CASE NO. 1:24-cv-00576-DII

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

WEBSEED, INC. & BRIGHTEON MEDIA, INC,
Plaintiffs,

v.

DEPARTMENT OF STATE, *et al.*,
Defendants.

PLAINTIFFS' OMNIBUS RESPONSE TO THE PLATFORM DEFENDANTS' SEPTEMBER 27, 2024, MOTIONS TO TRANSFER [D.E. 37] – [D.E. 39]

GREYBER LAW, PLLC
Jeffrey L. Greyber, Esq.
Texas Bar No. 24103030
jgreyber@greyberlaw.com
9170 Glades Rd., #161
Boca Raton, FL 33434
(561) 702-7673 (o)
(833) 809-0137 (f)

POLI, MOON & ZANE, PLLC
Jeffrey Zane, Esq.
Texas Bar No. 24095197
jzane@pmzlaw.com
807 S. Rock St., Suite 101
Georgetown, TX 78626
(512) 508-4693 (o)
(602) 857-7333 (f)

Attorneys for Plaintiffs.

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I. Summary Of The Platform Defendants' Motions To Transfer

The Platform Defendants consist of Meta Platforms, Inc. (f/k/a/ Facebook, Inc.) ("Meta"), Google, LLC ("Google"), and X Corp. (f/k/a/ Twitter, Inc.) ("X") (collectively, the "Platforms" or "Big Tech"). Pursuant to Court Order [D.E. 35], the Platforms filed their transfer motions on September 27, 2024, *see* [D.E. 37] – [D.E. 39], and this Response is due to be filed today.

Distilled, the Platforms' transfer motions argue that: (1) the Platforms' Terms of Service ("TOS"), or similarly named materials, are contractually valid and accordingly include mandatory forum selection clauses requiring litigation of any kind (not just litigation arising out of the use of social media services contemplated by the TOS) to unfold against the Platforms only in their home turf – California, namely the N.D. Cal. Court. (2) Transfer (forum selection clause enforceability) legal standards / considerations (*e.g.*, "fraud" / "overreach," "day in court," and "public policy / interest") all tilt in favor of the Platforms and not at all in favor of the Plaintiffs.[1]

Moreover, Google's motion to transfer [D.E. 37] argues that Plaintiffs are not Texans; rather, Wyomingites. Moreover, Meta's motion to transfer [D.E. 38] and X's motion to transfer [D.E. 39] argue, in a venue vein, that the harm / injuries complained of by Plaintiffs are to be pegged to California (where the harm / injury was inflicted by the Platforms) rather than Texas (where the harm / injury was suffered by the Plaintiffs) and that §1391(b)(2) has not been satisfied.

For the various reasons discussed throughout this brief, the Platforms' arguments fail.

II. Summary Of This Omnibus Response

First, as discussed in detail below (in reverse order of issue complexity), there is the question of whether the scope of this case falls within the four corners of the Platforms' TOS. The

[1] As will be discussed below, some of the transfer motions get into private interests (*e.g.*, parties' economic interests, convenience of prospective Platform witnesses, judicial economy / court congestion) in the forum selection clause enforceability analysis; but, we concur with Google that this does not involve a traditional §1404(a) analysis that takes private interests into consideration.

scope of this case extends well beyond the social media services contemplated by the TOS – this is not a contractual dispute involving Big Tech's ordinary carrying out of interactive computer services contemplated within the TOS. Instead, this case centers on significant constitutional violations by Defendants, including Government-coerced censorship and anti-competitive practices, which fall entirely outside the scope of the Platforms' "contracts" (TOS) for regarding interactive computer services. The heart of this case is the Platforms' being heavily coerced and fully directed by (quite possibly in conspiratorial fashion) Government Defendants to censor Plaintiffs' voices *via* censorship (restraint of Plaintiffs' individual civil liberties) bolstered by fabricated "disinformation" / "misinformation" data conjured up by NGOs (*e.g.*, NewsGuard, GDI, ISD) at the Government Defendants' behest. Had this been a routine content-filtering case involving *only* Big Tech and their standard provision of interactive computer services (in the realm of 47 U.S.C. §230(c)), the Platforms' argument might have had merit. This is not that kind of case.

The allegations (and causes of action) of the Amended Complaint involve far more than the social media / interactive computer services spelled out in the Platforms' so-called "contracts" labeled TOS. Google's motion to transfer correctly notes that the Amended Complaint *does not allege a breach of contract cause of action* (see [D.E. 37] at 6-7), and, rightly so – again, this action has nothing to do with the interactive computer services contemplated by the TOS. This case does not fall within the scope of the Platforms' TOS containing the forum selection clauses because this action involves far more than the Platforms' interactive computer services and includes more party Defendants than just Big Tech. Where, for example, do the TOS contract with Plaintiffs for other parties such as the Government and foreign NGOs to lean on Big Tech to censor the voice of Plaintiffs and cripple their businesses in the process? Nowhere.

