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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 JUSTIN HART,
11 Plaintiff,
12 v.

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

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

**DEFENDANT FACEBOOK, INC.'S
NOTICE OF MOTION AND MOTION TO
TRANSFER VENUE; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: December 13, 2021
Courtroom: 3C (Third Floor)
Judge: Hon. Thomas J. Whelan

Date Filed: August 31, 2021

Trial Date: None Set

**No oral argument unless requested by the
Court**

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 13, 2021 or as soon thereafter as this Motion may be heard in the above Court, located at Courtroom 3C, 221 West Broadway, San Diego, California, 92101, Defendant Facebook, Inc. will and hereby does, move the Court to transfer this action to the U.S. District Court for the Northern District of California pursuant to 28 U.S.C. § 1404(a) and Federal Rule of Civil Procedure 12(b)(3).

The Motion is made on the grounds that the Southern District of California is not the proper venue for this action because the valid and enforceable forum-selection clause in Facebook’s Terms of Service requires that Plaintiff litigate any disputes with Facebook brought in federal court in the Northern District of California.

This Motion is based on this Notice of Motion and Motion, the following Memorandum of Points and Authorities in support thereof, the Declaration of Jenny Pricer, the entire case file in this matter, and such other matters, both oral and documentary, as may properly come before the Court.

Dated: November 8, 2021

KEKER, VAN NEST & PETERS LLP

By: /s/ Melissa L. Cornell
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TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES1

I. INTRODUCTION1

II. BACKGROUND1

III. LEGAL ARGUMENT3

 A. Plaintiff assented to Facebook’s Terms of Service, including the forum-
 selection clause.3

 B. The Parties’ forum-selection clause is valid and mandatory.4

 1. Plaintiff cannot establish that the forum-selection clause is invalid.5

 2. Plaintiff cannot show any extraordinary circumstances requiring
 deviation from the forum-selection clause.6

IV. CONCLUSION.....7

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Federal Cases

Abat v. Chase Bank USA, N.A.,
738 F. Supp. 2d 1093 (C.D. Cal. 2010)6

Am. Libraries Ass’n v. Pataki,
969 F. Supp. 160 (S.D.N.Y. 1997).....7

Archdiocese of St. Louis v. Internet Ent. Grp., Inc.,
No. 99-cv-27-SNL, 1999 WL 66022 (E.D. Mo. Feb. 12, 1999).....7

Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. Of Texas,
571 U.S. 49 (2013).....3, 4, 6

Carnival Cruise Lines, Inc. v. Shute,
499 U.S. 585 (1991).....4

Everlast World’s Boxing Headquarters Corp. v. Ringside, Inc.,
928 F. Supp. 2d 735 (S.D.N.Y. 2013).....2

In re Facebook Biometric Privacy Litig.,
185 F. Supp. 3d 1155 (N.D. Cal. 2016)4

Franklin v. Facebook Inc.,
No. 15-cv-00655- LMM, 2015 WL 7755670 (N.D. Ga. Nov. 24, 2015)5

Fteja v. Facebook, Inc.,
841 F. Supp. 2d 829 (S.D.N.Y. 2012).....5

Miller v. Facebook, Inc.,
No. 1:09-CV-2810-RLV, 2010 WL 9525523 (N.D. Ga. Jan. 15, 2010)5, 6

Murphy v. Schneider Nat’l, Inc.,
362 F.3d 1133 (9th Cir. 2004)5

Song fi, Inc. v. Google Inc.,
72 F. Supp. 3d 53 (D.D.C. 2014).....6

Thomas v. Facebook, Inc.,
1:18-cv-00856-LJO-BAM, 2018 WL 3915585 (E.D. Cal. Aug. 15, 2018).....5

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19
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21
22
23
24
25
26
27
28

Federal Statutes

28 U.S.C. § 1404.....1, 2, 3

Rules

Federal Rule of Civil Procedure 12(b)(3).....3

Other Authorities

<https://about.facebook.com/company-info/> (last accessed November 8, 2021).....1

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Facebook, Inc.¹ (“Facebook”) respectfully moves to transfer venue to the U.S. District Court for the Northern District of California under 28 U.S.C. § 1404(a).

