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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

**REPLY IN SUPPORT OF FACEBOOK'S
MOTION TO TRANSFER VENUE**

Judge: Hon. Thomas J. Whelan

Date Filed: August 31, 2021

Trial Date: None Set

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1 **I. INTRODUCTION**

2 Under 28 U.S.C. § 1404(a) and *Atlantic Marine*, Defendant Facebook Inc. (Facebook)¹ set
 3 forth in its moving papers that transfer of this action to the Northern District of California is
 4 mandatory because when Plaintiff became a Facebook user and agreed to Facebook’s Terms of
 5 Service, he consented to a valid forum-selection clause designating the Northern District of
 6 California as the forum for any dispute that arises out of or relates to the Terms of Service or
 7 Facebook’s products brought in federal court. *See* Facebook’s Motion to Transfer Venue (“Mot.”)
 8 at 3–4. Plaintiff concedes that he agreed to the forum-selection clause in exchange for using
 9 Facebook’s services and products. *See* Plaintiff’s Opposition (“Opp.”) at 5–6 (acknowledging that
 10 Plaintiff agreed to Facebook’s Terms of Service to use Facebook’s products). As Plaintiff has
 11 neither established that the forum-selection clause is invalid, nor has demonstrated any
 12 extraordinary circumstances unrelated to convenience that would defeat Facebook’s motion to
 13 transfer venue, he has failed to provide any reason why transfer would be improper.

14 Instead, Plaintiff’s Opposition relies on three arguments: (1) the Southern District of
 15 California is the more convenient forum for Plaintiff and also convenient for Defendants, *id.* at 7;
 16 (2) Plaintiff’s assent to the forum-selection clause was the result of unequal bargaining power, *id.*
 17 at 5–6; and (3) Plaintiff’s claim brought under the Freedom of Information Act (FOIA) against
 18 the Department of Health and Human Services and the Office of Management and Budget
 19 (“Governmental Defendants”) precludes transfer, *id.* at 4–5. But all three arguments fail. When a
 20 defendant brings a motion to transfer venue under a forum-selection clause, plaintiff’s choice of
 21 forum “merits no weight” and a court “should not consider arguments about the parties’ private
 22 interests.” *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. Of Texas*, 571 U.S. 49, 63–64
 23 (2013). And the U.S. Supreme Court has rejected challenges to forum-selection clauses based on
 24 unequal bargaining power or the lack of bargaining. *See Carnival Cruise Lines, Inc. v. Shute*, 499
 25 U.S. 585, 593–95 (1991).

26 As to the FOIA claim, Plaintiff cites only to outdated authority to justify his assertion that

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

1 the FOIA claim requires that the case proceed in this district, and applicable case law supports the
2 opposite conclusion. Moreover, Plaintiff is wrong that if the Court determines that the FOIA
3 claim should be litigated in this district, then the entire action must also take place in this forum.
4 Rather, both case law and strong policy rationales support severing the FOIA claim and
5 transferring the remaining claims to the Northern District of California in the event that the Court
6 determines that the only proper venue for the FOIA claim is this district.

7 For these reasons, and for those further detailed in Facebook’s and Twitter’s moving
8 papers, Facebook respectfully requests that the Court transfer this action in its entirety to the
9 Northern District of California, or in the alternative, sever the FOIA claim and transfer the
10 remaining claims to the Northern District.

11 II. ARGUMENT

12 A. Under *Atlantic Marine*, where there is a valid forum-selection clause, 13 convenience of the parties carries no weight in the Section 1404(a) analysis.

14 Plaintiff implies that Facebook’s reasons for why this case should be transferred to the
15 Northern District of California under Section 1404(a) are inadequate, asserting that “[r]ather than
16 explaining why this Court is inconvenient to the parties and the witnesses, both [Facebook’s and
17 Twitter’s] motions focus on forum-selection clauses in their respective terms of service[.]” Opp.
18 at 2. Later in his opposition, Plaintiff contends that transfer would be improper because “this
19 forum is convenient for the parties [as] it is in California.” *Id.* at 7. But under *Atlantic Marine*,
20 when a defendant brings a motion to transfer venue under Section 1404(a) to enforce a forum-
21 selection clause, the standard balancing test taking into consideration a multitude of private
22 factors, including the convenience of the parties, does not apply.