Second, there is the question of whether the TOS (and their forum selection clauses) are contractually valid. In this analysis, the legal considerations around forum selection clauses (excluding private interests, despite some inappropriate references in the Platforms' motions) actually favor the Plaintiffs, not the Platforms. For example, "fraud" and "overreach" apply here in the Court's forum selection enforceability assessment. As another example, Plaintiffs are unlikely to receive fair treatment ("their day in court") in the N.D. Cal., where the court has shown nearly two-and-a-half decades of Big Tech bias, with case law overwhelmingly benefiting these companies. Transferring this matter to the N.D. Cal. would compromise any assurance of objectivity / neutrality in resolving this dispute. Moreover, Texas absolutely has a strong public interest in the appropriate adjudication of a dispute revolving around Texans' First Amendment rights (*e.g.*, free speech / free press) being deprived by Californians (Platform Defendants), District of Columbians (Government Defendants), New Yorkers (NewsGuard), and the British (ISD, GDI). As the Amended Complaint appropriately alleges, this entire nation is plagued by the nefarious conduct spelled out in the Amended Complaint. *See, e.g.*, [D.E. 4] at ¶ 20. Strong public policy / interest weighs in favor of having Texas adjudicate the Texan Plaintiffs' action amidst the constitutional rights back-drop of this matter (constitutional rights that cannot be overridden by any "contract"), especially given the aforementioned California judiciary's bias in Big Tech disputes. Moreover, given the significant harm to Plaintiffs' businesses (all felt in Texas), Texas has a strong public interest in adjudicating a matter with substantial implications for its local economy. For example, just with respect to Plaintiffs' workforce, the Defendants' wrongdoing has negatively impacted 15-20 employees to some degree or another. These employees are Texans, not Californias, and Texas has a strong public interest in protecting its workforce / local economy.

Third, regarding Google's argument that the Plaintiffs are Wyomingites rather than Texans, this is simply not the case. Everything about a traditional "nerve center" analysis (the simplest and most appropriate analysis per SCOTUS) puts the Plaintiffs squarely at home in Texas in this Court.

Fourth, Meta and X argue that the harm / injury location was California, not Texas, and that Plaintiffs accordingly somehow cannot establish venue per §1391(b)(2). This argument, however, is flat wrong. The location of harm / injury can certainly be considered where the harm / injury was suffered / felt by the Plaintiffs (here, Bastrop County, Texas). Plaintiffs need only establish one of §1391(b)'s subparts in order to confer venue in this Court, and Plaintiffs' suffering / feeling the harm of Defendants' wrongdoing in Bastrop County plainly satisfies the "substantial part of the events or omissions giving rise to the claim occurred" language of §1391(b)(2).

For all of the foregoing reasons, all of which are discussed in greater detail below, the Platforms' transfer motions should be denied.

III. Legal Analysis

A. Legal Standards

1. Forum Selection Clause Enforceability / Transfer

In assessing a transfer motion predicated on a forum selection clause, the Court "must first determine whether the forum-selection clause … is a contractually valid forum-selection clause." *Mendoza v. Microsoft, Inc.*, 1 F.Supp.3d 533, 542 (W.D. Tex. 2014) (citing *Atl. Marine Const. Co., Inc. v. U.S. Dist. Cout for W.D. Tex.*, 134 S.Ct. 568, 581 n.5 (2013)). "Whether a forum-selection clause applies to the present case involves two separate inquiries: (1) whether the forum-selection clause is enforceable, and (2) whether the present case falls within the scope of the forum-selection clause." *Id.* at 542-543 (citing, inter alia, *Braspetro Oil Services Co. v. Modec USA, Inc.*,

240 Fed.Appx. 612, 616 (5th Cir. 2007) for the proposition that enforcing a forum selection clause "requires first assessing the clause's contractual validity and its scope").

As to the first prong of the analysis (contractual validity), forum selection clause may be considered unreasonable / unenforceable if:

> (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.

Braspetro Oil Servs. Co. at 615 (5th Cir. 2007) (internal citations omitted); *see also Mendoza* at 543. As to the fourth sub-prong (public policy / interest) of the first prong, these factors are considered: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law." *Mendoza* at 550 (citing *Atl. Marine Const. Co., Inc.* at 581–582).

As to the second prong of the transfer analysis (scope):

> To determine whether the forum-selection clause applies to the type of claims asserted in the lawsuit, courts 'look to the language of the parties' contract to determine which causes of action are governed by the forum selection clause...." *Marinechance Shipping, Ltd. v. Sebastian,* 143 F.3d 216, 222 (5th Cir.1998). 'If the substance of the plaintiff's claims, stripped of their labels, does not fall within the scope of the forum selection clause, the clause cannot apply.' *Id.*

Mendoza at 547.

