TradeComet.Com LLC v. Google, Inc. Doc. 58

10-911

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRADECOMET.COM LLC,

Plaintiff-Appellant,

—against—

GOOGLE INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

JONATHAN M. JACOBSON
SARA CIARELLI WALSH
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
(212) 497-7700

Attorneys for Defendant-Appellee

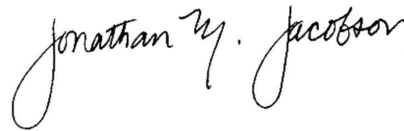
August 18, 2010

Dockets.Justia.com

CORPORATE DISCLOSURE STATEMENT

PURSUANT TO FRAP 26.1

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee Google Inc. states that it is a publicly-traded corporation. Google Inc. has no parent corporation and there is no publicly-held corporation that owns ten percent or more of its stock.



Jonathan M. Jacobson
Counsel of Record

August 18, 2010

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

JURISDICTION 1

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 13

SUMMARY OF ARGUMENT 13

ARGUMENT 16

I. The Forum Selection Clause Was Properly Enforced Through Dismissal Under Rules 12(b)(1) and 12(b)(3), Rather Than Transfer Under § 1404(a) 16

A. *Stewart v. Ricoh* Does Not Require Forum Selection Clauses to Be Analyzed Under 28 U.S.C. § 1404(a) 16

B. Courts In This Circuit Routinely Enforce Forum Selection Clauses Through Motions to Dismiss, Even Where the Clauses Designate a Federal Forum 20

C. Other Courts of Appeals Also Permit Enforcement of Forum Selection Clauses Through Motions to Dismiss, Even Where the Clauses Designate a Federal Forum 23

D. The Plain Language of the Relevant Statutes and Rules Supports Enforcement Through Motions to Dismiss 26

E. Dismissal Was Appropriate Here 29

II. The Forum Selection Clause Was Properly Applied To TradeComet's Case 30

A. The Clause Was "Reasonably Communicated" 30

B. The Clause is Mandatory....33

C. TradeComet's Claims Are Within the Scope of the Clause 34

1. Application of the August 2006 agreement is not impermissibly "retroactive"....34

2. The claims at issue here are in any event within the scope of the prior agreements....39

D. Enforcement of the Forum Clause Is Neither Unreasonable Nor Unjust 42

III. The District Court Did Not Err In Reviewing The Facts 48

IV. If the Forum Clause May Be Enforced Only Under § 1404, This Court Should Transfer to San Jose Without Remand....49

CONCLUSION....52

CERTIFICATE OF COMPLIANCE 53

ADDENDUM ADD.1

TABLE OF AUTHORITIES

Page(s)

CASES

Allez Med. Apps. Inc. v. Allez Spine LLC,
2007 WL 927905 (Cal. App., 4th Dist., Mar. 29, 2007)......38

Altvater Gessler - J.A. Baczewski Int'l (USA) Inc. v. Sobieski Destylarnia, S.A.,
572 F.3d 86 (2d Cir. 2009)......42

American Safety Equip. Corp. v. J.P. Maguire & Co.,
391 F.2d 821 (2d Cir. 1968)......45, 46

Anderson v. City of Bessemer City,
470 U.S. 564 (1985)......13

Argueta v. Banco Mexicano, S.A.,
87 F.3d 320 (9th Cir. 1996)......24

Armendariz v. Found. Health Psychcare Servs.,
6 P.3d 669 (Cal. 2000)......47

Asmus v. Pacific Bell,
23 Cal. 4th 1, 992 P.2d 71 (2000)......37

Asoma Corp. v. SK Shipping Co.,
467 F.3d 817 (2d Cir. 2006)......13, 21

AVC Nederland B.V. v. Atrium Inv. P'ship,
740 F.2d 148 (2d Cir. 1984)......21, 28

Bancomer, S.A. v. Superior Court,
44 Cal. App. 4th 1450, 52 Cal. Rptr. 435 (2d Dist. 1996)......38

Bank Julius Baer & Co. v. Waxfield Ltd.,
424 F.3d 278 (2d Cir. 2005)......39

Beneficial Nat'l Bank v. Payton,
214 F. Supp. 2d 679 (S.D. Miss. 2001)......38

Bense v. Interstate Battery Sys. of Am., Inc.,
683 F.2d 718 (2d Cir. 1982)..21, 27, 46

Bolar v. Frank,
938 F.2d 377 (2d Cir. 1991)...50

Burrows Paper Corp. v. Moore & Assocs.,
2007 WL 2089682 (N.D.N.Y July 20, 2007) 22

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

CFirstClass Corp. v. Silverjet PLC,
560 F. Supp. 2d 324 (S.D.N.Y. 2008) 28

Choice Sec. Sys. v. AT&T,
1998 WL 153254 (1st Cir. Feb. 25, 1998)...39

Chudner v. TransUnion Interactive, Inc.,
626 F. Supp. 2d 1084 (D. Or. 2009) 24

Consolidated Gold Fields v. Minorco, S.A.,
871 F.2d 252 (2d Cir. 1989)...48

Continental Ins. Corp. v. M/V Orsula,
354 F.3d 603 (7th Cir. 2003) 25, 29

Crown Beverage Co. v. Cerveceria Moctezuma, S.A.,
663 F.2d 886 (9th Cir. 1981) 46

Digital Envoy, Inc. v. Google Inc.,
319 F. Supp. 2d 1377 (N.D. Ga. 2004)...26, 50

Drywall Tapers & Pointers v. Local 530,
954 F.2d 69 (2d Cir. 1992)...48

Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.,
145 F.3d 505 (2d Cir. 1998)...21

Feldman v. Google Inc.,
513 F. Supp. 2d 229 (E.D. Pa. 2007) 26, 31, 41, 45, 50

Flowbee Int'l, Inc. v. Google Inc.,
No. 2:09-cv-00199 (S.D. Tex. Feb. 8, 2010)
(Addendum, attached)..26, 37, 45, 50

Google Inc. v. myTriggers.com LLC,
09 CV 014836 (Ohio Common Pleas)...46, 47

In re Currency Conversion Fee Antitrust Litig.,
265 F. Supp. 2d 385 (S.D.N.Y. 2003) 37, 46

In re LimitNone, LLC,
551 F.3d 572 (7th Cir. 2008) 26

JLM Indus. v. Stolt-Nielsen SA,
387 F.3d 163 (2d Cir. 2004)..45

Jumara v. State Farm Ins. Co.,
55 F.3d 873 (3d Cir. 1995)..25

Kerobo v. Southwestern Clean Fuels Corp.,
285 F.3d 531 (6th Cir. 2002) 26

KinderStart.com LLC v. Google Inc.,
2007 WL 831806 (N.D. Cal. Mar. 16, 2007).. *passim*