I. INTRODUCTION

Plaintiff Justin Hart filed this suit against Facebook, Twitter, Inc. (“Twitter”), and four federal Government Defendants. In his Complaint, Plaintiff alleges that Facebook inappropriately censored or removed posts published by Plaintiff that Facebook deemed to violate its Community Standards. *See* Compl. ¶¶ 1-4, 35–38.

Plaintiff’s claims against Facebook are entirely without merit, but this Court need not address the deficiencies because this lawsuit was filed in the wrong court. Pursuant to the valid and enforceable forum-selection clause in Facebook’s Terms of Service—to which Plaintiff, as a Facebook user, is bound—this lawsuit must be litigated in the Northern District of California.

Based on the unequivocal language of the forum-selection clause and Plaintiff’s own allegations, Facebook respectfully requests that the Court transfer this action to the U.S. District Court for the Northern District of California under 28 U.S.C. § 1404(a).

II. BACKGROUND

Facebook operates a social networking platform and products with billions of individual users and millions of businesses. *See* <https://about.facebook.com/company-info/> (last accessed November 8, 2021); *see also* Compl. ¶ 21. Plaintiff alleges that he is one of these users, as he “has used Facebook’s services since 2007” and “has roughly 1,700 Facebook users who follow his account, and roughly 3,000 Facebook friends.” Compl. ¶ 30. He further alleges that “[h]e uses his Facebook account as a feeder for his other social media accounts, as a networking tool for his consulting business, and as a promotion for his online website.” *Id.* ¶ 31. Moreover, Plaintiff states that “[o]ver the years, [he] has spent thousands of dollars on Facebook advertisements” to promote his consulting business and “tens of thousands of dollars” on ads for his consulting

¹ On October 28, 2021, Facebook, Inc. changed its name to Meta Platform, Inc. Because the Complaint was filed prior to the name change and for ease of reference, this motion refers to Defendant identified as “Facebook, Inc.” in the pleadings as “Facebook, Inc.” here.

1 clients.” *Id.* ¶¶ 32–33.

2 Plaintiff contends that between September 15, 2020 and July 13, 2021, Facebook
3 restricted his ability to use Facebook’s platform and products and access his account by (1)
4 issuing warnings and adding notices to a post, *id.* ¶ 35, (2) banning him from advertising and
5 using Facebook’s live streaming product (i.e., “going live”) for thirty days, *id.* ¶ 36, (3) removing
6 posts from public view, *id.* ¶¶ 4, 37, and (4) restricting Plaintiff’s ability to post or comment for
7 periods of twenty-four hours up to three days, *id.* Plaintiff also generally alleges that Facebook
8 “suspended [his] use of his personal Facebook account.” *Id.* ¶¶ 94, 105.

9 Plaintiff alleges that Facebook provided him notice that it was taking these actions as a
10 result of Facebook’s determination that several of Plaintiff’s posts failed to comply with
11 Facebook’s Community Standards, *id.* ¶¶ 4, 35–37, which Plaintiff acknowledges users must
12 follow, pursuant to Facebook’s Terms of Service, *id.* ¶ 26. Plaintiff asserts that Facebook’s
13 conduct violated constitutionally protected speech and gave rise to several tort claims. *Id.* ¶¶ 51–
14 65, 75–79, 80–87, 88–98, 99–110.