2. "Nerve Center"

§1331(b) provides that "'a corporation shall be deemed to be a citizen of any State by which it has been incorporated *and* of the State where it has its principal place of business.'" *Hertz Corp. v. Friend*, 130 S.Ct 1181, 1183 (2010) (emphasis added). "The phrase 'principal place of business'

in § 1332(c)(1) refers to the place where a corporation's high level officers direct, control, and coordinate the corporation's activities, *i.e.*, its 'nerve center,' which will typically be found at its corporate headquarters." *Id.* "[T]he 'nerve center' approach … is superior to other possibilities" in assessing the location of a company's principal place of business. *Id.* at 1184.

> The public often considers [the nerve center to be] the corporation's main place of business. … [T]he application of a more general business activities test has led some courts … to look not at a particular place within a State, but incorrectly at the State itself, measuring the total amount of business activities that the corporation conducts there and determining whether they are significantly larger than in the next-ranking State. [A]dministrative simplicity is a major virtue in a jurisdictional statute. A 'nerve center' approach, which ordinarily equates that 'center' with a corporation's headquarters, is simple to apply *comparatively speaking*. By contrast, a corporation's general business activities more often lack a single principal place where they take place. … A 'nerve center' test [is the proper approach for determining principal place of business, not] [a] general business activities test… .

Id. at 1184-1185 (internal citations omitted) (emphasis in original).

3. Location Of Harm / Injury

"To determine whether venue is proper, courts look to §1391(b)'s three subsections. If a case's chosen venue falls under one of the three subsections, 'venue is proper; if it does not, venue is improper....'" *Hawbecker v. Hall*, 88 F.Supp.3d 723, 730 (W.D. Tex. 2015) (citing *Atlantic Marine Const. Co.* at 577)). §1391(b)(2) confers venue "in a 'judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.'" *Id.* at 730-731.

When assessing the location of harm / injury, "the Court may consider the venue of where [the harm was inflicted] and the venue of where the harm was felt to determine the location of 'a substantial part of the events' under 1391(b)." *Hawbecker* at 731 (internal citation omitted). Ultimately, "[v]enue may be proper in multiple locations. If the [alleged injurious acts occurred] in [California], then [California] might also be a proper venue. However, considering the effect of

the alleged [injury] was intended to be felt in [Bastrop County], the [Austin] Division of the Western District of Texas is a proper venue in this case." *Id.* (internal citations omitted).

B. Plaintiffs' "Nerve Center" Is Plainly Situated In Bastrop County, Texas

This Response addresses the Platforms' arguments in order of complexity, beginning with less complex issues. We begin, therefore, with Google's argument that Plaintiffs are Wyomingites rather than Texans. *See* [D.E. 37] at 1-2 and 8 n. 4. Per the above legal standard, a plaintiffs' state of incorporation and place of principal business (*i.e.*, "nerve center") are two different considerations in a Court's determining whether a plaintiff has brought the action in the right place. *See Hertz Corp* at 1183, *supra*. "The phrase 'principal place of business' in § 1332(c)(1) refers to the place where a corporation's high level officers direct, control, and coordinate the corporation's activities, *i.e.*, its 'nerve center,' which will typically be found at its corporate headquarters." *Id.*

Per SCOTUS in *Hertz*, the "nerve center" approach is the simplest (and, therefore, the most appropriate) way in which to determine the location of a "principal place of business," rather than a "general business practices" assessment. As one can plainly see from the Plaintiffs' Declaration attached hereto as Ex. 1 and incorporated fully herein by reference, Plaintiffs' "principal place of business" (and sole place of business, for that matter) is located in Bastrop County. Per *Hertz*, that ends the analysis here as to whether, as Google argues (or at least strongly suggests), Plaintiffs were somehow wrong in bringing this action in this Court merely because their state of incorporation is Wyoming – per *Hertz*, Plaintiffs were entitled to bring this action where their nerve center is located. Nevertheless, Plaintiffs' Declaration (Ex. 1) also established that Plaintiffs' business practice flow almost entirely (if not entirely) out of Bastrop County. Transfer to California should not occur merely because Plaintiffs were incorporated in Wyoming (a place where Plaintiffs' husband and wife principals have not lived for over twenty years).

Continuing with addressing the Platforms' transfer arguments in reverse order of complexity, we now address Meta's and X's argument that this matter should be transferred to the N.D. Cal. Court because Big Tech inflicted the alleged harms from California. *See* [D.E. 38] at 12, 14 (wherein Meta argues that litigation can only unfold where the harm is inflicted) and [D.E. 39] at 7-8, 15-18 (wherein X argues that litigation can only unfold where the harm is inflicted).

C. Venue Is Proper In This Court Under Section 1391(b)(2) Because The Alleged Harms That Plaintiffs Have Suffered Were Felt In This Jurisdiction

Meta and X argue that the: "substantial part of the events or omissions giving rise to the claim occurred" aspect of §1391(b) only takes considers the location of harm infliction, not the location of harm suffering. This is wrong – per this Court, in assessing the location of harm in analyzing the propriety of venue under §1391(b)(2), "the Court may consider the venue of where [the harm was inflicted] *and* the venue of where the harm was felt to determine the location of 'a substantial part of the events' under 1391(b)." *Hawbecker* at 731 (internal citation omitted) (emphasis added). Ultimately, "[v]enue may be proper in multiple locations. If the [alleged injurious acts occurred] in [California], then [California] might also be a proper venue. However, considering the effect of the alleged [injury] was intended to be felt in [Bastrop County], the [Austin] Division of the [W.D. Tex.] is a proper venue in this case." *Id.* (internal citations omitted).