Klotz v. Xerox Corp.,
519 F. Supp. 2d 430 (S.D.N.Y. 2007) 22

Langley v. Prudential Mortg. Capital Co.,
546 F.3d 365 (6th Cir. 2008)..25

Madison Who's Who of Executives and Prof'ls Throughout the World, Inc. v. SecureNet Payment Sys., LLC,
2010 WL 2091691 (E.D.N.Y. May 25, 2010) 22

M.B. Restaurants, Inc. v. CKE Restaurants, Inc.,
183 F.3d 750 (8th Cir. 1999) 24

Mercer v. Raildreams, Inc.,
2010 WL 1342915 (E.D.N.Y. Apr. 7, 2010) 22

Minnette v. Time Warner,
997 F.2d 1023 (2d Cir. 1993)..50

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985)...45, 46

M/S Bremen v. Zapata Off-Shore Co.,
407 U.S. 1 (1972)...20, 28, 42, 46

Muzumdar v. Wellness Int'l Network, Ltd.,
438 F.3d 759 (7th Cir. 2006) 25

MySpace, Inc. v. The Globe.com, Inc.,
2007 WL 1686966 (C.D. Cal. Feb. 27, 2007) 37

Nagrampa v. MailCoups, Inc.,
469 F.3d 1257 (9th Cir. 2006) 47

New Moon Shipping Co. v. MAN B&W Diesel AG,
121 F.3d 24 (2d Cir. 1997)...21, 48, 49

Novak v. Overture Servs., Inc.,
309 F. Supp. 2d 446 (E.D.N.Y. 2004) 45

Nutter v. New Rents, Inc.,
1991 WL 193490 (4th Cir. Oct. 1, 1991)..24

NY Metro Radio Korea, Inc. v. Korea Radio U.S.A., Inc.,
2008 WL 189871 (E.D.N.Y. Jan. 18, 2008) 22

Pacific Bell Tel. Co. v. linkLine Commc'ns,
129 S. Ct. 1109 (2009) 40

Parts Geek, LLC v. U.S. Auto Parts Network, Inc.,
2010 WL 1381005 (D.N.J. Apr. 1, 2010) 26, 50

Person v. Google Inc.,
456 F. Supp. 2d 488 (S.D.N.Y. 2006) .... *passim*

Person v. Google Inc.,
2007 WL 1831111 (N.D. Cal. June 25, 2007),
aff'd mem., 346 Fed. Appx. 230 (9th Cir. 2009) 9, 40

Phillips v. Audio Active Ltd.,
494 F.3d 378 (2d Cir. 2007).. *passim*

Prim Securities, Inc. v. McCarthy,
2006 WL 2334836 (N.D. Ohio Aug. 10, 2006)...39

Salovaara v. Jackson Nat'l Life Ins. Co.,
246 F.3d 289 (3d Cir. 2001)..19, 24

Seacoast Motors v. DaimlerChrysler Motors Corp.,
271 F.3d 6 (1st Cir. 2001)..45

Security Watch, Inc. v. Sentinel Sys., Inc.,
176 F.3d 369 (6th Cir. 1999) 25, 39

Servewell Plumbing, LLC v. Federal Ins. Co.,
439 F.3d 786 (8th Cir. 2006) 24

Silva v. Encyclopedia Britannica Inc.,
239 F.3d 385 (1st Cir. 2001)...23

S.K.I. Beer Corp. v. Baltika Brewery,
2010 WL 2816331 (2d Cir. July 20, 2010)... *passim*

Stewart Org., Inc. v. Ricoh Corp.,
487 U.S. 22 (1988).. *passim*

Strategic Mktg. & Commc'ns v. Kmart Corp.,
41 F. Supp. 2d 268 (S.D.N.Y. 1998) 46

Thomas v. Carnival Corp.,
573 F.3d 1113 (11th Cir. 2009) 39

United States ex rel. Pittsburgh Tank & Tower, Inc. v. G & C Enterprises, Inc.,
62 F.3d 35 (1st Cir. 1995) 24, 29

Universal Grading Serv. v. eBay, Inc.,
2009 WL 2029796 (E.D.N.Y. June 10, 2009) 46

Weingrad v. Telepathy, Inc.,
2005 WL 2990645 (S.D.N.Y. Nov. 7, 2005)...22

STATUTES

28 U.S.C. § 1291 1

28 U.S.C. § 1404(a) .... *passim*

28 U.S.C. § 1406... *passim*

28 U.S.C. § 1406(a) .... *passim*

Sherman Act § 1..10, 41

Sherman Act § 2..10, 40

RULES

FED. R. CIV. P. 12(b) .... *passim*

FED. R. CIV. P. 12(b)(1)... *passim*

FED. R. CIV. P. 12(b)(3)... *passim*

FED. R. CIV. P. 12(b)(6)... *passim*

FED. R. CIV. P. 30(b)(6)..32

FED. R. CIV. P. 56(c)(2)..49

JURISDICTION

This appeal is from a final judgment dismissing TradeComet's Complaint. SA 17. This Court has jurisdiction under 28 U.S.C. § 1291.

Subject matter jurisdiction and venue were contested below. TradeComet agreed to a forum selection clause requiring that any claims against Google concerning its advertising programs be brought only in Santa Clara County, California. JA 67. The district court (Sidney H. Stein, J.) enforced the agreement, dismissing the Complaint under FED. R. CIV. P. 12(b)(1) for lack of jurisdiction and under FED. R. CIV. P. 12(b)(3) for improper venue. 693 F. Supp. 2d 370 (SA 1-16).

ISSUES PRESENTED

1. Did the district court err in enforcing Google's mandatory forum selection clause under Rules 12(b)(1) and 12(b)(3), consistent with Second Circuit and Supreme Court precedent, instead of converting Google's motion to dismiss into a motion for discretionary transfer under 28 U.S.C. § 1404(a)?
2. Did the district court properly enforce the forum selection clause where TradeComet assented repeatedly to its terms, never denied assent, could not have continued to reap profits from Google's programs absent assent, and where the clause covered all of the claims TradeComet now asserts?
3. Did the district court err in not holding an evidentiary hearing where (a) TradeComet never requested an evidentiary hearing, and (b) there was no genuine dispute as to any material fact?
4. If the only proper vehicle to enforce the forum selection clause is Section 1404(a), should this Court exercise its authority to order transfer without

remand given that, on the facts presented here, the United States District Court for the Northern District of California, San Jose Division, is the only possible forum for assertion of TradeComet's claims?

