IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WEBSEED, INC. and BRIGHTEON MEDIA,

Plaintiffs,

v.

DEPARTMENT OF STATE, GLOBAL ENGAGEMENT CENTER, DEPARTMENT OF DEFENSE, DEPARTMENT OF HOMELAND SECURITY, NEWSGUARD TECHNOLOGIES, INC., INSTITUTE FOR STRATEGIC DIALOGUE, GLOBAL DISINFORMATION INDEX, META PLATFORMS, INC. (f/k/a FACEBOOK, INC.), GOOGLE LLC, X CORP. (f/k/a TWITTER, INC.), JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5, JOHN DOE 6, JOHN DOE 7, JOHN DOE 8, JOHN DOE 9, and JOHN DOE 10,

Defendants.

Civil Action No. 1:24-cv-00576-DII

DEFENDANT X CORP.'S OPPOSED MOTION TO SEVER AND TRANSFER PLAINTIFFS' CLAIMS AGAINST IT TO THE NORTHERN DISTRICT OF CALIFORNIA

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I. INTRODUCTION

Plaintiffs' claims against X Corp. should be severed and transferred to the Northern District of California, for three independent reasons.[1]

1. This Court should sever and transfer Plaintiffs' claims against X Corp. pursuant to X Corp.'s Terms of Service ("Terms"), to which Plaintiffs agreed. Those Terms contain a valid, enforceable forum selection clause that requires Plaintiffs' claims against X Corp. to be brought in the Northern District of California, not this Court.

2. In the alternative, this Court should sever and transfer Plaintiffs' claims against X Corp. to the Northern District of California for the convenience of the parties and witnesses and in the interests of justice under 28 U.S.C. § 1404(a). When the events giving rise to Plaintiffs' claims occurred, X Corp. maintained its headquarters in San Francisco, California, and the employees of the allegedly relevant team—X Corp.'s Safety team (formerly known as the Trust & Safety team)—generally reside in the San Francisco Bay area or otherwise within the Northern District of California.

3. As a further alternative, this Court should sever and transfer Plaintiffs' claims against X Corp. to the Northern District of California because venue is not proper in the Western District of Texas, under 28 U.S.C. §§ 1391(b) and 1406(a). As Plaintiffs allege, not all defendants reside in this district, Plaintiffs do not allege "a substantial part of the events or omissions giving rise to [their] claim[s] occurred" in this district, and Plaintiffs could have brought their claims in the Northern District of California–the proper venue for their claims.

[1] X Corp. understands that Defendants Meta Platforms ("Meta") and Google will also move to transfer the claims asserted against them to the Northern District of California.

II. BACKGROUND

A. Plaintiffs' Allegations

Plaintiffs allege they operate websites such as NaturalNews.com, Brighteon.com, and HealthRanger.com that allegedly discuss "human rights issues," "ways to optimize health," and "'controversial' life issues" and which have "reached millions of readers." Dkt. 6 ("FAC") ¶¶ 12-14, 20, Exs. A-B. They also allege they "actively endorse / promote, among other things, holistic approaches to bettering one's health that are contrary to the [federal] Government's COVID vaccine 'mandates.'" *Id.* ¶ 48.

Plaintiffs allege the federal government tried to "eradicate" Plaintiffs from social media platforms because the government wanted to "silence" Plaintiffs' "COVID-related speech involving viewpoints that do not square with those of the Government." *Id.* ¶ 2. To do this, the federal agencies of the Department of State, Global Engagement Center, Department of Defense, and Department of Homeland Security (collectively, "Government") allegedly funded and developed "private censorship enterprises and their associated censorship technology / 'tools.'" *Id.* ¶ 39, *see id.* at 2 n.4. The alleged "censorship enterprises" are (1) NewsGuard Technologies, which allegedly developed the NewsGuard "rating system for news and information websites" (*id.* ¶ 40); (2) the Institute for Strategic Dialogue ("ISD"), which allegedly provides analysis and "advocate[s] policy solutions" to governments worldwide (*id.* ¶ 41); and (3) Global Disinformation Index ("GDI"), which allegedly provides data to "policymakers and business leaders on how to combat disinformation" (*id.* ¶ 42), all of which are non-governmental entities (*id.* ¶¶ 29-31). The "tools" of NewsGuard Technologies, ISD, and GDI (collectively, "Tool Defendants") allegedly "peg Plaintiffs as sources of misinformation." *Id.* ¶ 46.

