at 579).

Atlantic Marine explains that the analysis under Section 1404(a) must be "adjust[ed] . . . in three ways" when a forum-selection clause is involved.[3] *Atl. Marine*, 134 S. Ct. at 581; *see*

[3] In *Atlantic Marine*, as here, the forum-selection clause was mandatory, not permissive. *Compare Atl. Marine*, 134 S. Ct. at 576 (forum-selection clause stated that all disputes "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division") *with* Pricer Decl. Ex. 3 at 8 ("For any claim that is not arbitrated or resolved in small claims court, you agree that it will be resolved

also BlueDane, LLC v. Bandura Cyber, Inc., 2021 WL 2869154, at *2 (M.D. Tenn. July 7, 2021) ("When a court determines that there is a valid selection clause, the court should shift the traditional § 1404(a) analysis as directed by the Court in *Atlantic Marine*[.]"). "First, the plaintiff's choice of forum merits no weight"; "as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." *Atl. Marine*, 134 S. Ct. at 581. "Second, a court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests"; rather, the court "must deem the private-interest factors to weigh entirely in favor of the preselected forum," and "may consider arguments about public-interest factors only," which "will rarely defeat a transfer motion." *Id.* at 582. This is because "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Id.* And "[t]hird, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules." *Id.*

Since *Atlantic Marine*, courts in this Circuit have routinely granted motions to transfer venue pursuant to forum-selection clauses agreed to by the parties. *See, e.g.*, *Vitality Biologics, LLC v. Mesa*, 2021 WL 2581434, at *4 (M.D. Tenn. Apr. 6, 2021) (Campbell, J.); *Des-Case Corp. v. Madison Indus. Holdings LLC*, 2018 WL 1858161, at *5 (M.D. Tenn. Apr. 17, 2018) (Campbell, J.); *BlueDane, LLC*, 2021 WL 2869154, at *3-8; *Showhomes Franchise Corp. v. LEB*

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exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County."). *See also Gen. Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994) (holding that "because the [forum-selection] clause states that 'all' disputes 'shall' be at Siempelkamp's principal place of business, it selects German court jurisdiction exclusively and is mandatory").

Sols., LLC, 2017 WL 3674853, at *2 (M.D. Tenn. Aug. 24, 2017); *Burnette v. Dell Mktg. L.P.*, 2017 WL 11616078, at *2 (M.D. Tenn. July 25, 2017); *Brand Energy Servs., LLC v. Enerfab Power & Indus., Inc.*, 2016 WL 10650607, at *6 (M.D. Tenn. Oct. 28, 2016); *McCormick v. Maquet Cardiovascular U.S. Sales, LLC*, 2015 WL 6160701, at *1 (M.D. Tenn. Oct. 20, 2015); *Medalogix, LLC v. Alacare Home Health Servs., Inc.*, 2015 WL 6158026, at *5 (M.D. Tenn. Oct. 20, 2015).[4]

In short, if Instagram's forum-selection clause is enforceable, Mahoney "must bear the burden of showing that public-interest factors overwhelmingly disfavor a transfer." *Atl. Marine*, 134 S. Ct. at 583. As discussed next, the clause is fully enforceable, and Mahoney cannot carry the "heavy burden" of showing that enforcing the forum-selection clause would be unjust or unreasonable. *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 829-30 (6th Cir. 2009). *See also Boling*, 771 F. App'x at 567-68 ("Courts should uphold a forum-selection clause unless there is a strong showing that the clause should be set aside. . . . The party who opposes the enforcement of the forum-selection clause has the burden of showing that the clause should not be enforced.").

