

CAUSE NO. 22-0121

Deputy

The State of Texas

*Plaintiff,*

v.

Meta Platforms, Inc.  
f/k/a Facebook, Inc.

*Defendant.*

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IN THE DISTRICT COURT

71ST JUDICIAL DISTRICT

HARRISON COUNTY, TEXAS

**DEFENDANT META PLATFORMS, INC.'S SPECIAL APPEARANCE TO CONTEST PERSONAL JURISDICTION AND—SUBJECT TO SPECIAL APPEARANCE—ORIGINAL ANSWER, AFFIRMATIVE DEFENSES, SPECIAL EXCEPTIONS, AND REQUEST FOR DISCLOSURE**

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## I. Introduction

Defendant Meta Platforms, Inc. f/k/a Facebook, Inc. (“Meta”) hereby specially appears for the limited purpose of objecting to this Court’s jurisdiction over Meta. Subject to and without waiving its special appearance, Meta generally denies the allegations of the State’s Original Petition (“Petition”) and raises affirmative defenses and files special exceptions to the Petition.

## II. Meta’s Special Appearance to Contest Personal Jurisdiction

Under Texas Rule of Civil Procedure 120a, Meta—a Delaware corporation headquartered in California—makes this special appearance to this entire proceeding for the limited purpose of objecting to the jurisdiction of the Court. Meta files this special appearance before any other plea, pleading, or motion.

\* \* \*

The State challenges a popular feature nonresident-defendant Meta introduced to the Facebook platform in 2010 but no longer offers. *See* Pet. ¶¶ 38, 54 & n.16. That feature used facial recognition technology to enable people who used Facebook all over the world (not just in Texas) to more easily tag their Facebook “friends”—fellow Facebook users—in the photos and videos they uploaded to Facebook. *See* Pet. Introduction & ¶¶ 35, 37 & n.13, 38, 41, 45. If the feature determined that one of the uploading user’s friends appeared in a photo or video, Facebook would suggest that the user tag the friend by name, and, if the user confirmed the tag, Facebook would automatically notify the friend that he or she had been tagged. *See id.* Over time, the technology was expanded to improve Facebook users’ experience in other ways—including, as the Petition references, by providing users with notice and more control over the content other Facebook users uploaded but did not tag them in, and increasing Facebook’s accessibility by creating image descriptions for people who are blind or visually impaired.<sup>1</sup>

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<sup>1</sup> *See* Pet. ¶ 51 n.15 (Petition citing to and incorporating motion for summary judgment [ECF No. 299 in No.

The Petition, however, alleges that Meta violated Texas's Capture or Use of Biometric Identifier Act (CUBI) and Deceptive Trade Practices Act (DTPA) by using this facial recognition technology to analyze photos and videos of Texans on Meta's Facebook and Instagram platforms without giving them adequate notice or obtaining their consent.<sup>2</sup> While Meta believes the State's Petition is meritless, it specially appears now only to challenge the propriety of this forum to adjudicate this dispute.

A Texas court may not exercise personal jurisdiction over a nonresident defendant like Meta unless "(1) the defendant has established minimum contacts with [Texas], and (2) the exercise of jurisdiction comports with the traditional notions of fair play and substantial justice." *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 166 (Tex. 2007). As the plaintiff, the State bears the burden to plead "sufficient allegations" for this Court to exercise personal jurisdiction over Meta. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). But the sparse allegations in the State's Petition fail to carry that burden either for general or specific jurisdiction—and, as a result, Meta's special appearance should be sustained.

#### **A. Meta isn't subject to general jurisdiction because Meta isn't "at home" in Texas**

General jurisdiction exists only where a defendant's "affiliations with the State are so continuous and systematic as to render it *essentially at home* in the forum State." *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 565 (Tex. 2018) (emphasis added) (quoting *Daimler AG v. Bauman*, 134 S.Ct. 746, 761 (2014)). This is such a high bar that the Texas Supreme Court has stated categorically

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3:15-cv-03747-JD (N.D. Cal.) (relying on Declaration of Robert Sherman)).

<sup>2</sup> CUBI regulates the "capture or use of biometric identifier[s]," defined to include a "retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry." Tex. Bus. & Com. Code § 503.001(a). It prohibits, among other things, the "capture" of "biometric identifier[s]" for "a commercial purpose" unless the person "informs the individual" and "receives the individual's consent." Tex. Bus. & Com. Code § 503.001(b). The DTPA makes it unlawful to engage in any "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce." *Id.* §§ 17.44(a), 17.46(a).

that “[c]ourts do not have general jurisdiction over corporate defendants that are neither incorporated in the forum state nor have their principal place of business there, absent some relatively substantial contacts with the forum state.” *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 72 (Tex. 2016). As the Petition recognizes, Meta is incorporated in Delaware and has its principal place of business in California. Pet. ¶ 2; *see also* Decl. of M. Duffey In Support of Def. Meta Platforms, Inc.’s Special Appearance (“Duffey Decl.”), ¶ 3. The State alleges no facts and makes no argument even suggesting that this is an “exceptional” case nevertheless warranting general jurisdiction. *Daimler*, 571 U.S. at 128–131 & 139 n.19. Meta isn’t at home in Texas, and general jurisdiction is therefore lacking.