Here, that the Platforms inflicted the alleged harms / injuries from California is of no moment in deciding whether venue is appropriate in this Court because, per this Court, it is appropriate for a plaintiff to bring an action in the location in which the plaintiff suffered (or felt) the harms / injuries complained of. Here, the Amended Complaint certainly lays out how Plaintiffs have been harmed by Defendants' actions (no Platform transfer motions can rightly argue to the contrary, especially at this early stage where there has been no discovery and Plaintiffs' allegations

are to be considered true, *see, e.g. Hawbecker* at 727 ("[t]he Court must accept the uncontroverted allegations in the Complaint, affidavits, or other documentation as true," internal citation omitted))

Here, Defendants' severe curtailing of Plaintiffs' businesses *via* the Defendants' wrongdoing averred in the Amended Complaint was naturally felt where Plaintiffs' businesses are located and carry out the vast majority (if not all) of their functions – Bastrop County. *See* Ex. 1. There is no indication in the transfer motions that the Platforms only intended for Plaintiffs to feel the harm of the Platforms' wrongdoing in California; indeed, that would be an absurd contention.

> To determine whether venue is proper, courts look to § 1391(b)'s three subsections. If a case's chosen venue falls under one of the three subsections, 'venue is proper; if it does not, venue is improper....' *Atlantic Marine Const. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, ––U.S. ––––, 134 S.Ct. 568, 577, 187 L.Ed.2d 487 (2013).

Hawbecker at 730-731. X's transfer motion, for example, addresses each of §1391(b)'s three subsections. But, per this Court in *Hawbecker*, such was unnecessary. Per *Hawbecker*, Plaintiffs only needed to satisfy one of §1391(b)'s subsections to establish proper venue in this Court. In *Hawbecker*, this Court appropriately only looked to one allegation in the complaint (Docket No. 1 at ¶ 2) in deciding enough had been alleged in order to confer venue pursuant to §1391(b)(2). Such an allegation is present here – *see* June 21, 2024, Am. Compl. [D.E. 4] at ¶ 37. But, here, the Amended Complaint alleges more in relation to harm. *See, e.g., id.* at ¶¶ 18-19, 21, 121, 213, 218.

We now turn to the most complex issue raised by the Platforms' transfer motions – the (un)enforceability of the forum selection clauses within the Platforms' TOS. But, in continuing to address less complex issues first, we analyze the scope of the TOS before analyzing TOS validity.

D. The Forum Selection Clauses Are Unenforceable For Myriad Reasons

Per this Court in *Mendoza* (which such case cited to both SCOTUS and Fifth Circuit Court authority), the (un)enforceability of a forum selection clause involves a two-part analysis. One part of the analysis is the validity of the "contract" in which the forum selection clause is found, and

this assessment is broken out into sub-considerations ("fraud" / "overreach," "day in court," "public policy / interest"). The other part of the analysis is whether the gravamen of a complaint (allegations, causes of action, parties) falls within the scope of the "contract" containing the forum selection clause; *i.e.*, here, whether the gravamen of the Amended Complaint involves the ordinary interactive computer services contemplated by the Platforms' TOS or something else. We begin by addressing scope and we conclude by addressing contractual validity.

1. This Case Has Nothing To Do With The Platforms' TOS / The Scope Of This Matter Goes Well Beyond The Platforms' Ordinary Consumer Services

"This lawsuit is multi-faceted regarding the interrelationships between the various actors / wrongdoers / Defendants and the acts / wrongs flowing from those relationships. … Am. Compl., [D.E. 4] at ¶ 1. The second averment of the Amended Complaint reads as follows:

> As to Government's anti-competitive animus, for example, this lawsuit addresses Government's aim to eradicate (by way of the Government's Tools … implemented by the Government's Instruments …) Plaintiffs from social media platform spaces (*e.g.*, Facebook, Google, Twitter) relating to the dissemination of, for example, COVID information, which such social media space the Government and Plaintiffs compete over in the COVID vein. Put differently, part of this lawsuit involves Government's voracious appetite to silence competitive COVID-related speech involving viewpoints that do not square with those of the Government, which include Plaintiffs' viewpoints on COVID in general, COVID treatment, and / or COVID avoidance. Indeed, "the Government was the primary source of misinformation during the pandemic, and the Government censored dissidents [Plaintiffs] and critics [Plaintiffs] to hide that fact." ~ Stanford U. Professor J. Bhattacharya (speech with the MIT Free Speech Alliance).

Id. at ¶ 2 (footnote omitted).