II. INSTAGRAM'S FORUM-SELECTION CLAUSE IS BOTH VALID AND ENFORCEABLE.

Forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (internal quotation marks omitted). Indeed, because "district courts may not consider the plaintiff's choice of forum or private

[4] *See also, e.g., Reagan v. Encompass Sols., Inc.*, 2020 WL 7352665, at *4 (N.D. Ohio Dec. 14, 2020); *Richard Goettle, Inc. v. Kevitt Excavating, LLC*, 2020 WL 5749950, at *3-4 (S.D. Ohio Sept. 25, 2020); *Wiedo v. Securian Life Ins. Co.*, 2020 WL 5219536, at *2-4 (E.D. Ky. Sept. 1, 2020); *Com-Serv, LLC v. ICE Indus., Inc.*, 2018 WL 3543489, at *4-5 (W.D. Ky. July 23, 2018).

interests when a valid forum-selection clause is present" and "because the overarching consideration under [section] 1404(a) is whether a transfer would promote 'the interest of justice,'" the "practical result is that forum-selection clauses should control except in unusual cases." *Showhomes Franchise Corp. v. LEB Sols., LLC*, 2017 WL 3674853, at *2 (M.D. Tenn. Aug. 24, 2017) (quoting *Atl. Marine*, 134 S. Ct. at 581).

A forum-selection clause may be set aside only upon a "strong showing" (*Boling*, 771 F. App'x at 567-68) of one of the following exceptional circumstances: (1) if the "clause was obtained by fraud, duress, or other unconscionable means"; (2) if the "designated forum would ineffectively or unfairly handle the suit"; or (3) if "the designated forum would be so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust." *Boling*, 771 F. App'x at 568 (quoting *Wong*, 589 F.3d at 828). The party opposing the forum-selection clause bears the burden of showing that the clause should not be enforced. *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229 (6th Cir. 1995). None of these exceptions applies here.

No fraud, duress, or other unconscionable means. This factor considers the "circumstances surrounding plaintiff's agreement to the forum selection clause" and whether those circumstances are "indicative of either a substantively or a procedurally unconscionable bargain or of an inequality that shocks the judgment of a person of common sense." *Unique Shopping Network, LLC v. United Bank Card, Inc*., 2011 WL 2181959, at *8 (E.D. Tenn. June 3, 2011). "[T]he presence of a forum selection clause in agreements is not, by itself, oppressive or unconscionable." *Id.* This is especially true where, as here, "[p]laintiff had notice of the terms and conditions and acknowledged receipt of those terms and conditions" that contain the forum-selection clause. *Id.* Indeed, courts in this Circuit have enforced forum-selection clauses even where plaintiff did *not* have actual notice of the clause. *See e.g.*, *Shaffer v. Interbank FX*,

2013 WL 53979, at *5 (E.D. Tenn. Jan. 3, 2013) (enforcing standard-form forum-selection clause that plaintiff claimed "appeared inconspicuously on the 11th page of a 23-page online individual account application" and that was not "the result of specific bargaining between the parties").[5]

Here, Mahoney assented to Instagram's terms, including the forum-selection clause, on at least three separate occasions. First, at the time she created each Instagram account (in [redacted] and [redacted]), she pressed an arrow to continue on a screen that said "[b]y tapping to continue, you are indicating that you . . . agree to the **Terms of Service**," with a hyperlink to the 2013 Terms. *See* pp. 2-4 *supra*. Numerous courts have found this structure enforceable and demonstrative of assent. *See, e.g.*, *Wong*, 589 F.3d at 829-30 (enforcing forum-selection clause where plaintiffs were required to register on defendant's "website and agree to its "'Terms and Conditions of Use,'" which contained a forum-selection clause); *Anderson v. Amazon.com, Inc.*, 490 F. Supp. 3d 1265, 1269, 1275 (M.D. Tenn. 2020) (holding plaintiff assented to a browsewrap Terms of Use agreement that was "not hidden from the consumer" and that was provided as "hyperlinks [that would] take a customer to Walmart's Privacy Policy and Terms of Use"); *Wingo v. Twitter, Inc.*, 2014 WL 7013826, at *3 (W.D. Tenn. Dec. 12, 2014) (granting motion to transfer venue because plaintiff "alleges that he is a Twitter user, and as such, he agreed to Twitter's Terms of