**B. Meta isn’t subject to specific jurisdiction in Texas because this lawsuit doesn’t arise from Meta’s purported contacts with Texas**

“For a court to exercise specific jurisdiction over a nonresident defendant, two requirements must be met: (1) the defendant’s contacts with the forum must be purposeful, and (2) the cause of action must arise from or relate to those contacts.” *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002). A cause of action only arises from or relates to the defendant’s contacts with the forum when there is “a ‘substantial connection’ between those activities and the operative facts of the litigation.” *M & F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co.*, 512 S.W.3d 878, 890 (Tex. 2017). The State hasn’t made this showing.

In the entire 110-paragraph Petition, the State gestures in only a handful of ways that even loosely connect Meta to Texas, alleging: (1) venue is appropriate in Harrison County because Meta has “done business in Harrison County” and thus “a substantial part of the events and omissions giving rise to the claims in this Petition occurred in Harrison County,” Pet. ¶ 4; (2) individuals in Texas use Meta’s Facebook and Instagram platforms, Pet. Introduction & ¶¶ 2, 67; (3) “Facebook’s” and “Instagram’s” policies contained purported misstatements and omissions that are at issue in the State’s causes of action, *id.* ¶¶ 58, 69; (4) Meta “contracts” with users who are in Texas, *id.* ¶ 2; and (5) Meta

“provide[d] access” to its social media platforms to users in Texas, Pet. Introduction & ¶ 2. Meta disputes the State’s Petition on the merits. But even assuming these five allegations are true, none is sufficient to subject Meta to specific jurisdiction in Texas.

*First*, the State’s assertions that Meta has “done business” in Harrison County and “a substantial part of the events and omissions giving rise to the claims in this Petition occurred in Harrison County,” *id.* ¶ 4, simply parrot statutory language; they are not jurisdictional facts. The State doesn’t even identify *which* “events and omissions” allegedly occurred in Harrison County (or anywhere else in Texas, for that matter). These “conclusory statements” cannot support specific jurisdiction. *Predator Downhole Inc. v. Flotek Indus., Inc.*, 504 S.W.3d 394, 408–09 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (no specific jurisdiction where the alleged contacts with Texas were “only implied or stated in a conclusory manner”); *see also Urban v. Barker*, No. 14-06-00387-CV, 2007 WL 665118, at \*5 (Tex. App.—Houston [14th Dist.] Mar. 6, 2007, no pet.) (same where the petition “contains conclusory statements alleging misrepresentations and fraudulent conduct”); *Haferkamp v. Grunstein*, No. 11-10-00194-CV, 2012 WL 1632009, at \*6 (Tex. App.—Eastland May 10, 2012, pet. denied) (“[Plaintiff] did not meet her initial burden of pleading sufficient allegations to bring appellees within the provisions of the Texas long-arm statute . . . [T]he petition was vague and conclusory regarding jurisdiction.”).

*Second*, it is irrelevant that users of Meta’s Facebook and Instagram platforms sit in Texas. *See* Pet. Introduction & ¶¶ 2, 67. For a specific jurisdiction analysis, only the “*defendant’s* contacts” with Texas are relevant—a plaintiff or third party’s contacts with the forum cannot create jurisdiction over the defendant. *Old Republic*, 549 S.W.3d at 561 (emphasis added) (“[A] proper minimum-contacts analysis looks to the defendant’s contacts with the forum state itself, not the defendant’s contacts with persons who reside there.”); *see also, e.g., Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005); *Walden v. Fiore*, 571 U.S. 277, 291 (2014) (“And it is the defendant, not the plaintiff or

third parties, who must create contacts with the forum State.”).

*Third*, while the State contends that Facebook’s and Instagram’s policies contained misrepresentations or omitted information, Pet. ¶¶ 58, 69, the Petition doesn’t allege Meta—which is located in California—made any purported misrepresentations or omissions about its facial recognition practices *while present in Texas* or *specifically directed to users in Texas*. And it is settled law that a defendant isn’t subject to specific jurisdiction simply because its out-of-state representations—which are part of Facebook’s and Instagram’s general policies for users around the world—are *received* in Texas. *See Michiana*, 168 S.W.3d at 791–92 (no specific jurisdiction even where alleged misrepresentations were received by a Texas resident in Texas); *see also Old Republic*, 549 S.W.3d at 565 (“[E]ven if a tort was committed and even if [defendant] knew her actions would cause an injury in Texas, her contacts do not rise to the level of purposeful availment simply because the alleged harm occurred in Texas.”); *Corley v. Vance*, 365 F. Supp. 3d 407, 434–35 (S.D.N.Y. 2019) (Facebook not subject to personal jurisdiction in New York because privacy-related claims “arise out of [Facebook’s] activity in California”), *aff’d*, 811 F. App’x 62 (2nd Cir. 2020).<sup>3</sup>