STATEMENT OF THE CASE

The Parties. Plaintiff TradeComet.com LLC is a Delaware limited liability company with offices in New York. It operates a website known as "SourceTool.com." JA 9, 11.

Google is a Delaware corporation headquartered in Mountain View, California that owns and operates a search website and search advertising platform on the Internet. JA 8, 11.[1] Google generates revenue in part through its advertising programs, which are designed to provide users with advertisements relevant and responsive to their searches. JA 15, 23-24. Google's competitors in this line of business include Microsoft and Yahoo! JA 12.

Google's AdWords and AdSense Programs. Google's *AdWords* program allows an advertiser to bid for the opportunity to have its advertisement shown when a user searches for a particular character string, phrase, or concept. *See* JA 15. When a user types a query into a search engine, "natural" search results are generated and, in many instances, the advertised links appear alongside or above

[1] Although Google is known best for its natural search results, the allegations in this case focus, not on those results, but on the AdWords advertising program described below.

these results. *See* JA 13-15, 23-24. To have an ad associated with a particular query, an advertiser bids on a "keyword" based on the price it would be willing to pay for its ad to be displayed and "clicked" on by the user. JA 15-16. When a Google user types in a search term that contains or relates to that keyword, the winning bidders' ads may appear. JA 15. If a user clicks on the advertisement, the user is taken to the webpage ("landing page") promoted by the advertiser. As relevant to this lawsuit, an AdWords advertiser is only charged when and if a user clicks on its AdWords advertisement. JA 13. TradeComet started participating in Google's AdWords program in October 2005. JA 19.

Under Google's *AdSense* program, third party websites enter into contractual agreements with Google under which Google agrees to deliver advertisements to those websites. JA 16-17, 318-19. If a search user visiting the site of an AdSense participant clicks on one of the ads Google delivers, the advertiser pays Google for the click. JA 16-17. Google shares this revenue with the AdSense participant. *Id.* SourceTool has participated in Google's AdSense program since November 2005. JA 318-19.

AdWords Terms & Conditions. Advertisers who participate in the AdWords program are bound by Google's Terms and Conditions. *See* JA 312; *see also* JA 216. The Terms and Conditions are displayed conspicuously on the AdWords site and through a link on the advertiser's account page. JA 62. They

are revised from time to time. JA 67. When they are revised, the advertiser must assent to the revised terms to continue participating in the program. JA 313-14.

The Terms and Conditions in effect at the time this suit was filed contained the following provision, which went into effect in August 2006:

> ALL CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE GOOGLE PROGRAM(S) SHALL BE LITIGATED EXCLUSIVELY IN THE FEDERAL OR STATE COURTS OF SANTA CLARA COUNTY, CALIFORNIA, USA, AND GOOGLE AND CUSTOMER CONSENT TO PERSONAL JURISDICTION IN THOSE COURTS. The Agreement constitutes the entire and exclusive agreement between the parties with respect to the subject matter hereof, and supersedes and replaces any other agreements, terms and conditions applicable to the subject matter hereof.

JA 67. As discussed in more detail in the Argument below, TradeComet expressly assented to this provision repeatedly – on August 29, 2006, November 28, 2006, and May 20, 2007. JA 63, 321-30. And, as the district court noted, "TradeComet neither denies that its representatives agreed to the user agreement that contained the forum selection clause nor offers any evidence to the contrary." SA 10.

TradeComet's Business Model. TradeComet's site, SourceTool.com, provides an online business directory for business-to-business (or B2B) exchange. JA 9, 18-19. The SourceTool business model is to allow users to access its directory without charge, and to generate revenue by participating in Google's AdSense program. JA 18-19, 318-19. This strategy of relying on AdSense ads for profits has led SourceTool to fill its website with AdSense ads:

About SourceTool.com   Free Company Listing   Search Tips

Search SourceTool's Database of 750,000 Business Suppliers

Search

Results for pumps

AdSense Ads

FUJI MACHINERY CO., LTD.
Evolution of Packaging Machines & Innovative Design for Reliability
www.fuji-machinery.com/

Connect w/Manufacturers
Connect and Receive Quotes from Custom Manufacturers at MFG.com
www.MFG.com/Manufacturers

ERP For Manufacturing
Streamline Operation & Cut Costs w/ Global Shop. Free White Paper!
www.GlobalShopSolutions.com/ERP

Manufacturing Download
ERP/MRP, Shop Floor to Top Floor; Download a Free White Paper.
Mfg-Resource-Center.Plex.com

Ads by Google

SOURCETOOL PROFILE MATCHES

Results 1 - 10 of about 1848 for pumps

GREM PUMPS IS A DISTRIBUTOR SPECIALIZING IN PUMPS FOR COMMERCIAL PURPOSE.

Grem Pumps   France
Grem Pumps is a distributor in pumps for commercial purpose. They offer products like small pumps, centrifugal pumps, purification pumps, volumetric pumps, vacuum pumps, etc.

"Below the Scroll" Viewing Area

BUFFALO PUMPS INC SPECIALIZES IN MANUFACTURING CENTRIFUGAL PUMPS, SINCE 1887.

Buffalo Pumps Inc   North Tonawanda United States
Buffalo Pumps Inc manufactures centrifugal pumps like can-o-matic, model HCR, Model CRE/CRO, model RR, model HSM, model VCRE, model CR-SP, model CCRE, model VCRO. They have OEM supplier in the refrigeration, paper and lube oil markets for companies such as general electric, westinghouse, carrier and solar turbines.

ACE PUMP SERVICE LTD PROVIDE PUMP SALES, SERVICE AND PARTS FOR 50 YEARS.

Ace Pump Service Ltd   Canada
Ace Pump Service Ltd specializes in providing pump sales, service and parts for their clients. Their products include motors, brine pumps, booster pumps, heating pumps, sump pumps, chemical pumps, pool pumps, sewage pumps, barell pumps, industrial pumps, gaskets, alarms, package material, seals, circulating pumps, golf course pumps, diaphragm pumps, cottage pumps, etc.

BLAGDON PUMP IS A MANUFACTURER OF AIR OPERATED DOUBLE DIAPHRAGM PUMPS.