23 As Facebook has explained in its moving papers, Mot. at 3, the U.S. Supreme Court held
24 in *Atlantic Marine* that when there is a valid forum-selection clause, “[the] district court should
25 transfer the case unless extraordinary circumstances unrelated to the convenience of the parties
26 clearly disfavor a transfer.” *Atlantic Marine*, 571 U.S. at 52. In considering such a motion,
27 plaintiff’s choice of forum “merits no weight” and courts “should not consider arguments about
28 the parties’ private interests.” *Id.* at 63–64. Public-interest factors can only defeat a transfer
motion in the “most unusual cases,” as the “‘interest of justice’ is served by holding parties to

1 their bargain.” *Id.* at 66. Because a valid forum-selection clause should be “given controlling
2 weight in all but the most exceptional cases,” *id.* at 63, the party opposing the forum-selection
3 clause must show that public-interest factors “overwhelmingly disfavor a transfer,” *id.* at 67.

4 Plaintiff makes no arguments (and cites no authority) to support a claim that this case is
5 exceptional or unusual such that the public-interest factors would overwhelmingly disfavor a
6 transfer. Indeed, Plaintiff raises no challenges to Facebook’s arguments that public interest factors
7 here actually favor a finding that the forum-selection clause is enforceable and mandates transfer.
8 *See Mot.* at 6–7 (citing cases).

9 Thus, in ruling on Facebook’s motion to transfer venue, the Court need not give credence
10 to any argument that Plaintiff’s choice of forum or Plaintiff’s convenience in litigating in the
11 Southern District of California militates against transfer. As there are no extraordinary
12 circumstances unrelated to the parties’ convenience, the Court should hold that Facebook’s
13 forum-selection clause is controlling, especially because the public factors also support transfer.

14 **B. Facebook’s forum-selection clause is enforceable.**

15 Plaintiff asserts that “[w]hether the plaintiff was able to bargain in agreeing to a forum
16 selection clause is an important factor for courts to consider when deciding motions to transfer.”
17 *Opp.* at 5. But Plaintiff provides no authority in support of this proposition, nor could he. To the
18 contrary, over three decades ago, the U.S. Supreme Court in *Carnival Cruise* extended the
19 common understanding that forum-selection clauses are prima facie valid even where they appear
20 in non-negotiated form contracts. *Carnival Cruise*, 499 U.S. at 589, 593.

21 In *Carnival Cruise*, the plaintiffs, two cruise passengers, brought a negligence action
22 against a cruise line. *Id.* at 588. The cruise tickets contained a forum-selection clause that required
23 any suit “arising under, in connection with or incident to this Contract” to be brought in Florida,
24 where the cruise line maintained its principal place of business. *Id.* at 587–88. Notwithstanding
25 the forum-selection clause, plaintiffs filed suit in a federal district court in their home state of
26 Washington, and the cruise line moved that the court enforce the forum-selection clause. *Id.* at
27 588. The Ninth Circuit held that the clause was unenforceable because it “was not freely
28 bargained for.” *Id.* at 589.