*Fourth*, the State’s allegation that Meta “contracts” with users “in Texas to provide access to its social media platforms,” *see* Pet. ¶ 2, cannot pull Meta into Texas. *See NWR Georgia Construction, LLC v. Master Woodcraft Cabinetry, LLC*, No. 06-21-00104, 2022 WL 598674, \*7–8 (Tex. Ct. App.—Texarkana Mar. 1, 2022) (no personal specific jurisdiction over defendant that “contracted with Texas companies” because “an individual’s contract with an out-of-state party alone [cannot] automatically

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<sup>3</sup> *See also, e.g., Star Motors, LLC v. Motorwerks Vehicle Sales LLC*, No. 14-18-00763-CV, 2019 WL 2385755, at \*4 (Tex. App.—Houston [14th Dist.] June 6, 2019, pet. denied) (“misrepresentations made through electronic media do not establish minimum contacts”); *Anderson v. Bechtle*, No. 01-00-00593-CV, 2001 WL 930205, at \*2 (Tex. App.—Houston [1st Dist.] Aug. 16, 2001, no pet.) (“by its very nature, failure to disclose demonstrates that a party did not have contacts with the forum state”); *cf. Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Bacarella Transp. Servs., Inc.*, No. 3:19-cv-01364-X, 2021 WL 3372263, at \*3, 8 (N.D. Tex. Aug. 3, 2021) (finding no specific jurisdiction over tort claims for shipments of phones even though defendant was licensed in Texas and was aware that a particular shipment of goods was destined for Texas).

establish sufficient minimum contacts”) (internal quotation marks omitted). Those “contracts” are the nationwide Facebook and Instagram terms of service users agreed to after navigating to and deciding to create accounts on the Facebook and Instagram platforms. See Duffey Decl., ¶¶ 4–7. But again, neither of those agreements was *targeted* specifically to Texas—they were made available and agreed to by anyone who created an account on the platform at issue, wherever they might have been (even outside the United States). See *Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 318 (5th Cir. 2021) (“For Texas to have jurisdiction . . . the article had to target Texas specifically and knowingly.”) (citing *Revell v. Lidov*, 317 F.3d 467, 476 (5th Cir. 2002)).

Specific provisions in Facebook’s and Instagram’s terms of service underscore this point. In these “contracts,” Pet. ¶ 2, Meta disclaimed Texas law and venue in favor of California. See Duffey Decl., ¶¶ 8–13. As the Texas Supreme Court has observed, the “insertion of [such] a clause designating a foreign forum suggests that no local availment was intended.” *Michiana*, 168 S.W.3d at 792–93; see also *NWR Georgia Construction*, 2022 WL 598674, at \*7–8 (“[T]he inclusion of a Georgia choice-of-law provision and . . . [a] forum-selection clause . . . indicates that NWR did not attempt to avail itself of the benefits of Texas’ laws.”). Meta’s “purposeful[] structure[] . . . to avoid the benefits and protections of [Texas] law[]” demonstrates that it never intended to target Texas with its policies, any more than it did any other state. *J.A. Riggs Tractor Co. v. Bentley*, 209 S.W.3d 322, 332, 335 (Tex. App.—Texarkana 2006, no pet.); accord *M & F Worldwide Corp.*, 512 S.W.3d at 889 (finding no personal specific jurisdiction and noting that settlement agreement “contain[ed] a New York forum-selection clause”); *Johnson*, 21 F.4th at 318 (holding that “‘fair warning’ that [a defendant’s] activities may subject him to another state’s jurisdiction . . . permits the defendant to ‘structure its primary conduct to lessen or avoid exposure to a given State’s courts’”) (internal quotation marks omitted).

*Finally*, Meta isn’t subject to specific jurisdiction in Texas simply because individuals in Texas had “access to its social-media platforms.” Pet. ¶ 2. A defendant’s operation of a website “presumably



directed at the entire world” does not confer personal jurisdiction over that defendant in any particular forum. *Johnson*, 21 F.4th at 318–19 (internal quotation marks omitted).<sup>4</sup> And a user’s unilateral decision to access such a website in a particular forum cannot manufacture this jurisdiction, either. *See, e.g., Old Republic*, 549 S.W.3d at 561; *Michiana*, 168 S.W.3d at 785; *Walden*, 571 U.S. at 291.