Blagdon Pump   United Kingdom
Blagdon Pump specializes in manufacturing air operated double diaphragm pumps. Their products include metallic pumps, non metallic pumps, hygienic pumps, high pressure pumps, bespoke pumps, centrifugal pumps, pumper parts,

SPONSORED LINKS

AdSense Ads

Ads by Google

FadalCNC.com
One stop shopping. Everything under the sun for your Fadal in stock.
www.FadalCNC.com

Manufacturer Directory
PIERS helps to identify & qualify New U.S. and Foreign suppliers.
www.piers.com

Connect w/Manufacturers
Connect and Receive Quotes from Custom Manufacturers at MFG.com.
www.MFG.com/Manufact

Precision Stamper/Molder
Prog, Micro, Multi-slide, Spun Tip 50 Years experience ISO9000/TS16949
PlainfieldPrecision.com

"Below the Scroll" Viewing Area

http://www.sourcetool.com/results_solr.php?mt=pumps   7/1/2010

Starting in October 2005, TradeComet began purchasing advertisements by bidding on hundreds of thousands of keywords and phrases through Google's AdWords program to drive traffic to its website. JA 19, 318-19. SourceTool acquired the vast majority of its traffic – apparently over 90% – from users who clicked on SourceTool ads placed alongside Google search results through AdWords. JA 20. In other words, SourceTool has used advertising on Google's search page to drive traffic to its own site, where it publishes ads provided by Google. When visitors to SourceTool's site click on those ads, SourceTool earns money from Google.

SourceTool's strategy was to use AdWords ads to attract users searching on Google for a wide variety of items, in the hope that they would then come to its site and click on other companies' AdSense ads. As an example, if users searched for "pumps," these users might see a SourceTool ad placed through a successful AdWords bid for the keyword "pumps." The user might then click through to the SourceTool landing page, and then click further on SourceTool's AdSense ads (purchased, for example, by companies actually selling pumps) in an effort to find the product she was actually looking for – with each AdSense click generating income for SourceTool. If, for example, SourceTool paid Google 4 cents for each click on its AdWords ads, and then received an average of 10 cents for users' clicks on its AdSense ads, it would earn 6 cents profit when users clicked all the way

through. Under this business model, TradeComet "spent over $400,000 each month on AdWords," and its "revenues reached over $600,000 per month through AdSense from Google." JA 319.

This practice of purchasing AdWords advertisements to direct users to a site that generates AdSense advertising revenue is known in the trade as "ad arbitrage." Websites, such as SourceTool, that generate income in this fashion are sometimes also known as "MFA," or Made for AdSense, sites. These sites degrade the utility of search and ad results and frustrate users. A user who finds SourceTool on Google will be directed to a site with more ads, rather than substantive content; and the user will have to click, not once, but multiple times – first on SourceTool's ad, then on its directory pages – to find the information or product she wants.[2]

Google's Landing Page Quality Adjustments. According to the Complaint, as part of the AdWords program, Google algorithms analyze the quality of each advertiser's "landing page" based on factors such as the usefulness and relevance of information provided on the page. JA 16, 35. The Complaint further alleges that Google combines its landing page quality ("LPQ") assessment with other factors, including a keyword's click-through rate and the relevance of an ad,

---

[2] See the discussion at: www.techdirt.com/articles/20090217/1841023807.shtml; www.tamingthebeast.net/blog/web-marketing/adsense-mfa-arbitrage-0507.htm; www.jensense.com/2007/05/18/google-adsense-disabling-arbitrage-publisher-accounts-as-of-june-1st/; en.wikipedia.org/wiki/Scraper_site.

to calculate a "Quality Score" for each of an advertiser's keywords. JA 15-16, 35. Also according to the Complaint, this Quality Score influences the minimum bid that an advertiser must pay for use of a keyword and how much an advertiser will be charged for a click on its ad. *Id.* Sites with lower Quality Scores generally must submit higher bids to win placement of their ads on the Google search results page. JA 15-16, 20. Google began incorporating LPQ factors into its AdWords Quality Score calculations in 2005. JA 35; *see Person v. Google Inc.*, 456 F. Supp. 2d 488, 491 (S.D.N.Y. 2006).

Among other things, Google has used Quality Score adjustments to heighten the minimum bid requirements for ad arbitrage sites. As the Complaint explains, "Google seeks to prevent advertisements placed on AdWords to link to websites that similarly display advertisements with search results." JA 36. Thus, in July 2006, according to TradeComet, Google "raised the minimum bids for AdWords keywords" bid on by SourceTool based on "SourceTool's poor 'landing page quality,' as assessed by Google's new 'Landing Page Quality [LPQ] algorithm.'" JA 20, 319. The result of the increase in minimum bid requirements, according to the Complaint, has been a significant reduction in traffic to (and revenue derived from) the SourceTool site. JA 10, 20.

KinderStart. On October 26, 2006, TradeComet filed a declaration in a putative class action called *KinderStart.com LLC v. Google Inc.*, No. C-06-2057-

JF, filed in the Northern District of California, San Jose Division – the federal court located in Santa Clara County. JA 318-19. KinderStart.com had raised a variety of purported claims against Google, including antitrust claims similar to those at issue in this case. TradeComet's declaration announced its "intention to join this class action as a co-representative plaintiff" in order to challenge Google's LPQ increase in the minimum bid requirements for SourceTool – the precise same complaint it raises here. JA 319.

The *KinderStart* complaint was dismissed for failure to state a claim. 2007 WL 831806 (N.D. Cal. Mar. 16, 2007) (unpublished). Subsequently, another complaint, raising very much the same issues advanced by TradeComet here, was also dismissed, with prejudice, for failure to state a claim. *Person v. Google Inc.*, 2007 WL 1831111 (N.D. Cal. June 25, 2007) (unpublished). The *Person* case had originally been brought in the Southern District of New York, but was transferred based on the forum selection clause in Google's AdWords Terms and Conditions. *Person v. Google Inc.*, 456 F. Supp. 2d 493 (S.D.N.Y. 2006). The California court's Rule 12(b)(6) dismissal in *Person* was subsequently affirmed by the Ninth Circuit on appeal. 346 Fed. Appx. 230 (9th Cir. 2009).

The dismissal of the claims TradeComet sought to advance in *KinderStart*, as well as the venue transfer and subsequent dismissal in *Person*, did not end this matter, however. Notwithstanding the forum selection clause and the *Person*

precedent, TradeComet, through different counsel, filed this case in the Southern District of New York.[3]

Complaint. The Complaint was filed February 17, 2009. JA 8. It advances three claims. Counts 1 and 2 assert that Google's AdWords LPQ downgrade of SourceTool.com was an act of monopolization or attempted monopolization in violation of Sherman Act § 2. Count 3 alleges that another B2B site, Business.com, is treated more favorably by Google, and that the more favorable treatment represents a conspiracy in restraint of trade in violation of Sherman Act § 1. Although there are differences in the particular web sites at issue, these are largely the same claims rejected in *KinderStart* and *Person*.