Plaintiffs allege the Government "coerc[ed]" and "guid[ed]" Meta, Google, and X Corp. (collectively, "Platform Defendants") into using the "tools" of the Tool Defendants to "blacklist"

Plaintiffs and "remove and reduce (*i.e.*, censor) Plaintiffs' ability to speak freely" and "advertise [their] products" on the Platform Defendants' social media platforms. *Id.* ¶¶ 50, 116. (Plaintiffs allege that Meta operates the social media platform Facebook, that Google operates an unnamed platform, and that X Corp. operates Twitter.[2] *Id.* at p.2 (introduction), ¶¶ 2-5, 38.) Plaintiffs allege the purported censorship on the Platform Defendants' social media platforms caused Plaintiffs to suffer a loss of "advertising revenue / web trafficking monies" and "reduc[ed] the circulation of Plaintiffs' reporting and speech." *Id.* ¶ 45.

The Complaint asserts twelve claims: (1) "abridgment" of Plaintiffs' right to freedom of speech, against all Defendants; (2) "abridgment" of Plaintiffs' right to freedom of the press, against all Defendants; (3) "*ultra vires* non-final agency action," against the Government only; (4) "unlawful final agency action," against the Government only; (5) "*ultra vires* action beyond constitutional bounds," against the Government only; (6) violation of the Texas Free Enterprise and Antitrust Act of 1983, Tex. Stats. § 15.05(a) and (b), against the Tool Defendants and the Platform Defendants; (7) violation of the Texas Discourse on Social Media Platforms, Tex. Stats. §§143A.001 – 143A.008, against the Tool Defendants and the Platform Defendants; (8) negligence, against the Tool Defendants and the Platform Defendants; (9) tortious interference with business relations and prospective economic advantage, against the Tool Defendants and the Platform Defendants; (10) negligent misrepresentation, against the Platform Defendants; (11) fraud, against the Platform Defendants; and (12) promissory estoppel, against the Platform Defendants. *Id.* ¶¶ 210-95. Of these claims, Plaintiffs assert claims 1, 2, and 6-12 against the Platform Defendants. *Id.* ¶¶ 210-19, 252-95. Plaintiffs request injunctive relief and

[2] Twitter, the online social media platform, has been re-branded as "X." This motion continues to refer to the platform as "Twitter" throughout for ease of understanding.

damages of "more than $25,000,000.00." *Id.* ¶¶ 251, 271, 275, 279, 284, 289, 295.

In terms of residency, Plaintiffs allege they are Wyoming corporations whose principal place of business is in Texas. *Id.* ¶ 23. Plaintiffs allege the Government agencies were "headquartered in the District of Columbia" at "all material times." *Id.* ¶¶ 25-28. Regarding the Tool Defendants, Plaintiffs allege that, at "all material times," NewsGuard Technologies was a Delaware corporation headquartered in New York, and that ISD and GDI both are British companies headquartered in the United Kingdom. *Id.* ¶¶ 29-31. Finally, as to the Platform Defendants, Plaintiffs allege that, at "all material times," Meta is a Delaware corporation headquartered in San Mateo County, California; that Google is a Delaware limited liability company headquartered in Santa Clara County, California; and that "[a]t some material times," X Corp. was a Delaware corporation, while at "other material times," it was a Nevada corporation. *Id.* ¶¶ 2, 32-34. Plaintiffs allege that during all these "material times," X Corp. was headquartered in San Francisco County, California. *Id.*

B. X Corp.'s Terms

Plaintiffs allege they operate various websites, including NaturalNews.com, Brigteon.com, and HealthRanger.com, though they do not allege the handles for their Twitter accounts. FAC, Exs. A-B. But X Corp.'s investigations to date reflect that two Twitter accounts are associated with those websites: @BrighteonTV and @HealthRanger. Declaration of Samantha Birkenfeld-Malpass ("Birkenfeld-Malpass Decl."). ¶¶ 28-30. X Corp.'s investigations to date also show that the account @BrighteonTV was created in October 2023 and that Plaintiffs have agreed to the current Terms. *Id.* ¶ 29. Those investigations also show that the account @HealthRanger was created in 2008; that Plaintiffs agreed to the 2008 Terms when that account was created; that Plaintiffs consented to the current Terms; and that Plaintiffs continued to use the @HealthRanger account through September 2024. *Id.* ¶ 30.

All versions of the Terms give X Corp. the power to revise the Terms. *Id.*, Ex. A at 2; *id.*, Ex. B at 9; *id.*, Ex. C at 9; *id.*, Ex. D at 9; *id.*, Ex. E at 9; *id.*, Ex. F at 10; *id.*, Ex. G at 10; *id.*, Ex. H at 10; *id.*, Ex. I at 10; *id.*, Ex. J at 13; *id.*, Ex. K at 9; *id.*, Ex. L at 9; *id.*, Ex. M at 8; *id.*, Ex. N at 10; *id.*, Ex. O at 10; *id.*, Ex. P at 10; *id.*, Ex. Q at 10; *id.*, Ex. R at 7-8; *id.*, Ex. S at 10. All versions of the Terms since version 2, including the current Terms, provide that when a user continues to use Twitter after the Terms have been revised, the user "agree[s] to be bound by the revised Terms." *Id.*, Ex. B at 9; *id.*, Ex. C at 9; *id.*, Ex. D at 9; *id.*, Ex. E at 9; *id.*, Ex. F at 10; *id.*, Ex. G at 10; *id.*, Ex. H at 10; *id.*, Ex. I at 10; *id.*, Ex. J at 13; *id.*, Ex. K at 9; *id.*, Ex. L at 9; *id.*, Ex. M at 8; *id.*, Ex. N at 10; *id.*, Ex. O at 10; *id.*, Ex. P at 10; *id.*, Ex. Q at 10; *id.*, Ex. R at 7-8; *id.*, Ex. S at 10.