1 The U.S. Supreme Court reversed and upheld the forum-selection clause, emphasizing
2 that there is no requirement that a forum-selection clause be subject to bargaining. *Id.* at 593. The
3 Supreme Court reasoned that even though an individual purchasing a cruise ticket will not have
4 bargaining parity with the cruise line, a forum-selection clause “in a form contract of this kind” is
5 permissible as it provides several substantial benefits. *Id.* at 593–94. First, when the cruise line is
6 able to limit the fora in which it potentially could be subject to suit, it saves on litigation costs that
7 can then be passed on to the customer in the form of reduced ticket prices. *Id.* Second, as a forum-
8 selection clause “dispel[s] any confusion about where suits arising from the contract must be
9 brought and defended,” courts can “conserv[e] judicial resources that otherwise would be
10 devoted” to deciding venue motions. *Id.*

11 The forum-selection clause in Facebook’s Terms of Service, like the one at issue in
12 *Carnival Cruise*, provides similar benefits to both parties and the judicial system, only on an even
13 greater scale, as Facebook provides a social networking platform and products to millions of
14 individual users and businesses. *See* Mot. at 1. Several courts have recognized that the forum-
15 selection clause in Facebook’s Terms of Service provides benefits along the lines of those
16 emphasized by the Supreme Court in *Carnival Cruise*. *See id.* at 6 (citing *Miller v. Facebook,*
17 *Inc.*, 2010 WL 9525523, at *1 (N.D. Ga. Jan. 15, 2010) for the proposition that enforcing the
18 forum-selection clause in Facebook’s Terms of Service protects Facebook from “fac[ing]
19 litigation in every state in this country and in nations around the globe[,]” an externality which
20 would have “potential adverse consequences for the users of Facebook’s social-networking site
21 and for other internet companies.”); *see also Dolin v. Facebook, Inc.*, 289 F. Supp. 3d 1153, 1162
22 (D. Haw. 2018) (citing the same language from *Miller*).

23 Since *Carnival Cruise*, courts around the country have recognized that forum-selection
24 provisions in form contracts are presumptively enforceable, a principle that has been routinely
25 applied to enforce the forum-selection clause in Facebook’s Terms of Service specifically. *See,*
26 *e.g., Thomas v. Facebook, Inc.*, 2018 WL 3915585, at *4 (E.D. Cal. Aug. 15, 2018) (noting that
27 courts have consistently upheld forum-selection clauses “contained in click through user
28 agreements on websites[,]” like the forum-selection clause in Facebook’s Terms of Service);

1 *Franklin v. Facebook, Inc.*, 2015 WL 7755670, at *2 (N.D. Ga. Nov. 24, 2015) (“The Court
2 cannot identify a single instance where any federal court has struck down [Facebook’s] [Terms of
3 Service] as an impermissible contract of adhesion induced by fraud or overreaching[.]”); *Fteja v.*
4 *Facebook, Inc.*, 841 F. Supp. 2d 829, 841 (S.D.N.Y. 2012) (enforcing forum-selection clause
5 based on disclosure below “Sign Up” button).

6 Thus, Plaintiff’s assertion that he had no bargaining power in agreeing to the forum-
7 selection clause in Facebook’s Terms of Service bears no weight in whether the Court should
8 enforce the forum-selection clause and transfer this matter to the Northern District of California.

9 **C. Plaintiff’s FOIA claim does not require that the action in its entirety proceed**
10 **in this district.**

11 **1. Plaintiff provides no authority for his contention that the Northern**
12 **District of California is not an available forum for the FOIA claim.**

13 Plaintiff argues that under 5 U.S.C. § 552(a)(4)(B), his FOIA claim can only proceed in
14 the Southern District of California or the District of Columbia. *See* Opp. at 3–4. Plaintiff further
15 asserts that Facebook’s forum-selection clause does not change the venue analysis because
16 “[p]rivate parties’ forum-selection clauses do not transcend federal venue statutes.” *Id.* at 4. But
17 Plaintiff provides no valid authority for this contention. Indeed, the *only* support that he cites is
18 language from an outdated edition of Wright & Miller’s *Federal Practice and Procedure*,
19 language which the authors have since removed from the current edition.² Tellingly, this same
20 language was also cited by the Fifth Circuit in *In re Atlantic Marine Const. Co. Inc.*, 701 F.3d
21 736, 740 (5th Cir. 2012), the opinion for which the Supreme Court granted certiorari and reversed
in *Atlantic Marine*. 571 U.S. at 68.