---

[3] TradeComet's counsel in this case are Microsoft's primary counsel on Google-related antitrust matters. A Microsoft subsidiary and certain Microsoft-supported organizations are pursuing allegations against Google in other fora that mirror those raised in TradeComet's Complaint. *See* "Recent Press" under www.cadwalader.com/attorney/Charles_F._(Rick)_Rule/1396 (retrieved Aug. 5, 2010); *see also*, *e.g.*, www.mainjustice.com/2010/02/24/microsoft-v-google-goes-transatlantic. Microsoft offers a web search product that competes with Google called Bing. Microsoft's advertising program for Bing.com also contains a forum selection clause: "You and agency (if applicable) (a) irrevocably submit to venue and personal jurisdiction in the federal and state courts in King County, Washington, for any dispute arising out of or related to this agreement and waive all objections to jurisdiction and venue of such courts, and (b) agree not to commence or prosecute any such dispute other than in such courts. The prevailing party is entitled to recover its costs, including reasonable attorneys' fees in any action or suit to enforce any right or remedy under this agreement or to interpret any provision of this agreement." Microsoft adCenter Terms and Conditions § 11, *available at* https://adcenter.microsoft.com/TC.aspx.

Proceedings below. On March 17, 2009, the district court conducted a pre-motion hearing in which Google was authorized to pursue a motion to dismiss based on the forum selection clause in the AdWords agreement. The court also authorized discovery in connection with the motion. JA 376-78.

At the conference, Google suggested, and the court agreed, that the proper procedural vehicle for the motion would be to seek dismissal under Rules 12(b)(1) and 12(b)(3). JA 370-72. TradeComet did not disagree. On the contrary, it argued that analysis should proceed under this Court's decision in *Phillips v. Audio Active Ltd.*, 494 F.3d 378 (2d Cir. 2007), which upheld dismissal based on a forum selection clause under Rule 12(b)(3). *See* JA 360.

The discovery that ensued was one-sided. Google produced documents and provided a declaration from a knowledgeable witness whom TradeComet later deposed. JA 62-63. TradeComet, in contrast, submitted no fact declaration, refused to produce any documents, and refused to provide a witness for deposition. JA 302-09; Dist. Ct. Dkt. Entry 34, at 2 n3.

Both sides requested oral argument, but neither side requested an evidentiary hearing. The court declined to hear argument and proceeded to rule without any further hearing. JA 6; SA 1-16.

Opinion below. Judge Stein held that, under this Court's decisions, enforcement of a forum selection clause through a motion to dismiss under Rules

12(b)(1) or 12(b)(3) was procedurally proper. SA 5. His opinion took "the facts in the light most favorable" to TradeComet, "the party resisting enforcement of the forum selection clause," SA 5, and concluded that venue was improper because TradeComet had agreed to litigate these claims only in the state or federal courts of Santa Clara County, California.

Judge Stein applied the analysis articulated in this Court's opinion in *Phillips*, 494 F.3d at 383-84. He found that the clause had been "reasonably communicated" to TradeComet; that the August 2006 version of the agreement applied, superseding the parties' prior agreements; that the clause was mandatory; that it encompassed all of the claims at issue; and that enforcement of the agreement was neither unreasonable nor unjust. SA 9-16. He noted in particular the "testimony and screen shots" showing TradeComet's repeated acceptance of the August 2006 agreement, and the absence of *any* declaration, deposition testimony, or other evidence that might suggest the contrary. SA 9-10. Given the absence of any indication from TradeComet that it would be amenable to transfer to California, JA 116-19, the court dismissed the Complaint under Rule 12(b). The opinion is reported at 693 F. Supp. 2d 370.

This appeal followed.

STANDARD OF REVIEW

"On an appeal of a district court's dismissal based on a forum selection clause, we review factual findings for clear error and legal conclusions *de novo*." *S.K.I. Beer Corp. v. Baltika Brewery*, 2010 WL 2816331, at *2 (2d Cir. July 20, 2010) (quoting *Asoma Corp. v. SK Shipping Co.*, 467 F.3d 817, 822 (2d Cir. 2006)).[4]

SUMMARY OF ARGUMENT

1. The district court properly dismissed TradeComet's Complaint under Rule 12(b) rather than applying the discretionary transfer criteria of 28 U.S.C. § 1404(a). A party seeking to enforce a forum selection clause may proceed under § 1404(a), but is not required to do so. The Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), applicable decisions of this Court,

---

[4] Prior to *S.K.I. Beer*, this Court's decision in *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007), had indicated generally that review is *de novo* where "the district court has relied on pleadings and affidavits to grant a Rule 12(b)(3) motion to dismiss." As applied to factual findings, this appears inconsistent, not only with *S.K.I. Beer*¸ but with Supreme Court precedent establishing that the clear error standard of review applies on appeal irrespective of whether the district court relied only on a written record or on live testimony. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). In this case, however, the de novo/clear error distinction makes no difference. On the one factual argument advanced – whether TradeComet assented to the August 2006 agreement – there is no genuine issue of fact. The district court's finding of TradeComet's assent should be upheld whether the standard of review is "clearly erroneous" or "de novo."

and decisions of the other courts of appeals confirm that a forum selection clause may be enforced by a motion to dismiss under Rule 12(b).

2. The forum selection clause in Google's August 2006 Terms and Conditions for AdWords was properly applied by the court below, using the test articulated by this Court in *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383-84 (2d Cir. 2007):

- The clause was "reasonably communicated" to TradeComet, which repeatedly "clicked" assent to its terms. TradeComet submitted no declaration, document, or other evidence denying its assent.
- The clause is mandatory, stating that "all claims . . . shall be litigated exclusively" in Santa Clara County.
- The clause covers all the claims in TradeComet's Complaint, all of which relate to the AdWords program. The argument that the clause is being applied retroactively in an improper manner is without basis, as the Complaint was filed over two years *after* the agreement was entered into. Moreover, prior agreements also contained a forum selection provision. Although the prior versions were worded differently, they each specified Google's ability to modify the agreement's terms; and the August 2006 agreement expressly "supersedes and replaces" the prior agreements in any event.
- Enforcement is not unreasonable or unjust. There is no antitrust policy against enforcement of forum selection clauses. Enforcement is especially reasonable here in light of TradeComet's prior effort to assert these very same claims in Santa Clara County in the *KinderStart* case.