[5] *See also Sneed v. Wellmark Blue Cross & Blue Shield of Iowa*, 2008 WL 1929985, at *3 (E.D. Tenn. Apr. 30, 2008) (enforcing forum-selection clause despite plaintiffs' claim that "they have never seen the forum selection clause and the clause is one sentence out of a 46 page single spaced benefits certificate"); *MDB, LLC v. Bellsouth Advert. & Publ'g*, 2007 WL 2782287, at *3 (E.D. Tenn. Sept. 21, 2007) (noting forum-selection clauses are enforceable "even [where] the party did not read the contract terms, sign any documents explicitly containing the contract terms, or know about the contract terms at the time the party entered into the agreement").

Service when he initially registered to use Twitter and each time he accessed the service after registration").[6]

In other words, Mahoney's registration and continued use of Instagram constitutes her agreement to be bound by Instagram's terms, as courts have recognized on multiple occasions. *See, e.g.*, *Sinclair v. Ziff Davis LLC*, 454 F. Supp. 3d 342, 344 (S.D.N.Y. 2020) ("By creating an Instagram account, Plaintiff agreed to Instagram's Terms of Use[.]"); *Dancel v. Groupon, Inc.*, 2020 WL 4926538, at *2 (N.D. Ill. Aug. 21, 2020) ("It is undisputed that, as an Instagram user, Plaintiff agreed to the Instagram Terms of Use[.]"); *Rodriguez v. Instagram, LLC*, 2013 WL 3732883, at *1 (N.D. Cal. July 15, 2013) ("Individuals who use Instagram must agree to Instagram's terms of use."); *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594, 601 (S.D.N.Y. 2020) ("Everyone who signs up to use Instagram agrees to Instagram's Terms of Use.").

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[6] *See also, e.g.*, *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1166-67 (N.D. Cal. 2016) (plaintiffs accepted Facebook's terms by pressing "Sign Up" button); *Fteja v. Facebook*, 841 F. Supp. 2d 829, 840 (S.D.N.Y. 2012) ("Fteja was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough."); *Crawford v. Beachbody, LLC*, 2014 WL 6606563, at *3 (S.D. Cal. Nov. 5, 2014) ("Courts have held that a [forum-selection clause] constitutes a binding contract where the user is provided with an opportunity to review the terms of service in the form of a hyperlink immediately under the 'I Accept' button and clicks that button."); *In re Online Travel Co.*, 2013 WL 2948086, at *2 (N.D. Tex. June 14, 2013) (users of Travelocity assented to agreement by clicking on a button that said "Agree and Complete Reservation" located "directly above a notice explaining that, by clicking the button, the user agrees to the policies set forth in the User Agreement, which was accessible via hyperlink"); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 912 (N.D. Cal. 2011) (terms of service were enforceable where user "was provided with an opportunity to review the terms . . . in the form of a hyperlink immediately under the 'I accept' button"); *Snap-on Bus. Sols. v. O'Neil & Assocs.*, 708 F. Supp. 2d 669, 683 (N.D. Ohio 2010) (upholding terms for a "website [that] contain[ed] a single page access screen where users must input a user name and password and then click on an 'Enter' button to proceed," which was directly above a "green box with an arrow that users [could] click to view the" terms of service); *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1271 (C.D. Cal. 2008) (upholding arbitration clause contained in terms accessible via hyperlink next to a button on the registration page, and concluding that "[a] reasonably prudent [user] would have noticed the link and reviewed the terms before clicking on the acknowledgment icon").