In addition, all versions of the Terms since version 2 include a forum selection clause that requires disputes between the user and X Corp. related to their use of Twitter to be filed in San Francisco County, and a choice of law provision that requires the application of California law. *Id.*, Ex. B at 8; *id.*, Ex. C at 8; *id.*, Ex. D at 8; *id.*, Ex. E at 8; *id.*, Ex. F at 9; *id.*, Ex. G at 9-10; *id.*, Ex. H at 9; *id.*, Ex. I at 10; *id.*, Ex. J at 12; *id.*, Ex. K at 9; *id.*, Ex. L at 9; *id.*, Ex. M at 8; *id.*, Ex. N at 10; *id.*, Ex. O at 10; *id.*, Ex. P at 10; *id.*, Ex. Q at 10; *id.*, Ex. R at 8; *id.*, Ex. S at 10. In the current Terms, which became effective on September 29, 2023, the forum selection clause states: "All disputes related to these Terms or the Services will be brought solely in the federal or state courts located in San Francisco County, California, United States, and you consent to personal jurisdiction and waive any objection as to inconvenient forum." *Id.*, Ex. S at 10. The choice of law provision in the current Terms states: "The laws of the State of California, excluding its choice of law provisions, will govern these Terms and any dispute that arises between you and us." *Id.*

C. The Location of X Corp.'s Potential Witnesses and Evidence

During the time of the events alleged in the FAC, X Corp. maintained its headquarters in San Francisco, California. *Id.* ¶ 33. On September 13, 2024, after the alleged events giving rise to Plaintiffs' claims, X Corp. moved its headquarters to Bastrop, Texas. *Id.* ¶ 34. The allegedly relevant team here, X Corp.'s Safety team (formerly known as the Trust & Safety team) oversees the company's content moderation investigations and actions, including for COVID-related misinformation. *Id.* ¶ 35. Based on publicly available information, the then-X Corp. employees who were members of the Safety team at the time of the events alleged in the FAC and who may have knowledge of the alleged events generally reside in the San Francisco Bay area or otherwise within the Northern District of California. *Id.* ¶ 36.

III. LEGAL STANDARD

"Section 1404(a) [28 U.S.C. § 1404(a)] provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district." *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 59 (2013). In cases "where, as here, not all parties to the lawsuit have entered into a forum selection agreement," the court must decide whether "the claims of the forum-clause defendant" should be severed "from the claims of the non-forum clause defendants" and transferred pursuant to the forum selection clause. *In re Rolls Royce Corp.*, 775 F.3d 671, 679-80 (5th Cir. 2014). Under this *Rolls Royce* standard, courts apply a three-step inquiry: First, the court considers whether the forum selection clause is mandatory or permissive because "[o]nly mandatory clauses justify transfer." *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 768-69 (5th Cir. 2016). Second, if the clause is mandatory, the court "decide[s] whether a forum-selection clause applies to the present case." *Sabal Ltd. LP v. Deutsche Bank AG*, 209 F. Supp. 3d 907, 917 (W.D. Tex. 2016) (citing *Weber*, 811 F.3d at 770). Third, the court applies the *Rolls Royce* "severance-and-transfer inquiry" set forth by the Fifth Circuit. *Rolls*

Royce, 775 F.3d at 679-81.

Section 1404(a) also provides that [f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district . . . where it might have been brought." 28 U.S.C. § 1404(a). "For the usual § 1404(a) . . . motion, the court considers various private- and public-interest factors." *Weber*, 811 F.3d at 766. The private-interest factors under section 1404(a) are: (1) the "relative ease of access to sources of proof"; (2) "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses"; (3) "possibility of view of premises, if view would be appropriate to the action"; and (4) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 766-67. The public-interest factors are: (1) "the administrative difficulties flowing from court congestion"; (2) "the local interest in having localized controversies decided at home"; and (3) "the interest in having the trial of a diversity case in a forum that is at home with the law." *Id.* at 767.