3. The district court committed no error in failing to hold an evidentiary hearing since TradeComet never requested one.

4. In the event that this Court concludes that a forum clause may *only* be enforced under § 1404(a), the Court should exercise its own authority to transfer the case to the Northern District of California, San Jose Division, as transfer there would be the only permissible outcome on the facts of this case. The existence of a forum selection clause remains an extremely important factor in any § 1404(a) analysis. Moreover, Santa Clara County is where Google's headquarters are located, where TradeComet had a key meeting with Google in 2006, and where the overwhelming majority of witnesses and documents are located. The "plaintiff's choice of forum" also militates in favor of transfer in light of TradeComet's agreement to pursue any litigation in Santa Clara County – as well as its declaration in the *KinderStart* case volunteering to act as a class representative pursuing the same claims in the Northern District of California.

ARGUMENT

I. THE FORUM SELECTION CLAUSE WAS PROPERLY ENFORCED THROUGH DISMISSAL UNDER RULES 12(b)(1) AND 12(b)(3), RATHER THAN TRANSFER UNDER § 1404(a)

TradeComet agreed that the claims it asserts now against Google would be brought, if at all, only in a court located in Santa Clara County, California. It agreed, therefore, that a court located elsewhere would not be a proper venue and that no such court would be authorized to exercise jurisdiction. TradeComet, nonetheless, filed suit in the Southern District of New York in derogation of its contractual commitment. Accordingly, Google moved under Rules 12(b)(1) and 12(b)(3) to dismiss TradeComet's Complaint for lack of jurisdiction and improper venue. TradeComet's principal argument on appeal is that proceeding under Rule 12(b) was improper and that Google's only recourse was to seek discretionary transfer under 28 U.S.C. § 1404(a). Rule 12(b), however, specifically authorizes motions to dismiss when venue is improper or when jurisdiction is lacking. TradeComet's contrary position is inconsistent with the plain language of the rule and with the applicable precedents.

A. *Stewart v. Ricoh* Does Not Require Forum Selection Clauses to Be Analyzed Under 28 U.S.C. § 1404(a)

TradeComet argues that, under *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), the only procedural vehicle available to enforce a forum selection clause

permitting suit in a federal forum, rather than a foreign or state forum, is transfer under 28 U.S.C. § 1404(a). TradeComet Br. 17-26. *Stewart* does not so hold.

Nothing in *Stewart,* other Supreme Court precedent, or the decisions of this Court holds or even suggests that forum selection clauses permitting suit in a federal venue may only be enforced under § 1404(a), or that moving under Rule 12(b) of the Federal Rules of Civil Procedure is improper. Although a motion to transfer under § 1404(a) is certainly one permissible method of enforcing a forum selection clause – and was the relief specifically sought in *Stewart* – it is not the only method.

Stewart was a diversity action brought in federal court in Alabama regarding a dispute growing out of a dealership agreement. *Stewart*, 487 U.S. at 24. The defendant moved for transfer under § 1404(a) based on a forum selection clause designating Manhattan as the mandatory forum for adjudication of disputes arising out of the agreement. *Id.* The district court denied the motion, reasoning that the transfer motion was controlled by Alabama law, and that Alabama law looks unfavorably on contractual forum selection clauses. *Id.* On appeal, the Eleventh Circuit, *en banc*, reversed the district court, holding that questions of venue in diversity actions are governed by federal law. *Id.* at 25. The limited issue before the Supreme Court was therefore "whether a federal court sitting in diversity should apply state or federal law in adjudicating a motion to transfer a case to a

venue provided in a contractual forum-selection clause." *Id.* at 24. The Court held "that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to a court in Manhattan." *Id.* at 32.

Stewart does not hold that § 1404(a) is the *only* permissible vehicle for enforcing a forum selection clause that permits venue in a federal forum. In *Stewart*, § 1404(a) was the only relief being sought by the defendant by the time the Court reviewed the case. No suggestion of dismissal was before the Court. The Court's instruction to apply § 1404(a) on remand was therefore unremarkable.

TradeComet concedes, as it must, that dismissal under Rule 12(b) is appropriate when a forum clause specifies a state court or a tribunal outside the United States. TradeComet Br. 17-21. It argues, however, that the identical text of Rule 12(b) is not applicable when the clause designates a domestic, federal forum. *Id.* But nothing in *Stewart* so much as discusses a distinction between a forum selection clause that designates a federal forum and a clause that designates a state or foreign forum. Nor does anything in the decision state that a motion under Rule 12(b) is inappropriate.

Just three years after *Stewart*, in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), the Supreme Court confirmed that § 1404(a) is not the only means of enforcing a forum selection clause when the designated forum permits

suit in a federal court. In *Carnival*, respondents were residents of Washington State who purchased tickets for a cruise. *Id.* at 587. The terms and conditions of the ticket included a clause providing that all disputes arising in connection with the passage contract would be litigated in the State of Florida. *Id*. at 587-88. Respondents sued in the Western District of Washington for negligence based on injuries sustained from slipping during a tour of the cruise ship. *Id.* at 588. Petitioner moved for summary judgment dismissing the case based on the forum selection clause and for lack of personal jurisdiction. *Id.* at 588-89. The district court granted the motion, but was reversed on appeal. *Id.*

On certiorari, the *Carnival* Court held that it was error to refuse to enforce the forum selection clause, *id*. at 595-96, and in doing so, illustrated why *Stewart* does not command the interpretation that TradeComet advocates. In reversing the lower court's decision not to dismiss the case based on the forum selection clause, the Court did not apply § 1404(a) or even mention it, even though the forum selection clause permitted suit in a federal district court. Rather, the Court endorsed the district court's dismissal of the complaint under Rule 56 based on the forum clause. That outcome was analytically the same as a Rule 12(b) dismissal, and would have been improper had enforcement under § 1404(a) been the only permissible option. *See Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289,

299 n.7 (3d Cir. 2001) (decisions after *Carnival* construe its holding as applicable "in the context of 12(b) motions as well").

The *Carnival* Court analyzed the enforceability of the clause under *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), a case that had arisen on a motion to dismiss involving a forum clause designating a forum outside the United States. *Carnival* cited *Stewart* only as support for the proposition that federal law governs the enforceability of forum selection clauses. *Carnival*, 499 U.S. at 590. Had *Stewart* stood for the broad proposition that forum selection clauses designating federal forums *must* be analyzed under § 1404(a), as TradeComet argues, dismissal of the suit in *Carnival* – where § 1404(a) transfer was available even though the appeal was based on a summary judgment decision – would have been inappropriate, and the Court would have had to at least distinguish its precedent. *Carnival* confirms, at least implicitly, that *Stewart*'s holding extends only to the specific question it presented: that in a diversity case, federal law, rather than the law of the forum state, controls the analysis of the forum selection clause.