Second, Mahoney also agreed to the current Terms that became effective in December 2020. She received an email notification about the update stating that Instagram was "making a few updates to [its] Terms of Use," and that "continuing to use the app will mean you accept [the updated Terms]." *See* pp. 4-6 *supra*. The Terms of Use were hyperlinked and, when clicked, would direct Mahoney to the full 2020 Terms, including the forum-selection clause. *Id.* She then received a similarly worded Instagram feed notification that she could dismiss only by pressing a button or by viewing it. *See* pp. 4-6 *supra*. Mahoney viewed this notification, and then clicked the "dismiss" button. *Id.* She continued to use Instagram until her account was disabled on January 12.[7] Compl. ¶ 62. Moreover, her letter to Facebook opting out of Instagram's arbitration clause *attached* the 2020 Terms (Pricer Decl. Ex. 6), making clear that she was on specific notice of the dispute resolution provision in Instagram's terms that contained the forum selection clause. There is no dispute, then, that she "had notice of the terms and conditions and acknowledged receipt of those terms and conditions." *Unique Shopping Network*, 2011 WL 2181959, at *8.

The Northern District of California would effectively and fairly handle the suit. To defeat transfer, Mahoney must show that the Northern District of California would "ineffectively or unfairly handle the suit." *Wong*, 589 F.3d at 829. "Different or less favorable [ ] law or procedure alone does not satisfy this prong." *Id.* Rather, "to show unfairness or ineffectiveness, the party seeking to avoid a forum selection clause must show that litigating in the forum chosen by the parties would risk denial of any remedy or that the court is fundamentally unfair." *Morton*

[7] Additionally, Mahoney continues to operate her second Instagram account (*@genmahoney*). Pricer Decl. ¶ 12.

v. E. Kenneth Wall & Assocs., 2013 WL 12149641, at *4 (W.D. Tenn. Jan. 30, 2013) (citing *Wong*, 589 F.3d at 829).

There is no such fundamental unfairness here. The Northern District of California is not a "fundamentally unfair" court, and litigating this action in that court would not, because of transfer to that forum, "risk den[ying]" Mahoney any remedy she seeks. *Id.* Courts in this Circuit have granted motions to transfer cases to the Northern District of California based on similar forum-selection clauses. *See Wingo*, 2014 WL 7013826, at *3 (granting motion to transfer to the Northern District of California); *Wiedo*, 2020 WL 5219536, at *7 (granting motion to transfer to the Northern District of California and dismissing arguments that "courts in the Northern District of California are more congested with civil actions").

No grave inconvenience sufficient to deprive plaintiff of her day in court. Finally, the party challenging the enforceability of a forum-selection clause bears a "heavy burden" to "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *M/S Bremen*, 407 U.S. at 18-19. Any inconvenience to the plaintiff "must be balanced against the fact that [she] entered into a contract . . . which contained a clear forum selection clause." *Transp. Sys., LLC v. Pace Runners, Inc.*, 2018 WL 3708077, at *3 (E.D. Mich. Aug. 3, 2018). And as the Supreme Court instructed in *Atlantic Marine*, "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." 134 S. Ct. at 582."[T]he existence of the forum selection clause demonstrates that the parties clearly contemplated this expense when they entered into the agreement." *Shaffer*, 2013 WL 53979 at *5; *see also Atl. Marine*, 134 S. Ct. at 582 ("Whatever 'inconvenience' the parties would suffer by being forced to litigate in the

contractual forum as they agreed to do was clearly foreseeable at the time of contracting." (alterations incorporated)) (quoting *M/S Bremen*, 407 U.S. at 17-18). Accordingly, except in extraordinary circumstances, parties must be held to their agreement to the selected forum.

No such circumstances exist here. First, "[t]he forum selected for this dispute is not some arbitrary location chosen to restrict the parties' access to ligation"; rather, it "is the jurisdiction where the contracting defendant is located." *Nat'l Dev. Corp. v. Fenetres MQ, Inc.*, 1998 WL 34313581, at *3 (D.D.C. June 26, 1998). "It is neither unconscionable[] nor uncommon for a contracting party to bargain for the 'home field' as the sole forum for contractual disputes." *Id.* Thus, "any inconvenience [plaintiff] might now contest was 'clearly foreseeable at the time of contracting.'" *First Response, Inc. v. TMC Servs., Inc.*, 2013 WL 5434712, at *6 (M.D. Tenn. Sept. 27, 2013) (quoting *M/S Bremen*, 407 U.S. at 17-18).