Separately, under 28 U.S.C. § 1406(a), "[t]he district court of a district in which is filed a case laying venue in the wrong . . . district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." "[W]hether venue is 'wrong' . . . is generally governed by 28 U.S.C. § 1391." *Atl. Marine*, 571 U.S. at 55 (2013). Section 1391 provides three categories where venue is proper:

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b). "When venue is challenged, the court must determine whether the case falls within one of the three categories set out in § 1391(b). If it does, venue is proper; if it does not, venue is improper, and the case must be dismissed or transferred under § 1406(a)." *Atl. Marine*, 571 U.S. 49 at 56.

IV. ARGUMENT

A. Plaintiff's Claims Against X Corp. Should Be Severed and Transferred to the Northern District of California Pursuant to the Terms' Forum Selection Clause

Plaintiffs' claims against X Corp. should be severed and transferred to the Northern District of California pursuant to the Terms' forum selection clause[3] because (1) the forum selection clause is mandatory, (2) the clause applies to Plaintiffs' claims against X Corp., and (3) severance and transfer is appropriate under the *Rolls Royce* standard.

1. The Terms' Forum Selection Clause Is Mandatory

A mandatory forum selection clause "affirmatively requires that litigation arising from the contract be carried out in a given forum," while a "permissive" forum selection clause "is only a contractual waiver of personal-jurisdiction and venue objections if litigation is commenced in the specified forum." *Weber*, 811 F.3d at 768. A clause is mandatory "if it contains clear language specifying that litigation must occur in the specified forum," but "language merely indicating that the courts of a particular place 'shall have jurisdiction'" (or similar) is insufficient." *Id.*

Here, the governing Terms' forum selection clause provides that "[a]ll disputes related to these Terms or the Services will be brought *solely* in the federal or state courts located in San

[3] By opening and/or continuing to use their Twitter accounts, Plaintiffs agreed to the current version of the Terms which contains the forum selection clause X Corp. invokes here. Birkenfeld-Malpass Decl. ¶¶ 28-31.

Francisco County, California." Birkenfeld-Malpass Decl. Ex S at 10 (emphasis added) (current Terms); *see also id.*, Exs. B-R (prior versions of Terms with a forum selection clause). Thus, the Terms' forum selection clause is mandatory. *See JPay LLC v. Houston*, 2024 WL 3687099, at *5 (N.D. Tex. Aug. 5, 2024) (forum selection clause requiring "that litigation must occur 'solely and exclusively' in the Southern District of Florida or Florida state court" was mandatory); *Bilodeau v. Ahern Rentals, Inc.*, 2021 WL 8016841, at *2 (S.D. Tex. Aug. 20, 2021) (forum selection clause requiring disputes "be heard and resolved solely and exclusively by a Court in the State of Nevada" was mandatory).

2. The Terms' Forum Selection Clause Applies to Plaintiff's Claims Against X Corp.

The Terms' forum selection clause applies to Plaintiffs' claims against X Corp. To determine whether a forum selection clause applies, courts apply a two-part inquiry: "(1) whether the contract is valid and the forum-selection clause is enforceable, and (2) whether the present case falls within the scope of the forum-selection clause." *Sabal*, 209 F. Supp. 3d at 917 (citing *Weber*, 811 F.3d at 770, and *Mendoza v. Microsoft, Inc.*, 1 F. Supp. 3d 533, 542 (W.D. Tex. 2014)). Each of those two elements is met.

a. The Terms' Forum Selection Clause Is Valid and Enforceable.

There is "a strong presumption in favor of the enforcement of mandatory" forum selection clauses. *Weber*, 811 F.3d at 773. To overcome the presumption, the plaintiff must make a "clear showing that the clause is 'unreasonable' under the circumstances." *Id.*

> Unreasonableness potentially exists where (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection

clause would contravene a strong public policy of the forum state.

Noble House, LLC v. Certain Underwriters at Lloyd's, London, 67 F.4th 243, 248 (5th Cir. 2023). "The party resisting enforcement on these grounds bears a 'heavy burden of proof.'" *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972)).

Plaintiffs cannot meet this "heavy burden of proof" to resist enforcement of the Terms' forum selection clause, for several reasons. *First*, Plaintiffs cannot show the inclusion of the forum selection clause in the Terms was the product of fraud or overreaching. "Fraud and overreaching must be specific to a forum selection clause in order to invalidate it." *Haynsworth v. The Corp.*, 121 F.3d 956, 963 (5th Cir. 1997); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974) (A "forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion."). "Thus, allegations of such conduct as to the contract as a whole—or portions of it other than the [forum selection] clause—are insufficient; the claims of fraud or overreaching must be aimed straight at the [forum selection] clause in order to succeed." *Haynsworth*, 121 F.3d at 963. Plaintiffs cannot make this showing.