15 Plaintiff acknowledges that Facebook conditions the use of its services on complying with
16 certain requirements provided to users in Facebook’s Terms of Service. *Id.* at ¶ 26 (asserting that
17 Facebook’s Terms of Service “require users to follow its ‘Community Standards.’”). Indeed, the
18 Complaint even cites to the Terms of Service and the Community Standards—linked in the Terms
19 of Service—three times each. *Id.* at ¶¶ 25 n.17, 25 n.18, 26 n.19, 26 n.20, 26 n.21, 27 n.22.
20 These Terms of Service govern the use of Facebook’s products and services. Declaration of Jenny
21 Pricer in Support of Facebook, Inc.’s Motion to Transfer Venue (“Pricer Decl.”) Ex. A.² As a
22 condition of signing up for Facebook’ services, Plaintiff—like anyone who creates a Facebook
23 account and uses Facebook’s products—agreed to the Terms of Service. Pricer Decl. ¶¶ 4–5. The
24 Terms of Service include a forum-selection clause, which provides:

25 For any claim, cause of action, or dispute you have against us that arises out of or

26 ² A motion to transfer does not restrict the evidence the court may consider. *See* 28 U.S.C.
27 § 1404. A court considering a motion to transfer venue is not limited to considering materials
28 contained in the complaint and may consider outside materials, including declarations and
affidavits. *Everlast World’s Boxing Headquarters Corp. v. Ringside, Inc.*, 928 F. Supp. 2d 735,
737 n.1 (S.D.N.Y. 2013).

1 relates to these Terms or the Facebook Products (“claim”), **you agree that it will**
2 **be resolved exclusively in the U.S. District Court for the Northern District of**
3 **California** or a state court located in San Mateo County. You also agree to submit
4 to the personal jurisdiction of either of these courts for the purpose of litigating
any such claim, and that the laws of the State of California will govern these
Terms and any claim, without regard to conflict of law provisions.

5 Pricer Decl., Ex. A, § 4.4 (emphasis added).³ Facebook’s principal place of business is located in
6 Menlo Park, California, a city within the Northern District of California. Pricer Decl. ¶ 3.

7 **III. LEGAL ARGUMENT**

8 Under Section 1404(a), “[f]or the convenience of parties and witnesses, in the interest of
9 justice, a district court may transfer any civil action to any other district or division where it might
10 have been brought or to any district or division to which all parties have consented.” 28 U.S.C.
11 § 1404(a); *see also* Fed. R. Civ. P. 12(b)(3).

12 Where there is a valid forum-selection clause, the clause should be “given controlling
13 weight in all but the most exceptional cases” and the standard Section 1404(a) analysis, which
14 considers both private and public interests, does not apply. *Atl. Marine Const. Co. v. U.S. Dist.*
15 *Ct. for W. Dist. Of Texas*, 571 U.S. 49, 63 (2013). When such a clause is in play, plaintiff’s choice
16 of forum “merits no weight” and the courts “should not consider arguments about the parties’
17 private interests.” *Id.* at 63–64. Public-interest factors only will defeat a transfer motion in the
18 “most unusual cases,” as the “‘interest of justice’ is served by holding parties to their bargain.” *Id.*
19 at 66. The party opposing the forum-selection clause must show that public-interest factors
20 “overwhelmingly disfavor a transfer.” *Id.* at 67.

21 As discussed below, this case should be transferred to the Northern District of California,
22 as Plaintiff agreed to litigate any disputes arising out of or relating to Facebook in that venue.

23 **A. Plaintiff assented to Facebook’s Terms of Service, including the forum-**
24 **selection clause.**

25 Plaintiff alleges that he signed up for his Facebook account in 2007. Compl. ¶ 30. As part

26 ³ The Terms of Service have been amended from time to time since 2007 (when Plaintiff alleges
27 that he first became a Facebook user, Compl. ¶ 30), but every version of the Terms of Service in
28 effect from that time to the present have similarly required that any federal litigation arising out
of or relating to the Terms of Service or Facebook be brought in the Northern District of
California. Pricer Decl. ¶ 7.

1 of the registration process, Plaintiff, like all Facebook users, agreed to abide by the Terms of
2 Service, as a condition for creating his Facebook account and using Facebook’s services. Pricer
3 Decl. ¶¶ 4–5; *In re Facebook Biometric Privacy Litig.*, 185 F. Supp. 3d 1155, 1163–67 (N.D. Cal.
4 2016) (Facebook’s user registration process provides sufficient notice to create an enforceable
5 contract). The Terms of Service effective in 2007 (and every iteration since) contained a forum-
6 selection clause that requires federal litigation of any claim or dispute that arises out of or relates
7 to the Terms of Service or Facebook’s products to occur in the Northern District of California.
8 Pricer Decl. ¶ 7; Ex. A, § 4.4.