That common-sense outcome flows from the due process principles underlying the doctrine of personal jurisdiction: “the plaintiff cannot be the only link between the defendant and the forum,” *Walden*, 571 U.S. at 285, because to hold otherwise would “undermine” the “fairness” that the “defense of personal jurisdiction exists to ensure,” and would mean jurisdiction has “no limit,” *Johnson*, 21 F.4th at 320; *accord Admar Int’l, Inc. v. Eastrock, L.L.C.*, 18 F.4th 783 (5th Cir. 2021) (collecting cases). That simply “cannot be right.” *Head v. Las Vegas Sands, LLC*, 298 F. Supp. 3d 963, 978–79 (S.D. Tex. 2018) (it cannot be that “a forum has jurisdiction over a foreign defendant merely because of its highly interactive and transaction oriented web pages,” because “then the same defendant is likely subject to the coercive authority of every state in the union”), *aff’d*, 760 F. App’x 281 (5th Cir. 2019).<sup>5</sup>

Crucially, the State “does not [even] *allege* that [Meta] targets its alleged biometric collection activities at [Texas] residents.” *Gullen v. Facebook.com, Inc.*, No. 15 C 7681, 2016 WL 245910, at \*2 (N.D. Ill. Jan. 21, 2016) (emphasis added). Even if it did, the same result would follow. As the State recognizes, Meta’s facial recognition technology was available to virtually all Facebook users all over

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<sup>4</sup> The U.S. Supreme Court has explained that “internet transactions” raise different “doctrinal questions” than ordinary cases where companies sell products nationwide. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S.Ct. 1017, 1028 n.4 (2021). While a court may have personal jurisdiction over a defendant that physically sells products in the forum state and elsewhere in the country, that reasoning does not extend to “the very different question[ ] whether and how a defendant’s virtual ‘presence’ and conduct translate into ‘contacts’ with a particular State.” *Id.* (quoting *Walden*, 571 U.S. at 290 n.9).

<sup>5</sup> Electronic communications in general are governed by this rule, whether a platform involves social media or a direct messaging service. *Riverside Exports, Inc. v. B.R. Crane & Equip., LLC*, 362 S.W.3d 649, 655–56 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). The recipient receives the communication wherever he or she “may happen to be at the given time, whether in Texas, Tennessee, or Tibet.” *EnerQuest Oil & Gas, L.L.C. v. Antero Res. Corp.*, No. 02-18-00178-CV, 2019 WL 1583921, at \*7 (Tex. App.—Fort Worth Apr. 11, 2019, pet. dismissed) (mem. op. on reh’g); *Lisitsa v. Flit*, 419 S.W.3d 672, 681 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (noting that where the email is received is “the direct result” of a “unilateral decision” by the recipient).

the world, not just those in Texas. See Pet. Introduction & ¶¶ 33, 35–45, 49–50, 62, 64. Meta’s purported conduct is “not targeted at [Texas] residents” specifically. *Gullen*, 2016 WL 245910, at \*2. Rather, it “simply [means] that [Meta] operates an interactive website available to [Texas] residents” that they could choose to access. *Id.*

That is not “sufficient to confer specific jurisdiction,” and it is why the federal court in *Gullen* held that it lacked specific jurisdiction in a suit involving Meta’s facial recognition technology. *Id.* at \*2–3. “Having an ‘interactive website’”—which “hardly rule[d] out anything in 2014,” much less 2022—“should not open a defendant up to personal jurisdiction in every spot on the planet.” *Id.* at \*2 (quoting *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014)). That is true for Meta in this case, and why myriad courts have reached the same conclusion. E.g., *Georgalis v. Facebook, Inc.*, 324 F. Supp. 3d 955, 960 (N.D. Ohio 2018) (no personal jurisdiction over the “ubiquitous” Facebook even where the complaint alleged that “millions [of] Facebook users in Ohio generate significant revenues for [Facebook]”); *Ralls v. Facebook*, 221 F. Supp. 3d 1237, 1244 (W.D. Wash. 2016) (“[P]ersonal jurisdiction over Facebook may not exist simply because a user avails himself of Facebook’s services in a state other than the states in which Facebook is incorporated and has its principal place of business.”).<sup>6</sup>

\* \* \*

The State has failed to carry its burden to plead “sufficient allegations” establishing any basis

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<sup>6</sup> See also, e.g., *Facebook, Inc. v. K.G.S.*, 294 So. 3d 122, 131–143 & n.11 (Ala. 2019) (holding plaintiff failed to establish personal jurisdiction and observing that other courts “have concluded that the general accessibility of Facebook’s Web site or mobile application in a forum does not provide a sufficient connection to the forum to support the exercise of general or specific jurisdiction”); *Harrison v. Facebook, Inc.*, No. 18-0147-TFM-MU, 2019 WL 1090779, at \*4 (S.D. Ala. Jan. 17, 2019), *report and recommendation adopted*, 2019 WL 1102210 (S.D. Ala. Mar. 8, 2019) (“Plaintiff’s allegations that Facebook failed to delete content that she or her agent, who happen to be residents of Alabama, posted on her Facebook page fail to show ‘with reasonable particularity any specific conduct . . . by [Facebook] that would support an exercise of specific jurisdiction’ in Alabama.”); *Wells v. Facebook Inc.*, No. 19-2379-DDC-JPO, 2019 WL 6894681, at \*5 (D. Kan. Dec. 18, 2019) (holding that plaintiff failed to show Facebook had sufficient contacts to support personal jurisdiction); *Dennis v. Zuckerberg*, No. 4:17CV0670, 2017 WL 3873761, at \*2 (N.D. Ohio Sept. 5, 2017) (holding plaintiff failed to show specific jurisdiction).