22 Thus, Plaintiff’s opposition is lacking any viable authority that would preclude litigation
23 of the FOIA claim in the Northern District of California.

24 **2. Plaintiff’s consent in the form of agreeing to Facebook’s forum-**
25 **selection clause renders the Northern District of California an**
26 **available forum for the FOIA claim.**

27 When Plaintiff assented to the forum-selection clause in Facebook’s Terms of Service, he

28 ² Plaintiff’s opposition, filed on November 29, 2021, cites § 3803.1 of the third edition of Wright & Miller. Opp. at 4–5. But edition four is the operative edition of this treatise and was updated before Plaintiff filed his brief. *See* 14D Fed. Prac. & Proc. Juris. (4th ed.).

1 agreed that the Northern District of California would be the designated federal district forum for
 2 “any claim, cause of action, or dispute” that Plaintiff could bring against Facebook *or* “that arises
 3 out of or relates to” Facebook’s Terms of Services or products. Mot. at 2–3. Under the test
 4 articulated in *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018), a forum-
 5 selection clause like the one in Facebook’s Terms of Service encompasses “any dispute that has
 6 some logical or causal connection to” the Terms of Service or Facebook’s services. *Id.* at 1086.
 7 Thus, the FOIA claim necessarily “arises out of or relates” to Facebook’s Terms of Service or
 8 products, because as Plaintiff alleges in the Complaint, the documents that Plaintiff has requested
 9 with his FOIA request are “relevant to this lawsuit,” *see* Compl. ¶ 6.³ And Plaintiff does not
 10 dispute that every other claim in this lawsuit—which all include allegations as to Facebook’s
 11 purported failure to enforce its Terms of Service, *see* Mot. at 2—arise out of Facebook’s Terms of
 12 Service. Indeed, Plaintiff concedes in his opposition that the FOIA claim “share[s] common
 13 questions of both law and fact” and “bear[s] a logical relation to” the other claims. Opp. at 8
 14 (quotations and citations in original omitted). Plaintiff thus does not dispute that under the
 15 requisite test in *Sun*, the scope of the forum-selection clause, to which Plaintiff concedes he has
 16 consented—covers the FOIA claim.

17 Under the express statutory language of Section 1404(a) added via amendment in 2011, a
 18 district court may transfer an action “to any district or division to which all parties have
 19 consented.” 28 U.S.C. § 1404(a).⁴ Two years after the amendment, the U.S. Supreme Court held
 20 in *Atlantic Marine* that a forum “to which all parties have consented” means “any other district to
 21 which the parties have agreed by contract or stipulation[,]” including a valid forum-selection
 22 clause. 571 U.S. at 59. Courts have held that a forum-selection clause constitutes consent
 23 rendering venue proper in a federal district that would otherwise be unavailable when the relevant
 24 statutory venue provisions are not satisfied. *See Huawei Technologies Co., Ltd. v. Yiren Huang*,

25 ³ *See also* Twitter’s Motion to Transfer Venue at 13.

26 ⁴ *Compare* Section 1404(a) (1996) (“For the convenience of parties and witnesses, in the interest
 27 of justice, a district court may transfer any civil action to any other district or division where it
 28 might have been brought.”), *with* Section 1404(a) (2011) (“For the convenience of parties and
 witnesses, in the interest of justice, 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.”) (emphasis added).

1 2018 WL 1964180, at *6–9 (E.D. Tex. 2018), motion to certify appeal denied, 2018 WL 2463800
2 (E.D. Tex. 2018) (venue was proper in the district where originally filed even though venue was
3 not satisfied under 28 U.S.C. Section 1391(b) because the parties consented to it in a mandatory
4 forum-selection clause and that this outcome does not risk “running afoul [of] Congress’ intent to
5 have venue lie in at least one federal court”); *Nymbus, Inc. v. Sharp*, 2018 WL 705003, at *6 (D.
6 Conn. 2018) (holding that “the statutory venue factors are inapplicable in light of” the forum-
7 selection clause).