The third averment of the Amended Complaint reads as follows:

> As to the Government's Instruments' anti-competitive animus, for example, this lawsuit also addresses Big Tech's anti-competitive animus towards Plaintiffs concerning social media space (*e.g.*, Facebook, Google, and Twitter platforms) in general, which such space is of substantial revenue generating potential (*e.g.*, advertising monies and web trafficking monies, derived from the dissemination of information) and which such space Plaintiffs and Facebook (for example) compete over. Put differently, part of this lawsuit involves Big Tech's insatiable,

> monopolistic greed to augment corporate profit in anti-competitive fashion. This … not only serves Big Tech in fulfilling the Government's coerced censorship objectives, but also in fulfilling Big Tech's monopolistic money-making objectives.

Id. at ¶ 3.

The interrelation of Defendants in effectuating the alleged wrongdoing unfolded like this:

> Over approximately the last year, through the release of the internal communications at Twitter (the "Twitter Files"), the preliminary discovery in *Missouri v. Biden*, the House of Representatives' release of the "Facebook Files," and ongoing responses to FOIA requests, for examples, Americans have learned that the Government has affirmatively coerced social media platforms (*e.g.*, Facebook, Google, Twitter) to censor lawful and legitimate (but disfavored) information of their own users (*e.g.*, Plaintiffs) by way of, for example, "misinformation" / "disinformation" / "untrustworthiness" / "unreliableness" / "riskiness" data manufactured by the Government-funded Tools. That is, the Government has not only coerced (*via* exertion of extreme pressure and threat) Big Tech into the Government's desired censorship campaign (*i.e.*, overt molding / manipulation of the modern public square), but the Government has also equipped Big Tech with the maligning / discriminatory Tools-based information (*e.g.*, NewsGuard "blacklist") by which to carry out such heavy-handed censorship.
>
> Here, the Government's animus toward / motivation for stripping Plaintiffs (a large digital news-media presence) of their voices and economic well-being (through Government-coerced Big Tech facilitated censorship "supported" by Government-funded "misinformation" / "disinformation" / "untrustworthiness" / "unreliableness" / "riskiness" smear data hoked up by the Government's Tools) was / is that the Plaintiffs and the Government were / are news-media competitors (to Government and its partners) in the space of healthcare and life sciences who did / do not share the same views on a number of related topics / issues.
>
> Here, one of the hot topics / issues (although not the only topic / issue) over which Plaintiffs and the Government did / do not share similar views and over which Plaintiffs and the Government were / are in competition for social media platform space was / is COVID. And, here, the Government does not want to concede social media space to anybody (Plaintiffs) who holds differing viewpoints on COVID because the public may well choose to get COVID information from Plaintiffs instead of the Government and choose to make COVID-related decisions based on Plaintiffs' information rather than the Government's information.
>
> Because Plaintiffs present a competitive threat to the Government in relation to COVID, Plaintiffs were / are disfavored by the Government (*i.e.*, sources of "misinformation" / sources of "disinformation" / "risky" / "untrustworthy" / "unreliable" per the Government-funded Tools) and were / are accordingly due to be eliminated from the modern public square that is social media vis-à-vis

> Government-coerced Big Tech censorship "substantiated" by Government-funded Tools.

Id. at ¶¶ 5-8.

This conspiratorial web between Government, Big Tech, and other foreign and domestic NGOs has absolutely nothing to do with the ordinary interactive computer services contemplated by the Platforms' TOS containing the forum selection clauses at issue; *i.e.*, the gravamen of the Amended Complaint falls outside the scope of the TOS "contract." Accordingly, as Google's transfer motion rightly points out, the Amended Complaint *does not* contain a breach of contract cause of action. This is not the product of artful draftsmanship; rather, this is the product of what this case is really about (a conspiratorial web, coerced by the Government, aimed at violating constitutional rights and effectuating other illegalities through the Government's tools and instruments; here, Big Tech, NewsGuard, ISD, and GDI) and what this case is not about (a contract pertaining to ordinary interactive computer services contemplated by the TOS; *i.e.*, a contract pertaining to the individual conduct of Platform Defendants). The Platforms' decisions to eradicate Plaintiffs from their social media spaces had nothing to do with content filtering related to ordinary interactive computer services contemplated within TOS; *i.e.*, this is not a 47 U.S.C. §230(c) case.

In addition to the common allegations of the Amended Complaint *prima facie* falling outside the scope of social media services contemplated by the Platforms' TOS (which is the only reason this Court needs to deny the transfer motions), the Amended Complaint's causes of action necessarily fall outside the scope of ordinary interactive computer services contemplated by the TOS. Counts I-II (concerning all Defendants) pertain to the abridgement of Plaintiffs' constitutionally guaranteed First Amendment free speech and free press rights, respectively. *See* [D.E. 4] at ¶¶ 210-219. The constitutionally repugnant wrongdoing at issue in Counts I-II has

nothing to do with ordinary interactive computer services contemplated by the TOS, as if constitutional rights can be contracted around anyway.[2]

Count VI (concerning the Platform Defendants, as well as NewsGuard, ISD, and GDI) involves violation of Texas' Unfair Competition / Antitrust Statutes. *See* [D.E. 4] at ¶¶ 252-262. Count VII (concerning these Defendants) involves violation of Texas' Discourse On Social Media Platforms Statute. *See id.* at ¶¶ 263-271. First, as it relates to this section of the brief (the conduct complained of in the Amended Complaint falling outside the scope of the TOS), the TOS should not be allowed to abrogate Texas statutes. But, second, these causes of action implicate the next section of this brief (Texas having a public interest cutting against enforcement of the TOS' forum selection clauses); and, so, this is discussed in greater detail in the next section of this brief.