And second, while Mahoney may claim that it is burdensome to litigate her claims in the Northern District of California, "such inconvenience does not rise to the level of unfairness." *Friendship Home Healthcare, Inc. v. Procura, LLC*, 2010 WL 500427, at *5 (M.D. Tenn. Feb. 5, 2010). Courts in this Circuit have enforced forum-selection clauses that required U.S. plaintiffs to litigate their claims in *international* courts. *See Wong*, 589 F.3d at 829-830 ("In this case, plaintiffs are not sophisticated business entities with the ability to negotiate the forum and continuing the suit in Gibraltar would no doubt be an inconvenience. Yet even with these considerations, plaintiffs have not carried their 'heavy burden' of showing that enforcing this forum selection clause would be unjust or unreasonable."); *Interamerican Trade Corp. v. Companhia Fabricadora De Pecas*, 973 F.2d 487, 489 (6th Cir. 1992) (affirming district court's dismissal and enforcement of a forum-selection clause requiring resolution of all claims in Brazilian courts because although "a jury trial [in Brazil] is not available," "the judicial process

is slow," "trial by depositions is not permitted," and "[plaintiff] would have to deposit in excess of $2.2 million as security," "[t]hese matters were all known or foreseeable at the time [plaintiff] agreed to litigate in Brazilian courts"); *Siempelkamp*, 29 F.3d at 1099 (enforcing forum-selection clause where parties agreed to litigate in German courts). Certainly, litigating this case in California would not be "*so* gravely difficult and inconvenient," *M/S Bremen*, 407 U.S. at 18 (emphasis added), that it would constructively deprive Mahoney of her day in court.

III. PUBLIC POLICY FAVORS TRANSFER.

Because Instagram's forum-selection clause is enforceable, Mahoney "bear[s] the burden of showing that public-interest factors *overwhelmingly* disfavor a transfer." *Atl. Marine*, 134 S. Ct. at 583 (emphasis added). And as discussed above, absent a "strong showing" that the forum-selection clause should be set aside, the clause should be enforced, and the transfer motion granted. *Wong*, 589 F.3d at 828. No such showing is possible. In fact, another judge in this District recently rejected the argument that transfers are against the public policy of Tennessee because "federal courts in Tennessee have interpreted [the Tennessee venue statute] as *permitting* transfer of venue." *BlueDane, LLC*, 2021 WL 2869154, at *7 (emphasis added).

Public policy *supports* the enforcement of Instagram's forum-selection clause. Forum-selection clauses provide certainty for online services like Instagram that offer their platforms free of charge to hundreds of millions of people around the world. "A primary reason for forum selection clauses is to protect a party . . . from having to litigate in distant forums all over the nation." *Friendship Home Healthcare*, 2010 WL 500427, at *5 (internal quotation marks omitted); *accord Song fi, Inc. v. Google Inc.*, 2014 WL 5472794, at *6 (D.D.C. Oct. 29, 2014) (enforcing YouTube's forum-selection clause "[b]ecause many millions of users from across the globe create accounts and upload videos on YouTube's website free of charge, the

forum-and-venue selection clause is necessary to manage the costs of litigation and reduce the burden to YouTube personnel of litigating all over the world").

In short, Mahoney affirmatively agreed to a mandatory forum-selection clause requiring her to litigate any disputes against Instagram in California. "Having taken advantage of [the defendant's] free services, [she] cannot complain that the terms allowing [her] to do so are unenforceable." *Song fi*, 2014 WL 5472794, at *6.

CONCLUSION

This case should be transferred to the Northern District of California.

Dated: August 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed and served upon the following via the Court's ECF system on this the 30th day of August, 2021:

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