to exercise personal jurisdiction over Meta in this case. *Moki Mac*, 221 S.W.3d at 574. To find jurisdiction exists in Texas based on the State’s conclusory allegations would mean that there is “no limit” to the exercise of jurisdiction over any operator of a nationwide web platform, as a “plaintiff could sue everywhere.” *Johnson*, 21 F.4th at 320 (internal quotation marks omitted); *see also id.* at 321–22 (“To target every user everywhere . . . is to target no place at all.”). It “would not be fair,” *id.* at 320, and would more than offend “traditional notions of fair play and substantial justice,” *PHC-Minden, L.P.*, 235 S.W.3d at 166 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)), for every Internet company to be subject to suit in “all 50 states, for no other reason than that it put up a website,” *Admar Int’l, Inc.*, 18 F.4th at 788. After all, the “defense of personal jurisdiction exists to ensure fairness to defendants and to protect federalism”—and “fairness” requires that companies “have some chance to limit or avoid [their] exposure” without having “to wall themselves off from the world” or “block Texans from visiting [their] site[s].” *Johnson*, 21 F.4th at 320–23.

The Court should sustain Meta’s Special Appearance and enter a final judgment dismissing the State’s claims against Meta for want of jurisdiction.

**III. Subject to Meta’s Special Appearance to Contest Personal Jurisdiction, Meta’s Original Answer**

Subject to Meta’s Special Appearance to Contest Personal Jurisdiction and without waiving any other defenses included in this Motion, Defendant Meta generally denies each and every material allegation contained in the State’s Original Petition and states that the State should be required to prove its allegations by a preponderance of evidence as required by Texas Rule of Civil Procedure 92.

**IV. Subject to Meta’s Special Appearance to Contest Personal Jurisdiction, Meta’s Affirmative Defenses**

Subject to Meta’s Special Appearance to Contest Personal Jurisdiction and without waiving any other defenses included in this Motion, Meta states as follows and sets forth affirmatively matters constituting an avoidance or an affirmative defense under Texas Rule of Civil Procedure 94.

1. The State has not provided “fair notice” of its claims under the Capture or Use of Biometric Identifier Act (CUBI) for disclosure of purported “biometric identifiers” to unspecified “third parties,” *see* Pet. ¶¶ 64–65, 80–91 (Count II), for failure to destroy purported “biometric identifiers,” *see id.* ¶¶ 92–102 (Count III), or for violations of the Deceptive Trade Practices Act (DTPA), *see id.* ¶¶ 103–06 (Count IV), under Texas Rules of Civil Procedure 45 and 47.

2. The State’s CUBI claims (Counts I–III) are barred because Texas users of Meta’s Facebook platform consented to the activities of which the State now complains. *See* Tex. Bus. & Com. Code § 503.001 (CUBI proscribes certain conduct related to “biometric identifiers” “unless the person . . . receives the individual’s consent.”). At the outset and despite the Petition’s unsupported hyperbole, Meta’s historical facial recognition technology was unique to Facebook, meaning that the facial recognition template Meta used to identify any given individual was not a “biometric identifier” and could *not* be used to identify users outside of the Facebook platform. *Cf.* Facebook, Inc.’s Mot. for Summ. J., *In re Facebook Biometric Info. Privacy Litig.*, No. 3:15-cv-03747-JD (N.D. Cal. Mar. 16, 2018), ECF No. 299 at 19:1–24:9 (explaining facial recognition template was not a “biometric identifier” under Illinois privacy statute because it did not capture “scans of face geometry”); *see* Pet. ¶ 51 n.15 (Petition citing to and incorporating motion for summary judgment [ECF No. 299 in No. 3:15-cv-03747-JD (N.D. Cal.)]). Regardless, upon information and belief, Meta alleges that every person who signed up for Facebook—including Texas Facebook users—agreed to its terms of service, and by doing so, consented to the conduct alleged in the Petition. Further, upon information and belief, Meta alleges that Texas Facebook users consented to the conduct alleged in the Petition because they continued using Facebook after being put on notice of the facial recognition tagging features on the Facebook platform.