9 The present dispute falls well within the scope of the forum-selection clause. Plaintiff
10 asserts that he was harmed because of the actions that Facebook allegedly took to restrict his
11 access to his Facebook account and other Facebook products. These allegations arise from or
12 relate to Plaintiff’s use of Facebook and fit squarely under the forum-selection clause.

13 **B. The Parties’ forum-selection clause is valid and mandatory.**

14 The forum-selection clause contained in the Terms of Service is valid and mandates
15 transfer. The U.S. Supreme Court has held that forum-selection clauses are
16 presumptively valid as a matter of law. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585,
17 593–95 (1991). And in *Atlantic Marine*, the U.S. Supreme Court held that a forum-selection
18 clause may be enforced through a motion to transfer under 28 U.S.C. § 1404(a). 571 U.S. at 59.
19 The Supreme Court held that where “the parties have agreed to a valid forum-selection clause, a
20 district court should ordinarily transfer the case to the forum specified in that clause.” *Id.* at 62.
21 And “[o]nly under extraordinary circumstances unrelated to the convenience of the parties should
22 a § 1404(a) motion be denied.” *Id.* (emphasis added).

23 Furthermore, “the plaintiff must bear the burden of showing why the court should not
24 transfer the case to the forum to which the parties agreed.” *Id.* at 64. Thus, the Court must enforce
25 the forum-selection clause unless Plaintiff can establish that (1) the forum-selection clause is not
26 valid; or (2) there are “extraordinary circumstances unrelated to the convenience of the parties”
27 why the clause should not be enforced. Plaintiff can do neither.

1 **1. Plaintiff cannot establish that the forum-selection clause is invalid.**

2 In the Section 1404(a) context, forum-selection clauses are presumptively valid and
3 enforceable. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004). “Because
4 forum selection clauses are presumptively valid, they should be honored ‘absent some compelling
5 and countervailing reason.’” *Id.* (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12
6 (1972)). The party challenging the clause bears a “‘heavy burden of proof’ and must ‘clearly
7 show that enforcement would be unreasonable and unjust, or that the clause was invalid for such
8 reasons as fraud or over-reaching.’” *Id.* (quoting *Bremen*, 407 U.S. at 15).

9 Here, Plaintiff has not, and cannot, allege anything to meet this heavy burden of
10 establishing that the forum-selection clause is invalid. Indeed, courts routinely enforce the forum-
11 selection clause in Facebook’s Terms of Service. *See, e.g., Thomas v. Facebook, Inc.*, 1:18-cv-
12 00856-LJO-BAM, 2018 WL 3915585, at *4 (E.D. Cal. Aug. 15, 2018) (enforcing Facebook’s
13 forum-selection clause and transferring case to the Northern District of California); *Dolin v.*
14 *Facebook, Inc.*, 289 F. Supp. 3d 1153 (D. Haw. 2018) (enforcing Facebook’s forum-selection
15 clause and transferring case to California from Hawaii); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d
16 829, 841 (S.D.N.Y. 2012) (by registering for Facebook, the plaintiff had “assented to
17 [Facebook’s] Terms of Use and therefore to the forum-selection clause therein”); *E.K.D. ex rel.*
18 *Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894, 900–903 (S.D. Ill. 2012) (applying California law
19 and finding Facebook’s forum-selection clause to be mandatory, reasonable, not in contravention
20 of public policy, and enforceable); *Miller v. Facebook, Inc.*, No. 1:09-CV-2810-RLV, 2010 WL
21 9525523, at *1 (N.D. Ga. Jan. 15, 2010) (upholding the forum-selection clause in part due to
22 policy concerns because to do otherwise “could wreak havoc on the entire social-networking
23 internet industry”).