B. Courts In This Circuit Routinely Enforce Forum Selection Clauses Through Motions to Dismiss, Even Where the Clauses Designate a Federal Forum

The district court's dismissal of TradeComet's claims under FED. R. CIV. P. 12(b)(1) and 12(b)(3) was entirely proper under established practice in this Circuit. Long after *Stewart* was decided, this Court confirmed that there is not a specific

procedural vehicle under which forum selection clause enforcement must be brought. *See Asoma Corp. v. SK Shipping Co.,* 467 F.3d 817, 822 (2d Cir. 2006) ("("The Supreme Court has not specifically designated a single clause of Rule 12(b) as the 'proper procedural mechanism to request dismissal of a suit based upon a valid forum selection clause,' nor have we.") (quoting *New Moon Shipping Co. v. MAN B&W Diesel AG*, 121 F.3d 24, 28 (2d Cir. 1997)). As the district court noted (SA 5), this Court has reviewed motions to dismiss based on forum selection clauses under FED. R. CIV. P. 12(b)(1), *see AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148, 152 (2d Cir. 1984); 12(b)(3), *see Phillips*, 494 F.3d at 382; and 12(b)(6), *see Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 508 n.6 (2d Cir. 1998); *see also S.K.I. Beer*, 2010 WL 2816331, at *1-*2 (12(b)(6)).

TradeComet's counter is that the decisions of this Court cited by the district court each involved a forum selection clause that designated a foreign jurisdiction as the proper forum. TradeComet Br. 24. But this Court made no such distinction in deciding those cases; and, in any event, the courts of this Circuit routinely enforce forum selection clauses through Rule 12(b) when the clause at issue designates a forum allowing suit in domestic federal court. *See, e.g.*, *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718 (2d Cir. 1982) (affirming dismissal for improper venue under FED. R. CIV. P. 12(b)(3) based on a forum selection clause requiring

suit to be brought in Texas); *Madison Who's Who of Executives and Prof'ls Throughout the World, Inc. v. SecureNet Payment Sys., LLC*, 2010 WL 2091691 (E.D.N.Y. May 25, 2010) (dismissing action under Rule 12(b) where forum clause designated Maryland as proper venue); *Mercer v. Raildreams, Inc.*, 2010 WL 1342915 (E.D.N.Y. Apr. 7, 2010) (dismissing action under 12(b)(1) where forum clause designated Michigan as proper venue); *NY Metro Radio Korea, Inc. v. Korea Radio U.S.A., Inc.*, 2008 WL 189871 (E.D.N.Y. Jan. 18, 2008) (dismissing action under 12(b)(3) where forum clause designated California as proper venue); *Weingrad v. Telepathy, Inc.*, 2005 WL 2990645 (S.D.N.Y. Nov. 7, 2005) (dismissing action under 12(b)(3) where forum clause designated Virginia as proper venue).

Several other cases have entertained motions to dismiss under Rule 12(b), but exercised their authority under 28 U.S.C. § 1406(a) to transfer to another federal district. In *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 434-35 (S.D.N.Y. 2007), Circuit Judge Lynch, then sitting in the district court, affirmatively rejected TradeComet's argument that enforcement of a forum selection clause must be sought and examined under § 1404(a). His opinion, like several others in this Circuit, authorized the defendant to proceed under Rule 12(b), implementing 28 U.S.C. § 1406(a), which expressly permits dismissal of cases filed in the wrong federal district. To the same effect, see *Burrows Paper Corp. v. Moore & Assocs.*,

2007 WL 2089682 (N.D.N.Y July 20, 2007) (transferring case under 28 U.S.C. § 1406 to Northern District of Georgia based on forum selection clause); *Person v. Google Inc.*, 456 F. Supp. 2d 488 (S.D.N.Y. 2006) (transferring case under 28 U.S.C. § 1406 to Northern District of California, San Jose Division, based on forum selection clause).

Holding that § 1404(a) is the only permissible procedural means of enforcing forum clauses that designate a federal forum would thus effectively overrule numerous cases in this Circuit.

C. Other Courts of Appeals Also Permit Enforcement of Forum Selection Clauses Through Motions to Dismiss, Even Where the Clauses Designate a Federal Forum

TradeComet offers no judicial support for its overstatement of *Stewart*. TradeComet Br. 18. The secondary sources on which TradeComet relies in turn cite no case law to support the statements quoted in TradeComet's brief. *Id.* But applicable decisions of the First, Third, Fourth, Sixth, Seventh, and Eighth Circuits – all the courts of appeals that appear to have addressed the issue – controvert TradeComet's argument and permit forum clause enforcement through motions under Rule 12(b). TradeComet ignores these decisions entirely.

In *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 388-89 (1st Cir. 2001), for example, the First Circuit affirmed a dismissal under FED. R. CIV. P. 12(b)(6) based on a forum selection clause permitting suit in federal court in

Illinois, specifically confirming the use of Rule 12(b) as an appropriate enforcement mechanism. *Accord, e.g.*, *United States ex rel. Pittsburgh Tank & Tower, Inc. v. G & C Enterprises*, *Inc.*, 62 F.3d 35, 37 (1st Cir. 1995) (affirming dismissal for improper venue under § 1406). In *Servewell Plumbing, LLC v. Federal Ins. Co*., 439 F.3d 786, 789-91 (8th Cir. 2006), the Eighth Circuit similarly enforced the forum selection clause at issue by affirming a dismissal for improper venue. *Accord M.B. Restaurants, Inc. v. CKE Restaurants, Inc.*, 183 F.3d 750, 751-53 (8th Cir. 1999). The unpublished Fourth Circuit decision in *Nutter v. New Rents, Inc.*, 1991 WL 193490, at *5-*7 (4th Cir. Oct. 1, 1991), is to the same effect. *See also Chudner v. TransUnion Interactive, Inc*., 626 F. Supp. 2d 1084, 1088 (D. Or. 2009) (stating that Ninth Circuit courts interpret forum selection clauses as rendering venue in the original forum improper, enforcing the clauses under § 1406(a) or Rule 12(b)(3)) (citing *Argueta v. Banco Mexicano, S.A*., 87 F.3d 320, 324 (9th Cir. 1996)).