3. The State’s CUBI claims are also barred in part due to impossibility. Meta had no relationship with—and therefore kept no identifying records of—Texas non-users, meaning it would

have been impossible for Meta to obtain consent from them for the alleged conduct in the Petition. *See* Facebook, Inc.'s Mot. to Dismiss, *Zellmer v. Facebook, Inc.*, No. 3:18-CV-01880-JD (N.D. Cal. July 2, 2018), ECF No. 22 at 7:21–25 (“Facebook has no way of identifying (much less providing notice to, or obtaining consent from) non-users who merely appear in photographs uploaded to the service. Facebook keeps no records of such people. Nor could it, because Facebook has no idea who they are; these individuals have never interacted with Facebook or provided any identifying information.”). Meta is therefore not liable for any alleged violations of CUBI related to non-users.

4. The State’s CUBI claims are further barred because CUBI is unconstitutional as the State seeks to apply it in this case, as its application would violate the Commerce Clause of the United States Constitution. *See* U.S. Const. art. I, § 8, cl. 3.

5. The State’s CUBI claims are barred because CUBI is unconstitutional as the State seeks to apply it in this case, as its application would violate the Due Process Clauses of the United States Constitution and the Texas Constitution for being unconstitutionally vague. *See* U.S. Const. amend. XIV, § 1; Tex. Const. art. I, § 19.

6. The State’s CUBI claims are barred because CUBI does not apply extraterritorially to acts occurring outside of Texas. *See Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 682 (Tex. 2006) (holding “a statute will not be given extraterritorial effect by implication but only when such intent is clear”).

7. All of the State’s claims are barred, in whole or in part, by intervening acts or omissions. Meta alleges that all or part of the harm to Texas non-users alleged in the Petition was caused by the acts or omissions of other persons or entities (including, without limitation, acts or omissions of Texas Facebook and Instagram *users* who uploaded photos or videos including non-users, *see, e.g.*, Pet. Introduction (explaining that Texas users upload photos or videos to Meta’s Facebook platform that include Texas non-users)), for whose conduct Meta is not legally responsible.

The acts or omissions of those Texas users intervened between Meta's alleged acts or omissions and any harm allegedly suffered by Texas non-users.

8. All of the State's claims are barred, in part, because there was no special relationship between Meta and Texas non-users. In the absence of any special relationship, Meta had no duty to control the conduct of third-party users of the Facebook and Instagram platforms who uploaded photos of Texas non-users to those platforms.

9. The State's claims for civil penalties for purported violations of both CUBI and the DTPA are limited because it cannot recover penalties under both statutes "for the same act[s] or practice[s]." Tex. Bus. & Com. Code Ann. § 17.43.

10. Finally, the State's claims for civil penalties and injunctive relief are barred or limited by the prohibition against excessive fines in the Eighth Amendment of the U.S. Constitution and Article 1, Section 13 of the Texas Constitution.

\* \* \*

Meta reserves the right to assert such other and further matters constituting an avoidance or an affirmative defense as may be revealed in further discovery and/or investigation in this action.

**V. Subject to Meta's Special Appearance to Contest Personal Jurisdiction, Meta's Special Exceptions**

Subject to Meta's Special Appearance to Contest Personal Jurisdiction and without waiving any other defenses included herein, Meta asserts the following special exceptions under Texas Rules of Civil Procedure 90 and 91, or alternatively, as pleas in abatement, and asks that this Court dismiss the State's claims or require the State to replead its claims with more particularity, as follows.

1. The State hasn't provided fair notice of its claim for Meta's alleged disclosure to unspecified "third parties" of biometric identifiers in accordance with Texas Rules of Civil Procedure 45 and 47. *See* Pet. ¶¶ 64–65, 80–91 (Count II); Tex. R. Civ. P. 45, 47. CUBI places restrictions on

the disclosure of “biometric identifiers.” Tex. Bus. & Com. Code § 503.001(c)(2). But the Petition alleges only that Meta purportedly disclosed this data to “third parties” that “includ[e] other Facebook subsidiaries and related entities.” Pet. ¶ 64. The State fails to specify the subsidiaries to which Meta allegedly made such disclosures. *Id.* Even more fundamentally, the State’s vague allegations that Meta made disclosures to other “third parties” and “related entities” cannot be deemed to put Meta on fair notice of to whom it is being accused of unlawful disclosure. *See Kinder Morgan SACROC, LP v. Scurry Cnty.*, 622 S.W.3d 835, 849 (Tex. 2021) (Texas’s “notice-pleading rules require pleadings to not only give notice ‘of the claim and the relief sought’ but also of the essential factual allegations.”). Meta asks that the State be required to amend this pleading accordingly or that its CUBI section 503.001(c)(1) claim be dismissed.