8 *Atlantic Marine* makes clear that a forum-selection clause operates as consent under
9 Section 1404(a), 571 U.S. at 59, and Plaintiff has consented to the Northern District of California
10 by agreeing to Facebook’s forum-selection clause, *see* Opp. at 5–6. As a result, the Northern
11 District of California is a proper forum for the entire action, including the FOIA claim,
12 notwithstanding whether the FOIA’s venue provisions have been satisfied. Thus, the Court need
13 not find that Plaintiff’s FOIA claim can only be heard in districts made available under 5 U.S.C.
14 § 552(a)(4)(B) and should transfer the entire action to the Northern District of California.

15 **3. If the Court holds that the FOIA claim cannot be transferred, then the**
16 **Court should sever the FOIA claim and transfer the remaining action.**

17 Plaintiff asserts that “this District is the only forum in which all claims can be brought
18 against all Defendants.” *Id.* at 7. Plaintiff does not dispute that under Facebook’s and Twitter’s
19 forum-selection clauses, the non-FOIA claims belong in the Northern District of California, but
20 he also insists that severing those claims so that they may proceed in that forum is inappropriate.
21 *Id.* These positions are inconsistent. Either the entire action should be transferred to the Northern
22 District of California, or the non-FOIA claims should be severed and transferred. But it defies
23 logic and the principles espoused in *Atlantic Marine* to require Facebook and Twitter to litigate
24 claims that they are entitled to defend against in the Northern District of California only because
25 Plaintiff has also included a FOIA claim in the Complaint.

26 Nor does keeping this entire action together in the Southern District of California comport
27 with policies of judicial efficiency and administration. If the addition of a FOIA claim could
28 alone defeat an otherwise valid and enforceable forum-selection clause, then any plaintiff, as a
strategic matter, could add a FOIA claim to a complaint as an end run around an enforceable

1 forum-selection clause, in contravention of *Atlantic Marine*. This kind of practice would require
2 courts to expend extra resources resolving claims involving government defendants in lawsuits
3 that should be between private parties. This cannot be the outcome that Congress intended in the
4 drafting of 5 U.S.C. § 552(a)(4)(B).

5 Thus, if the Court concludes that the FOIA claim must proceed in the Southern District of
6 California, then the Court should sever the non-FOIA claims and transfer them to the Northern
7 District of California. *See* Fed. R. Civ. P. 21; *Harrison v. Fed. Bureau of Prisons*, 2019 WL
8 147720, at *4 (D.D.C. Jan. 9, 2019) (severing First Amendment retaliation claim from FOIA
9 claim because “the two claims do not share any common questions of law or fact”).⁵

10 **III. CONCLUSION**

11 For the foregoing reasons, and for those set forth in Facebook’s opening brief, Facebook
12 respectfully requests that this case be transferred to the Northern District of California, or in the
13 alternative, that the Court sever the non-FOIA claims and transfer them to the Northern District of
14 California.

16 Dated: December 13, 2021

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18 By: /s/ Melissa L. Cornell
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19
20 Attorneys for Defendant
FACBEOOK, INC.

25 _____
26 ⁵ Plaintiff contends that Section 1404 “requires that a full action be transferred if a transfer takes
27 place” and cites three cases in support. Opp. at 8. But Plaintiff misrepresents the holdings in those
28 cases. The well-established case law cited in the opposition provides that “transferring a portion
of a pending action to another jurisdiction” is permissible as long as the district court first
“sever[s] the action under Rule 21 before effectuating the transfer.” *Chrysler Credit Corp. v.*
Country Chrysler, Inc., 928 F.2d 1509, 1518–19 (10th Cir. 1991); *Wyndham Assocs. v. Bintliff*,
398 F.2d 614, 618 (2d Cir. 1968) (same).