Second, enforcement of the Terms' forum selection clause will not deprive Plaintiffs of their day in court. "[T]he resisting party must show it is impossible for the party to try the case, and litigating in another forum will require the party to abandon his claims." *Moates v. Facebook Inc.*, 2021 WL 3013371, at *5 (E.D. Tex. May 14, 2021); *see also Davis v. Meta Platforms, Inc.*, 2023 WL 4670491, at *11 (E.D. Tex. July 20, 2023) ("To carry his heavy burden of making such a showing, [plaintiff] must demonstrate that, for all practical purposes, the courthouse doors will close to him upon transfer. A showing of comparatively less convenience or of a personal preference for the original forum cannot carry [plaintiff's] heavy burden." (citation omitted)).

Plaintiffs cannot show transferring their claims against X Corp. to the Northern District of California would make it impossible to try their case or require them to abandon their claims, and whatever inconvenience they may contend they would suffer cannot meet their burden.

Third, Plaintiffs cannot demonstrate there is any fundamental unfairness of the chosen law that would deprive them of a remedy if their claims against X Corp. are transferred. Under the Terms, California law governs Plaintiffs' claims, regardless of the forum. Birkenfeld-Malpass Decl., Ex. S at 10. Thus, transfer to the Northern District of California will not deprive Plaintiffs of any remedy. *See Trevino v. Cooley Constructors, Inc.*, 2014 WL 2611823, at *4 n.3 (W.D. Tex. June 9, 2014) ("[B]ecause Oklahoma substantive law applies regardless of the venue, transferring the case to the Western District of Oklahoma will not deprive Plaintiff of a remedy.").

Fourth, enforcement of the Terms' forum selection clause would not contravene a strong public policy of Texas. To the contrary, "'Texas's strong public policy favoring freedom of contract' compels courts to 'respect and enforce the terms of a contract that the parties have freely and voluntarily entered'," and "[t]his strong public policy extends to the enforcement of forum-selection clauses." *Davis*, 2023 WL 4670491, at *12 (quoting *Phil. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016)); *see also In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) ("Contractual forum-selection clauses are generally enforceable in Texas.").

In sum, the Terms' forum selection clause is valid and enforceable.

b. The Terms' Forum Selection Clause Applies to Plaintiffs' Claims against X Corp.

"[T]o interpret the meaning and scope of a forum selection clause, a court must use the forum's choice-of-law rules to determine what substantive law governs." *Sabal*, 209 F. Supp. 3d

at 918 (citing *Weber*, 811 F.3d at 770-71). "Texas law gives effect to choice of law clauses regarding construction of a contract." *Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 726 (5th Cir. 2003) (citing *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 549 (Tex. 2002)). Here, because the Terms' choice-of-law clause provides that "[t]he laws of the State of California . . . will govern these Terms" (Birkenfeld-Malpass Decl., Ex. S at 10), California law determines the scope of the Terms' forum selection clause. *See Sabal*, 209 F. Supp. 3d at 919 (applying New York law to determine scope of forum selection clause because choice-of-law clause provided that New York law governed interpretation of contract).

"Under California law, a 'broad' clause contains language such as 'any claim arising from or related to this agreement' or 'arising in connection with the agreement.'" *Moates v. Facebook Inc.*, 2021 WL 3013371, at *8 (E.D. Tex. May 14, 2021) (quoting *Howard v. Goldbloom*, 241 Cal. Rptr. 3d 743, 746 (Cal. Ct. App. 2018)); *see also Davis*, 2023 WL 4670491, at *11 ("To fall within the scope of a 'broad' clause, the dispute between the parties 'need only touch matters covered by the contract containing the' forum-selection clause." (quoting *Ramos v. Super. Ct.*, 239 Cal. Rptr. 679, 689 (Ct. App. 2018))). Here, the Terms' forum selection clause encompasses "[a]ll disputes related to these Terms or the Services"[4]—*i.e.*, Plaintiffs' use of Twitter. Birkenfeld-Malpass Decl., Ex. S at 10. Because all of Plaintiffs' claims against X Corp. relate directly to their use of Twitter (*see, e.g.*, FAC ¶¶ 45, 50, 57), their claims fall within the scope of the Terms' "broad" forum selection clause. *See Davis*, 2023 WL 4670491, at *11 (under California law, forum selection clause requiring any dispute "that arises out of or relates to these Terms or your access or use of the Meta Products" encompassed Texas

[4] The Terms define "Services" to include X Corp.'s "various websites" and "applications," which include the Twitter platform. Birkenfeld-Malpass Decl., Ex. S at 3-4.

statutory claims because they "relate directly to Meta's terms of service and to Davis's ability to use Meta's products without restriction"); *Moates*, 2021 WL 3013371, at *8-9 (under California law, forum selection clause requiring any dispute "arising out of or relating to . . . the Terms of Service or Facebook" encompassed federal claims, Texas statutory claims, and tort claims because the "claims all concern [plaintiff's] Facebook accounts" (brackets omitted)).