2. The State hasn’t provided fair notice of its claim for Meta’s alleged failure to destroy biometric identifiers. *See* Pet. ¶¶ 92–102 (Count III); Tex. R. Civ. P. 45, 47. The Petition first alleges that “[b]ecause Facebook’s possession of biometric identifiers in the first instance was unlawful, maintaining possession of these biometric identifiers for any period of time is unreasonable, and violates Tex. Bus. & Comm. Code § 503.001(c)(3).” Pet. ¶ 99. But it then alleges that “Facebook has not destroyed the biometric identifiers it possesses by the first anniversary of the date the purpose for collecting the identifiers expired, in further violation of Tex. Bus. & Comm. Code § 503.001(c)(3).” *Id.* ¶ 100. These vague, conflicting allegations fail to put Meta on notice of, among other things, what Meta’s “purpose” was or when it expired. Regardless, and as the Petition admits, “Facebook announced, in November 2021, that it would cease use of the face-recognition feature on [] Facebook,” *id.* ¶ 54 & n.16, so one year cannot have passed yet since Meta’s “purpose” expired. Meta asks that the State be required to amend this pleading accordingly or that this claim be dismissed or stricken. *See Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 386 (Tex. 1991).

3. The State hasn’t provided fair notice of its claim under subsection (b) of section 17.46

of the DTPA. *See* Pet. ¶ 105 (Count IV); Tex. R. Civ. P. 45, 47. Subsection (a) of section 17.46 prohibits “[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce.” Tex. Bus. & Com. Code § 17.46(a). Subsection (b) provides that the term “false, misleading, or deceptive acts or practices” includes 34 specific acts known as the “laundry list.” These acts encompass a wide variety of activities, from “knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service” to “promoting a pyramid promotional scheme” to “disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge.” *Id.* § 17.46(b)(13), (16), (24). The Petition fails to specify which acts (if any) in subsection (b) Meta allegedly committed, claiming only that Meta “engaged in false, misleading, and deceptive acts and practices declared unlawful by sections 17.46(a) and (b).” Pet. ¶ 105. Meta asks that the State be required to amend this pleading accordingly or that the DTPA claim under subsection (b) be dismissed or stricken. *See Seagram & Sons*, 814 S.W.2d at 386.<sup>7</sup>

**4.** The State hasn’t provided fair notice of which Meta-owned entities allegedly violated the DTPA by making false or misleading statements or omissions. *See* Pet. ¶¶ 103–06 (Count IV); Tex. R. Civ. P. 45, 47.

Although Meta Platforms, Inc. is the named defendant, the State imprecisely labels it “Facebook.” Pet. ¶ 2. As the Petition acknowledges, however, “Facebook” is one of many platforms under the Meta umbrella. *Id.* ¶ 55 (referring to “the other platforms or operations under [Meta’s] corporate umbrella, such as Instagram, WhatsApp, Facebook Reality Labs, or its upcoming virtual-reality metaverse”). Indeed, the Petition at times uses the term “Facebook” in a way that appears to refer to Facebook the *platform*, rather than the company Meta. The State’s use of the term “Facebook”

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<sup>7</sup> To be clear, Meta isn’t arguing that the State must claim Meta’s alleged conduct violated one of the “laundry list” items to bring suit under sections 17.47 and 17.46(a) of the DTPA.



interchangeably to mean Facebook the platform and Meta the company creates ambiguity and fails to put Meta on notice of the entity through which it is being accused of taking a violative action.

This ambiguity particularly infects the State's claim for violations of the DTPA. The Petition includes the following factual allegations about "Facebook's" and "Instagram's" purportedly false statements or omissions related to that claim: (1) "Facebook's" purportedly false statement in the Instagram Data Policy that "Instagram does not run its face-recognition technology on Instagram media,"<sup>8</sup> *id.* ¶¶ 58–59, and (2) "Facebook's" purported failure to "inform[]" Texas users and non-users "of the scope of its facial recognition program" in "its" terms of use or privacy policy, *id.* ¶¶ 44, 69.

Based on those allegations, the Petition then claims that "Facebook" purportedly violated the DTPA in four ways: (1) representing that "Facebook" doesn't collect the biometric identifiers of "Facebook" users or non-users in Texas; (2) representing that "Facebook" doesn't collect the biometric identifiers of "Instagram" users or non-users in Texas; (3) failing to disclose that "it" collects biometric identifiers with the intent to induce "Facebook" users in Texas into using "Facebook"; and (4) failing to disclose that "it" collects biometric identifiers with the intent to induce "Facebook" users in Texas into using "Instagram." *Id.* ¶ 105.