Count VIII (concerning the aforementioned Defendants) involves the negligence exhibited by the Platform Defendants (in addition to the NewsGuard, ISD, and GDI Defendants) in carrying out (without any real independent thought) the Government's demanded censorship of Plaintiffs. *See* [D.E. 4] at ¶¶ 272-275. Negligence hinges on the (un)reasonableness of the aforementioned Defendants' conduct. Negligent / unreasonable conduct is not something contracted to between the parties within the TOS; *i.e.*, Count VIII falls outside the scope of the TOS; *i.e.*, Count VIII does not implicate the ordinary interactive computer services contemplated within the TOS.

Count IX (concerning the aforementioned Defendants) involves these Defendants' tortious interference with business relationships / prospective economic advantage. *See id.* at ¶¶ 276-279. Tortious interference is not something contracted to between the parties within the TOS; *i.e.*, Count

[2] Counts III-V concern the Government Defendants and are, therefore, not germane to the instant motion practice.

IX falls outside the scope of the TOS; *i.e.*, Count IX does not implicate the ordinary interactive computer services contemplated within the TOS.

Counts X - XII (concerning just the Platform Defendants) involve the Platform Defendants' negligent misrepresentations, fraud, and promissory estoppel, respectively, concerning what their social media services were supposed to be. *See* [D.E. 4] at ¶¶ 280-295. While these Counts involve the social media services contemplated within the TOS, the Plaintiffs' claims of negligent misrepresentation, fraud, and promissory estoppel (as alleged and applied here) align with the fraud exception to forum selection clause enforceability, discussed in the next section.

2. The TOS Are Contractually Invalid, It Would Be Unreasonable To Enforce Same

At the threshold of the contractual validity analysis, there is the fact that the TOS are unenforceable contracts of adhesion. An adhesion contract is defined as "a standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about its terms." Garner, Bryan A., *Black's Law Dictionary* at 139 (2d pocket ed., 2001). It cannot be legitimately disputed that the TOS are something other than adhesion contracts; *i.e.*, something other than "take it or leave it" contracts that consumers have no say over. The interplay between adhesion contract tenets and forum selection clause enforceability is nicely addressed by the dissenting opinion in *Carnival Cruise Lines, Inc. v. Shute*, 111 S.Ct. 1522 (1991):

> Forum-selection clauses in passenger tickets involve the intersection of two strands of traditional contract law that qualify the general rule that courts will enforce the terms of a contract as written. Pursuant to the first strand, courts traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power. Some commentators have questioned whether contracts of adhesion can justifiably be enforced at all under traditional contract theory because the adhering party generally enters into them without manifesting knowing and voluntary consent to all their terms. …

> The common law, recognizing that standardized form contracts account for a significant portion of all commercial agreements, has taken a less extreme position and instead subjects terms in contracts of adhesion to scrutiny for reasonableness.
>
> > Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all of the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.
>
> The second doctrinal principle implicated by forum-selection clauses is the traditional rule that 'contractual provisions, which seek to limit the place or court in which an action may ... be brought, are invalid as contrary to public policy.' … Although adherence to this general rule has declined in recent years, particularly following our decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), the prevailing rule is still that forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy. … A forum-selection clause in a standardized passenger ticket would clearly have been unenforceable under the common law before our decision in *The Bremen*, see 407 U.S., at 9, and n. 10, 92 S.Ct., at 1912-13, and n. 10, and, in my opinion, remains unenforceable under the prevailing rule today.
>
> *The Bremen*, which the Court effectively treats as controlling this case, had nothing to say about stipulations printed on the back of passenger tickets. That case involved the enforceability of a forum-selection clause in a freely negotiated international agreement between two large corporations providing for the towage of a vessel from the Gulf of Mexico to the Adriatic Sea. The Court recognized that such towage agreements had generally been held unenforceable in American courts, but held that the doctrine of those cases did not extend to commercial arrangements between parties with equal bargaining power. *Id.* at 1530-1532 (internal citations omitted).

Id. at 1530-1532 (various internal citations omitted).

This case does not involve a scenario such as that found in *The Bremen* where the parties freely negotiated the contractual instrument at issue (here, the TOS). Rather, the TOS are indisputably adhesion contracts wherein Plaintiffs had zero say / negotiation right as to the terms

of same. "The prevailing rule is [accordingly] still that forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy." *Id.* at 1531. Given the forum selection clauses at issue here were not freely bargained for (not to mention, would involve additional expense for Plaintiffs if forced to litigate in California and also would place Plaintiffs in a highly biased jurisdiction where it would be more than likely Plaintiffs would be denied remedies otherwise available outside the N.D. Cal. Court), the forum selection clauses in the TOS "are not enforceable" under the "still prevailing" rules set forth above.