3. Under the Rolls Royce Standard, This Court Should Sever and Transfer Plaintiffs' Claims Against X Corp. Pursuant to the Terms' Forum Selection Clause

Where a defendant moves to transfer pursuant to a forum selection clause while other defendants are not parties to the contract containing the forum selection clause, a court has "three options: (1) transfer the entire case; (2) sever and transfer only the parties bound by the forum-selection clause; and (3) maintain the entire lawsuit in this district notwithstanding the forum-selection clause." *Buc-ee's, Ltd. v. Bucks, Inc.*, 262 F. Supp. 3d 453, 464 (S.D. Tex. 2017) (quoting *Royal Smit Transformers BV v. HC BEA-LUNA M/V*, 2017 WL 819243, at *3 (E.D. La. Mar. 2, 2017)). To determine which course of action to take, courts in the Fifth Circuit apply the standard from *Rolls Royce*:

> First, pursuant to *Atlantic Marine*, the private factors of the parties who have signed a forum agreement must, as matter of law, cut in favor of severance and transfer to the contracted for forum. Second, the district court must consider the [section 1404(a)] private factors of the parties who have *not* signed a forum selection agreement as it would under a Rule 21 severance and section 1404 transfer analysis. Finally, it must ask whether this preliminary weighing is outweighed by the judicial economy considerations of having all claims determined in a single lawsuit.

Rolls Royce, 775 F.3d at 681. In considering judicial economy, courts also analyze the section 1404(a) public interest factors. *Buc-ee's*, 262 F. Supp. 3d at 465-66.

Each of the three steps of the *Rolls Royce* standard favor severing and transferring Plaintiffs' claims against X Corp. or, alternatively, transferring the entire lawsuit.

First, Plaintiffs' and X Corp.'s private factors "weigh entirely in favor of the preselected forum": the Northern District of California. *Atl. Marine*, 571 U.S. at 64. Plaintiffs' selection of this district to assert claims against X Corp. in violation of the Terms' forum selection clause "merits no weight." *Id.* at 63.

Second, the other defendants' private factors[5] weigh in favor of transfer. Two of the other defendants, Meta and Google, are headquartered in the Northern District of California, and none of the other defendants are located in the Western District of Texas. *See* FAC ¶¶ 25-33 Access to evidence from Meta and Google would be better in the Northern District of California. *See W. Coast Trends, Inc. v. Ogio Int'l, Inc.*, 2011 WL 5117850, at *2 (E.D. Tex. Oct. 27, 2011) (presuming relevant documents are located in party's headquarters). Unlike this Court, the Northern District of California can compel the attendance of California-based witnesses. *See Theallet v. H&M Hennes & Mauritz, L.P.*, 2020 WL 13413466, at *2 (S.D. Tex. Mar. 9, 2020) ("[T]his Court would be unable to compel the attendance of New York[-]based witnesses." (citing Fed. R. Civ. P. 45(c)). The Northern District of California would be more convenient for Meta's and Google's willing witnesses. *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 317 (5th Cir. 2008) ("[I]t is an 'obvious conclusion' that it is more convenient for witnesses to testify at home"). And the "other practical problems" factor favors the Northern District of California because trial costs would be lower where witnesses are located. *See Ratcliff v. W & T Offshore, Inc.*, 2009 WL 10720340, at *2 (S.D. Tex. Feb. 10, 2009) ("other practical problems" factor favors transfer to Eastern District of Louisiana because majority of witnesses reside in Louisiana,

[5] The private interest factors are: (1) the "relative ease of access to sources of proof"; (2) "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses"; (3) "possibility of view of premises, if view would be appropriate to the action"; and (4) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Weber*, 811 F.3d at 766-67.

which "makes trial in the Southern District of Texas more costly"). The premises factor is not relevant because Plaintiffs do not allege facts indicating "view [of premises] would be appropriate to the action." *Weber*, 811 F.3d at 766.

Third, judicial economy considerations and public interest factors[6] favor transferring Plaintiffs' claims against X Corp. to the Northern District of California. Meta and Google are filing their own motions to transfer venue, and transferring all of Plaintiffs' identical claims against the Platform Defendants would promote judicial economy. *See Smith v. Thor Motor Coach, Inc.*, 2024 WL 3585684, at *3 (S.D. Tex. July 30, 2024) ("Because the claims against [two defendants] are based on common questions of law and fact, considerations of judicial economy strongly support transferring all the claims to Indiana."). Moreover, the local interests factor favors transferring Plaintiffs' claims against X Corp. because "[a]t all material times" of the events alleged in the Complaint, the three Platform Defendants were headquartered in the Northern District of California. FAC ¶¶ 32-34; *see also* Birkenfeld-Malpass Decl. 33. And there is no indication the Northern District of California is afflicted with administrative difficulties from court congestion such that that factor would weigh against transfer.