These allegations and claims don't make sufficiently clear which entity or entities allegedly engaged in what conduct. *Cf. Low v. Henry*, 221 S.W.3d 609, 615 (Tex. 2007) ("group pleading" doesn't "relieve [a] party from" its obligation under Chapter 10 to ensure "[e]ach claim against each defendant" has evidentiary support). For instance, when the State alleges that "Facebook" didn't inform Instagram users of certain technology, Pet. ¶ 58, it's unclear if the State is using the term "Facebook" to refer to Meta or if it intends to refer to Facebook the separate platform. The State has thus failed

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<sup>8</sup> Subject to and without waiving Meta's Special Appearance to Contest Jurisdiction, Meta will demonstrate at the appropriate time that Meta does not use facial recognition technology to identify individuals in photos uploaded to Instagram, as the Petition alleges. *See* Pet. ¶ 59.

to provide fair notice of the practices that it alleges violate the DTPA, and Meta asks that the State be required to amend its pleading accordingly or that the DTPA claim be dismissed. *See Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 386 (Tex. 1991).

5. The State also hasn't provided fair notice of all of the affirmative misrepresentations that allegedly violate the DTPA. *See* Pet. ¶¶ 103-06 (Count IV). The State alleges "Facebook" made misrepresentations as to the collection of biometrics identifiers of Facebook and Instagram users and non-users in Texas, *id.* ¶ 105(A-B), but the State fails to identify any purported misrepresentations other than alleging "Facebook" made a single misrepresentation about its facial recognition practices in the *Instagram* Data Policy, *id.* ¶ 58. Without notice of all of the specific purported affirmative misrepresentations that allegedly violate the DTPA, Meta will be unable to respond to the State's claim. Meta asks that the State be required to amend this pleading accordingly or that the DTPA claims for those practices be dismissed. *See Seagram & Sons*, 814 S.W.2d at 386.

\* \* \*

Meta reserves the right to assert such other and further matters constituting special exceptions, abatements, and defenses, including but not limited to that the State is barred from bringing its CUBI and DTPA claims in this forum because, upon information and belief, every person who signed up for Facebook or Instagram—including Texas Facebook and Instagram users—agreed to Facebook's or Instagram's terms of service, which contained a California forum selection clause. *See In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231–32 (Tex. 2008) ("A forum-selection clause is generally enforceable, and the burden of proof on a party challenging the validity of such a clause is heavy."). Upon information and belief, the State of Texas and the Attorney General of Texas also accepted this forum selection clause before using either platform. *See* Texas.gov, Facebook, <http://www.facebook.com/Texas.gov> (last visited Mar. 6, 2022); Texas Attorney General, Facebook, <http://www.facebook.com/TexasAttorneyGeneral> (last visited Mar. 6, 2022); Texas.gov, Instagram,

<https://www.instagram.com/texasgov/> (last visited Mar. 6, 2022); Texas Attorney General, Instagram, <https://www.instagram.com/texasattorneygeneral/> (last visited Mar. 6, 2022).

**VI. Subject to Meta's Special Appearance to Contest Personal Jurisdiction, Meta's Requests for Disclosure**

Subject to Meta's Special Appearance to Contest Personal Jurisdiction and without waiving any other defenses included in this Motion, Meta requests that the State disclose the information described in Texas Rule of Civil Procedure 194.2 within 30 days of service of this request.

**VII. Prayer**

For all of the above reasons, Meta asks the Court to set a hearing for Meta's Special Appearance to Contest Personal Jurisdiction and, after the hearing, to sustain Meta's Special Appearance and enter a final judgment dismissing the State's claims against Meta for want of jurisdiction.

Subject to and without waiver of its Special Appearance to Contest Personal Jurisdiction, Meta requests that its Special Exceptions be sustained, and the State's noncompliant claims and allegations be dismissed or stricken.

Subject to and without waiver of its Special Appearance to Contest Personal Jurisdiction, Meta requests that its Original Answer be deemed good and sufficient and that the Court order that the State's requested relief be denied with prejudice, that all costs and court and legal fees be taxed against the State, and that Meta be awarded all such other and further relief, legal, equitable, general, or special, to which it may be justly entitled.

Dated: March 7, 2021

Respectfully submitted,

*/s/ Robert C. Walters*

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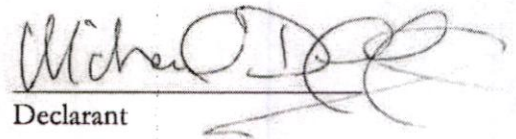
*Attorneys for Defendant Meta Platforms, Inc.*

**Verification**

State of California                   §  
   §  
San Mateo County                   §

My name is Michael Duffey, my date of birth is November 22, 1971, and my business address is 1601 Willow Rd., Menlo Park, CA 94025. I declare under penalty of perjury that to the best of my knowledge and understanding as of the date on which I am executing this verification, the factual statements in Sections II.A and II.B of Meta's Special Appearance to Contest Personal Jurisdiction are true and correct.

Executed in San Mateo County, State of California, on 4th day of March, 2022.

  
Declarant

**Certificate of Service**

I hereby certify that on the 7th day of March, 2022, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

*/s/ Robert C. Walters*

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Associated Case Party: The State of Texas

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Associated Case Party: Meta Platforms, Inc., f/k/a Facebook, Inc.

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