24 One federal district court recently noted that it could not find “a single instance where any
25 federal court has struck down [Facebook’s] [Terms of Service] as an impermissible contract of
26 adhesion induced by fraud or overreaching or held the forum selection clause [] to be otherwise
27 unenforceable due to public policy considerations.” *Franklin v. Facebook Inc.*, No. 15-cv-00655-
28 LMM, 2015 WL 7755670, at *2 (N.D. Ga. Nov. 24, 2015).

1 This Court should join numerous other courts that have found the forum-selection clause
2 in Facebook’s Terms of Service valid and enforceable.

3 **2. Plaintiff cannot show any extraordinary circumstances requiring**
4 **deviation from the forum-selection clause.**

5 Because Plaintiff agreed to a valid forum-selection clause upon becoming a Facebook
6 user, Plaintiff cannot avoid its effect unless he can establish that there are “extraordinary
7 circumstances unrelated to the convenience of the parties” requiring that it not be enforced. *Atl.*
8 *Marine*, 571 U.S. at 62. In making this determination, the Court must evaluate the public interest.
9 *Id.* at 63–64. The Plaintiff’s decision to file suit outside of the Northern District “merits no
10 weight” in the transfer analysis, and courts “should not consider arguments about the parties’
11 private interests.” *Id.* The plaintiff must show that the public interest factors “overwhelmingly
12 disfavor a transfer.” *Id.* at 67.

13 Here, Plaintiff cannot demonstrate that public interest factors overwhelmingly defeat
14 transfer. To the contrary, the public interest favors enforcing the forum-selection clause. The
15 public maintains a strong interest in enforcing forum-selection clauses to provide consistency and
16 certainty for companies such as Facebook. Courts long have recognized the “importance of
17 enforcing choice[-]of[-]law provisions for businesses with nationwide customers to limit the risk
18 and expenses of litigation under different laws in every state.” *Abat v. Chase Bank USA, N.A.*,
19 738 F. Supp. 2d 1093, 1096 (C.D. Cal. 2010). Without enforcement, Facebook—and companies
20 like Facebook, which provide free networking services and access to information to users all over
21 the world—would face the undue burden of litigating claims in countless jurisdictions:

22 [S]triking the forum selection clause could wreak havoc on the entire social
23 networking internet industry. If this court were to determine that the forum
24 selection clause contained in Facebook’s [Terms of Service] was unenforceable,
25 the company could face litigation in every state in this country and in nations
26 around the globe which would have potential adverse consequences for the users
27 of Facebook’s social-networking site and for other internet companies.

28 *Miller*, 2010 WL 9525523, at *1; *accord Song fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 64
(D.D.C. 2014) (“[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

1 litigating all over the world.”).

2 Courts long have held that denying Internet companies certainty on what laws will apply
3 to them—or subjecting them to an unpredictable patchwork of potentially conflicting state
4 regulations—could “chill free speech and the rapidly expanding field of Internet commerce.”
5 *Archdiocese of St. Louis v. Internet Ent. Grp., Inc.*, No. 99-cv-27-SNL, 1999 WL 66022, at *3
6 (E.D. Mo. Feb. 12, 1999); *see also Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 181
7 (S.D.N.Y. 1997) (“[I]nconsistent regulatory schemes could paralyze the development of the
8 Internet altogether.”).

9 Moreover, enforcement of the forum-selection clause would not be unreasonable or unjust
10 here. The designation of the Northern District of California as the forum for any dispute arising
11 out of or relating to the Terms of Service or Facebook’s products has a rational basis as Facebook
12 has its principal place of business there. For all the reasons set forth above, it is in the public’s
13 interest to enforce Facebook’s forum-selection clause and transfer this case to the Northern
14 District of California.

15 **IV. CONCLUSION**

16 For the foregoing reasons, venue is improper in the Southern District of California, and
17 proper in the Northern District of California. Facebook therefore respectfully requests that the
18 Court grant this motion and transfer this case to the Northern District of California in accordance
19 with *Atlantic Marine* and Section 1404(a).

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Dated: November 8, 2021

KEKER, VAN NEST & PETERS LLP

By: /s/ Melissa L. Cornell
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