That X Corp. recently moved its headquarters to Bastrop, Texas (Birkenfeld-Malpass Decl. ¶ 34)—*after* the alleged events giving rise to Plaintiff's claims allegedly occurred—is not relevant because the local-interests factor looks to "where the acts giving rise to the lawsuit occurred." *Stellar Restoration Servs., LLC v. James Christopher Courtney*, 533 F. Supp. 3d 394, 428 (E.D. Tex. 2021) (quoting *Metromedia Steakhouses Co. v. BMJ Foods P.R., Inc.*, 2008 WL

[6] The public interest factors are: (1) "the administrative difficulties flowing from court congestion"; (2) "the local interest in having localized controversies decided at home"; and (3) "the interest in having the trial of a diversity case in a forum that is at home with the law." *Weber*, 811 F.3d at 767.

794533, at *3 (N.D. Tex. Mar. 26, 2008)). And a California court will be more "at home" with California law, which governs Plaintiffs' claims against X Corp. under the Terms' choice of law clause. *See Ray v. Google, LLC*, 2023 WL 7329562, at *7 (S.D. Miss. Aug. 18, 2023) ("Given the choice-of-law provisions, the action is at home with California law in the Northern District of California."); *Bowen, Miclette & Britt Ins. Agency, LLC v. Marsh USA Inc.*, 2015 WL 5458631, at *4 & n.2 (S.D. Tex. Sept. 17, 2015) ("The Southern District of New York is clearly more 'at home' with New York law," which applied under the choice-of-law clause). In short, this action does not present "the sort of exceptional circumstance that justifies disregarding the parties' agreement on public-interest-factor grounds." *Weber*, 811 F.3d at 776 (affirming enforcement of forum selection clause).

Accordingly, this Court should enforce the Terms' forum selection clause and sever and transfer Plaintiffs' claims against X Corp. to the Northern District of California.

B. In the Alternative, Plaintiffs' Claims Against X Corp. Should Be Transferred to the Northern District of California for the Convenience of the Parties and Witnesses Pursuant to 28 U.S.C. § 1404

Even if the Court disagrees that the Terms' forum selection clause requires transfer, Plaintiffs' claims against X Corp. should still be severed and transferred to the Northern District of California for the "convenience of parties and witnesses" and "in the interest of justice" under 28 U.S.C. § 1404(a).

The private interest factors weigh heavily in favor of transfer. The Northern District of California could compel attendance of potentially unwilling witnesses in California, while this Court cannot. *See Theallet*, 2020 WL 13413466, at *2. Also, the Northern District of California is "more convenient" for the then-X Corp. employees who were members of X Corp.'s Safety team at the time of the events alleged in the FAC and who may have knowledge of the alleged events. Birkenfeld-Malpass Decl. ¶ 36; *In re Volkswagen of Am.*, 545 F.3d at 317. Based on

publicly available information, they generally reside in the San Francisco Bay area or otherwise within the Northern District of California. Birkenfeld-Malpass Decl. ¶ 36. And the "other practical problems" factor favors the Northern District of California because trial costs would be lower where witnesses are located. *See Ratcliff*, 2009 WL 10720340, at *2.[7]

The public interest factors also favor transfer, as discussed above. As noted, there is no indication the Northern District of California is beset by administrative difficulties flowing from court congestion. The local interest factor favors the Northern District of California because that is where the Platform Defendants were headquartered during the events alleged in the Complaint. And the Northern District of California would be more at home with California law, which applies to Plaintiffs' claims against X Corp. under the Terms' choice of law provision.

Accordingly, this Court should sever and transfer Plaintiffs' claims against X Corp. to the Northern District of California pursuant to 28 U.S.C. § 1404(a).

C. As a Further Alternative, Plaintiff's Claims Against X Corp. Should Be Transferred to the Northern District of California, Where This Lawsuit Could Have Been Filed, Because This Court Is Not a Proper Venue

As a further alternative, this Court should find that venue in the Western District of Texas is not proper and transfer Plaintiffs' claims against X Corp. to the Northern District of California under 28 U.S.C. § 1406(a). *See Atl. Marine*, 571 U.S. 49 at 56 (where venue is not proper, "the case must be dismissed or transferred under § 1406(a).").[8] Venue is not proper in this Court under any of the three categories provided by 28 U.S.C. § 1391(b).

[7] As discussed above, the premises factor is not relevant because the Complaint does not allege facts showing that viewing any premises would be appropriate here.