But, in an abundance of caution, we move on with discussion of other considerations for courts in assessing the validity of contracts containing a forum selection clause ("fraud" / "overreach," "deprivation of day in court," "unfairness of chosen law," and "public policy," *see Braspetro Oil Servs. Co.* and *Mendoza*, *supra*).

a. The TOS Are The Product Of Overreach And Fraud, The Forum Selection Clauses Found Therein Are Accordingly Unenforceable

There is also contract unconscionability, defined as follows: "[t]he principle that a court may refuse to enforce a contract that is unfair or oppressive because of … overreaching contractual terms, especially terms that are unreasonably favorable to one party while precluding meaningful choice for the other party." *Black's Law Dictionary* at 731. Indeed, we now turn to the overreach (and, thus, unconscionability) of the forum selection clauses embedded within the Platforms' TOS.

First, there is no way that parties can contract around the United States Constitution or Texas law, or otherwise contract as to illegality. To say that the TOS (and their forum selection causes) capture Amended Complaint Counts I-II, VI-IX, therefore, would be the epitome of contractual "overreach," militating in favor of this Court not enforcing the forum selection clause. Second, Counts X-XII implicate the negligent misrepresentations or fraudulent representations (all of which is promissorily estopped) made by the Platform Defendants' regarding the social media

services contemplated in their TOS. Causes of action concerning fraud lacing the very services implicated by a services "contract" (the TOS) are not subject to a services contract's forum selection clause.

b. If This Matter Is Transferred To The Northern District Of California Court, Plaintiffs Would More Than Likely Be Deprived Of Their "Day In Court" Because Of The Historical "Unfairness" Demonstrated By That Court Relating To Big Tech Disputes

Undersigned counsel has been quagmired in the N.D. Cal. Court system (as well as the Ninth Circuit) for six-plus years in a case in which the California courts have not followed the letter of the law, Congressional intent, or even the Constitution. *See, e.g., Fyk v. Facebook*, No. 4:18-cv-05159-HSG (N.D. Cal.). Undersigned can properly attest, as an officer of the court in over 20 jurisdictions (including the State of Texas and all of its four federal district courts) beginning in 2007 (Florida), that (1) in the six-plus-years involved in the aforementioned *Fyk* matter, undersigned has personally assessed several dozen California cases involving Big Tech disputes, and (2) with only a few exceptions, the California courts (namely the N.D. Cal. Court) have demonstrated point blank Big Tech bias in resolving Big Tech disputes. If this matter is transferred to the N.D. Cal., it is doubtful Plaintiffs will have their "day in court."

c. Public Policy Cuts Against Transfer

Texas has a compelling public interest in protecting its citizens (here, Plaintiffs, their principals, and their employees) from any erosion of constitutionally guaranteed rights. Given the documented history of Big Tech bias in the N.D. Cal., this Court has a duty to safeguard the constitutional rights implicated in Counts I-II of the Amended Complaint.

Further, Texas has a strong public interest in preventing non-Texans (like the Platform Defendants) from circumventing its statutes. Texas should seek to ensure that Big Tech does not undermine its unfair competition and antitrust laws (Count VII) or its public discourse on social

media statute (Count IX). These laws embody Texas (not California) prerogatives. Ensuring Texas law is upheld is not guaranteed if this case is transferred to the Big Tech biased N.D. Cal. Court.

Texas has a substantial public interest in protecting its workforce and economy, not California (which favors its Silicon Valley Big Tech workforce). Plaintiffs, along with all of their W2 employees, are Texans based in Bastrop County (see Ex. 1), and the vast majority of Plaintiffs' business flows through the Texas economy (*see id*.). California has no vested interest in safeguarding Texas' workforce or economy, Texas does. As outlined in this brief, the harms / injuries experienced by Plaintiffs, along with the resulting impact on their employees, have been felt solely in Bastrop County. This Court should retain this case to ensure that the Texas workforce and economy are not compromised by the actions of California Platform Defendants.

E. Private Interests Raised By Some Of The Platforms' Transfer Motions

At the threshold of this section, Plaintiffs agree with what at least one of the Platforms (Google at the very least, *see, e.g.*, [D.E 37] at 8 n. 4) with respect to the view that this Court's transfer assessment should not venture into the realm of private interests. *See, e.g.*, *Mendoza* at 549-550, *supra*. But, given at least one of the Platforms' transfer motions (X) leans heavily into private interests, Plaintiffs briefly address some of the more key private interest considerations.

1. This Court Is Not Inferior To California In Legal Ability

Some of the Platforms' transfer motions argue that the N.D. Cal. Court is better equipped to adjudicate matters involving Big Tech because of how many such matters the N.D. Cal. Ct. has adjudicated in the past, resulting in the N.D. Cal. Ct.'s supposed superior knowledge concerning germane case law or supposed superior ability to apply the law to the parties and the issues at hand. This Platforms argument is the epitome of poppycock, and, frankly, insulting to this Court.