[8] In this Motion, X Corp. does not request dismissal of Plaintiffs' claims against it under 28 U.S.C. § 1406(a) because a Rule 12(b)(3) motion to dismiss for improper venue would be subject to this Court's order staying the "Platform Defendants' responsive-pleading deadlines . . . pending this Court's disposition of" their "motions to transfer." Dkt. 35 at 1.

First, venue in the Western District of Texas is not proper under section 1391(b)(1) because, as Plaintiffs allege, not all defendants reside in this state. *See* FAC ¶¶ 25-34 (Government, Tool Defendants, Meta, and Google all reside outside Texas); *Tabletop Media, LLC v. Citizen Sys. Am. Corp.*, 2016 WL 11522083, at *3 (N.D. Tex. Sept. 21, 2016) (section 1391(b)(1) did not apply where, as alleged, "all defendants are not residents of the same state").

Second, venue in the Western District of Texas is not proper under Section 1391(b)(2) because the FAC does not allege "a substantial part of the events or omissions giving rise to [Plaintiffs'] claim[s] occurred" in this district. 28 U.S.C. § 1391(b)(2). "Although the chosen venue does not have to be the place where the most relevant events took place, the selected district's contacts still must be substantial." *McClintock v. Sch. Bd. E. Feliciana Parish*, 299 F. App'x 363, 365 (5th Cir. 2008). The FAC does not allege that any act or omission substantially occurred in Texas; rather, it alleges a conspiracy in which during "material times" the Government, Tool Defendants, and Platform Defendants participated from their headquarters in jurisdictions other than Texas. *E.g.*, FAC ¶¶ 25-34; *see also Lacy v. Off. of Att'y Gen. Child Support Div. of Texas*, 2020 WL 13725928, at *1 (E.D. Tex. Aug. 18, 2020) ("Plaintiff alleges that the events giving rise to this lawsuit occurred in Dallas, Texas, but he does not allege any facts concerning events that occurred in Dallas, Texas."); *Watson v. Lifeshare Transplant Donor Servs. of Oklahoma, Inc.*, 2009 WL 10702544, at *3 (S.D. Tex. Sept. 3, 2009) (venue was not proper where "all alleged wrongdoing occurred in Oklahoma, not Texas"). That Plaintiffs allegedly are headquartered in this district does not satisfy section 1391(b)(2). *See Allen v. Equifax Info. Servs. LLC*, 2024 WL 643297, at *2 (S.D. Tex. Feb. 15, 2024) ("The substantial part of pertinent events or omissions giving rise to the . . . claim occurred at the [defendant's] headquarters in the Western District of Texas, not at Plaintiff's residence in the Southern District

of Texas."); *Huffington v. Cont'l Airlines, Inc.*, 1998 WL 874937, at *2 (N.D. Tex. Dec. 4, 1998) (where plaintiff resided does not establish proper venue under § 1391(b)(2)).

Third, section 1391(b)(3) does not apply because this case could have been brought in the Northern District of California. Plaintiffs allege the Platform Defendants made decisions to blacklist and censor Plaintiffs when all the Platform Defendants were headquartered in the Northern District of California. FAC ¶¶ 32-34, 50, 116. Because venue would have been proper in that district, venue cannot be laid in this Court under section 1391(b)(3). *See Athens v. Copidas*, 2023 WL 6450423, at *2 (W.D. Tex. Oct. 3, 2023) ("Subsection (b)(3) of the venue statute only applies if there is no district in which venue is proper."). This is true even though X Corp. moved its headquarters to this district recently, after the alleged events in the FAC. Birkenfeld-Malpass Decl. ¶ 34; *see also Rex Real Est. I, L.P. v. Rex Real Est. Exch., Inc.*, 2019 WL 2524830, at *5 (E.D. Tex. June 19, 2019) ("[I]f there is another district in which this action could be brought under either § 1391(b)(1) or § 1391(b)(2), venue does not exist in this District—even if it could exercise personal jurisdiction over a defendant.").

Thus, because venue is not proper in the Western District of Texas, this Court should transfer Plaintiffs' claims against X Corp. to the Northern District of California where those claims could have been brought.

V. CONCLUSION

For these reasons, this Court should sever and transfer Plaintiffs' claims against X Corp. to the Northern District of California pursuant to the Terms' forum selection clause, pursuant to 28 U.S.C. § 1404(a), or pursuant to 28 U.S.C. § 1406(a).

Dated: September 27, 2024

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that counsel for X Corp. conferred with Jeffrey Greyber, counsel for Plaintiffs, in a good-faith attempt to resolve the matter by agreement. Because the parties disagree as to whether X Corp.'s claims should be severed and transferred, the parties were unable to reach agreement and this motion is opposed.

/s/ Michael R. Abrams
Michael R. Abrams

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2024, the foregoing document was electronically filed with the Court's CM/ECF system, thereby effectuating service on counsel for all parties.

/s/ Michael R. Abrams
Michael R. Abrams