Unlike the Platforms, we have confidence in this Court's legal acumen and related ability to comfortably adjudicate this matter; *i.e.*, ability to not somehow be confused by law or ability to not somehow misapply the law. Moreover, as discussed above, if any court were to be rightly accused of being more susceptible to misconstruing / misapplying the law relating to Big Tech disputes, it would be the N.D. Cal. Court (not from a legal acumen standpoint, but from an impartiality standpoint), given the N.D. Cal. Ct. has consistently demonstrated a strong bias toward resolving Big Tech disputes in favor of their next door Big Tech neighbors. So, if judicial capability / ability (and, thus, the propensity for ensuring correct case outcomes) were to be analyzed here, that analysis certainly should come down in favor of maintaining this action in this Court of greater objectivity / neutrality regarding, at the very least, the kinds of parties at play.[3]

2. This Court Is Not More Congested Than California Courts / Overall Federal Judicial Economy Does Not Militate In Favor Of Transfer

Some of the Platforms' transfer motions argue that overall federal judicial economy would benefit from transferring this case to the N.D. Cal. Court because of less congestion found in that Court. We do not, however, construe the statistics that way. Regarding caseload and termination rates, the N.D. Cal. Court consistently has one of the highest caseloads per judge in the federal judiciary, especially for civil cases, which often results in longer delays for case resolutions. Meanwhile, the W.D. Texas Court has been able to maintain a more efficient flow of cases, with shorter median times for case terminations overall. *See, e.g.*, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 and https://www.uscourts.gov/statistics-

[3] If this Court does not see it our way on this issue or others (*i.e.*, should this Court decide to transfer this action), Plaintiffs specifically request that this matter be transferred to District Judge William Alsup, who has demonstrated that he, unlike so many of his colleagues on the N.D. Cal. Ct. bench, is capable of adjudicating Big Tech disputes impartially / correctly. *See, e.g., X Corp. v. Bright Data, Ltd.*, 2024 WL 2113859, No. 23-03698 (N.D. Cal. May 9, 2024) and *Dangaard v. Instagram, LLC*, 2022 WL 17342198, No. 22-01101 (N.D. Cal. Nov. 30, 2022).

reports/analysis-reports/federal-judicial-caseload-statistics. This difference suggests that transferring the case to California would likely introduce delays contravening judicial economy. N.D. Cal. Court's caseload burden is further intensified by long-standing judicial vacancies and high-volume civil dockets, particularly in high-demand areas like San Francisco. The W.D. Texas Court, in contrast, benefits from a more stable judicial lineup, allowing for faster resolutions. *See, e.g.*, https://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics. Shifting the case to an overburdened court would likely hinder efficiency.

3. Economic Considerations – The Convenience Of Prospective Witnesses (And Party Costs Associated With Testimony) Tilts In Favor Of The Plaintiffs

The idea that it will be easier / more convenient for the Platforms' prospective witnesses to participate (which such idea is espoused in some of the Platforms' transfer motions) is a wash at best. There is an equally compelling (if not more compelling) argument that it will be easier / more convenient for the witnesses of the little guy (by far the Plaintiffs) to participate. If this Court were to venture into the private interest that is witness convenience / participation, we submit that that scale should tilt in favor of the Plaintiffs given the net worth of the Platform Defendants is multiples upon multiples upon multiples of Plaintiffs' wealth; meaning, if any parties were better equipped to absorb costs associated with the participation of prospective witnesses (*e.g.*, travel costs), it would be the Platforms. In sum, in weighing the economic considerations of the parties (whether it be in relation to absorbing witness-related costs or otherwise), the negative economic impact of a transfer would be felt by Plaintiffs to a far greater degree than would be felt by the Platform Defendants if this matter were kept put.

WHEREFORE, for all of the foregoing reasons, whether considered separately or together, Plaintiffs respectfully request entry of an Order (a) denying the transfer motions ([D.E. 37] – [D.E. 39]), and / or (b) affording Plaintiffs any other relief that is equitable, just, or proper.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Local Rule CV-7(D), as this responsive brief does not exceed twenty (20) pages. Moreover, this responsive brief complies with the typeface and type style requirements of Local Rule CV-10, this brief has been prepared in a proportionately double-spaced typeface using Times New Roman 12-point font.

Dated: October 28, 2024.

Respectfully Submitted,

/s/ Jeffrey L. Greyber
Jeffrey L. Greyber, Esq.
Greyber Law, PLLC

and

Jeffrey Zane, Esq.
Poli, Moon & Zane, PLLC

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2024, I electronically filed the foregoing with the Court by using the applicable CM / ECF system. Participants in the case who are registered CM / ECF users will be served by the appellate CM / ECF system.

/s/ Jeffrey L. Greyber
Jeffrey L. Greyber, Esq.