Although a prior decision had suggested otherwise, the most recent decision in the Third Circuit also supports the ability to proceed under Rule 12(b). In *Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 300 (3d Cir. 2001), that court affirmed dismissal pursuant to Rule 12(b)(6) based on a forum selection clause permitting suit in federal court in New York, concluding that "the District Court was not required to treat [defendant's] motion for dismissal as a motion for

transfer simply because the forum selection clause specified that suit be brought in either a federal or a state forum." *But cf. Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879-83 (3d Cir. 1995) (stating that the district court should have applied § 1404(a)).

Decisions in the Seventh and Sixth Circuits also approve the use of motions to dismiss. *See Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760 (7th Cir. 2006) ("A challenge to venue based upon a forum selection clause can appropriately be brought as a motion to dismiss the complaint under [Rule] 12(b)(3)."); *Continental Ins. Corp. v. M/V Orsula*, 354 F.3d 603, 606-08 (7th Cir. 2003) (affirming dismissal under 28 U.S.C. § 1406 based on a forum selection clause designating the federal district court in the Northern District of Indiana, and stating expressly that a venue challenge based on a forum selection clause may be brought under FED. R. CIV. P. 12(b)(3)); *Security Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 374-76 (6th Cir. 1999) (upholding dismissal based on forum selection clause permitting suit in federal court in Virginia); *see also Langley v. Prudential Mortg. Capital Co.*, 546 F.3d 365, 370-71 (6th Cir. 2008) (Moore, J., concurring) (noting movant's option to seek dismissal under 12(b) or transfer under § 1404(a)). However, in cases – unlike this one – in which the defendant effectively has selected venue itself by *removing* the case from state to federal court, both the Sixth and Seventh Circuits have permitted forum clause

enforcement only through § 1404(a), not § 1406(a) or Rule 12(b). *See In re LimitNone, LLC*, 551 F.3d 572, 575-77 (7th Cir. 2008); *Kerobo v. Southwestern Clean Fuels Corp.*, 285 F.3d 531, 535, 539 (6th Cir. 2002) (2-1 decision).

It should be noted that district court decisions outside the Second Circuit have reached inconsistent views on this question, and that a number of lower court opinions involving Google have declined to apply Rule 12(b) – enforcing Google's forum selection clause only under § 1404(a). *See Parts Geek, LLC v. U.S. Auto Parts Network, Inc.*, 2010 WL 1381005 (D.N.J. Apr. 1, 2010); *Flowbee Int'l, Inc. v. Google Inc.*, No. 2:09-cv-00199 (S.D. Tex. Feb. 8, 2010) (in attached Addendum, at Add. 1-18); *Feldman v. Google Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007); *Digital Envoy, Inc. v. Google Inc.*, 319 F. Supp. 2d 1377 (N.D. Ga. 2004); *see also In re LimitNone*, 551 F.3d at 575-77 (applying § 1404(a) rather than Rule 12(b) following removal of action from state court). Nevertheless, the consistent view in those circuit courts that have addressed the issue is that a forum selection clause may be enforced through a motion to dismiss, even where another federal district is a permitted forum under the clause.

D. The Plain Language of the Relevant Statutes and Rules Supports Enforcement Through Motions to Dismiss

TradeComet's view is that litigants seeking to enforce a contractual forum selection clause that permits suit in a federal forum may only move for a transfer under § 1404(a), but litigants seeking to enforce a contractual forum selection

clause that designates a foreign or state venue have the option to move to dismiss under FED. R. CIV. P. 12(b) and/or 28 U.S.C. § 1406. That is contrary to the plain meaning of these provisions and would, in fact, assign different meanings to identical words depending on nothing more than the designated forum in the parties' agreement.

The text of § 1406(a) expressly provides that a "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." 28 U.S.C. § 1406(a) (emphasis added). A complaint filed in one district in contravention of a forum clause is, by definition, a case filed in the "wrong district." In such a case, the statute expressly permits a motion to dismiss – i.e., a motion under Rule 12(b) – as one of the defendant's options. TradeComet's contrary reading cannot be squared with the plain language of § 1406(a).

TradeComet's argument is also inconsistent with the text of FED. R. CIV. P. 12(b). Rule 12(b)(3) expressly authorizes motions to dismiss for "improper venue." This provision is applicable on its face, and has been used to enforce forum selection clauses in this Circuit. *See Phillips*, 494 F.3d 378 (enforcing forum selection clause under 12(b)(3)); *Bense*, 683 F.2d 718 (same). Rule 12(b)(1), permitting a defense to a pleading based on a court's lack of jurisdiction

of the matter, is likewise applicable, and consistent with the cases in this Circuit. *See AVC Nederland B.V.*, 740 F.2d at 152 (enforcing forum selection clause under 12(b)(1)); *CFirstClass Corp. v. Silverjet PLC*, 560 F. Supp. 2d 324 (S.D.N.Y. 2008) (same).

Under TradeComet's logic, Google would be permitted to move for dismissal under FED. R. CIV. P. 12(b) if the forum selection clause required adjudication of this dispute in California *state* court in Santa Clara County, yet cannot seek dismissal under the clause's actual language because it permits adjudication of this dispute in state or *federal* court in Santa Clara County. But a lawsuit cannot reasonably be found to have been filed in the "wrong district" when a clause specifies a state or international venue, but in the "right district" when an otherwise identical clause specifies a different federal district. *See* 28 U.S.C. § 1406(a). When a lawsuit is filed in New York after the parties have agreed to litigate disputes elsewhere, venue is no more or less improper in New York whether the agreed-upon location is Seattle or Vancouver. Accordingly, FED. R. CIV. P. 12(b) should be equally available to litigants seeking to enforce a forum selection clause no matter what specific venue the forum clause designates. Nothing in *Stewart, Carnival,* or *M/S Bremen* suggests otherwise.

E. Dismissal Was Appropriate Here

Allowing a party to seek dismissal on the basis of a forum selection clause does not tie a court's hands to prevent transfer when transfer is appropriate. Section 1406(a) specifically authorizes transfer, "in the interest of justice," as an alternative remedy. In this case, however, TradeComet consistently opposed transfer, taking the position that litigation in New York was the only alternative. JA 119. In contrast to cases such as *Person*, where the plaintiff specifically indicated a preference for transfer as an alternative to dismissal, 456 F. Supp. 2d at 498, TradeComet made no such suggestion here. Indeed, TradeComet makes no such suggestion even on this appeal.

Given the clarity of the forum selection clause here in issue, as well as TradeComet's knowing opposition to transfer as a potential remedy, dismissal – not transfer – was entirely appropriate. *See Continental Ins. Co.*, 354 F.3d at 608 (upholding dismissal rather than transfer, even where statute of limitations had run, because there "'was nothing obscure' about the proper forum," and the improper filing could not be justified as a simple mistake); *G & C Enterprises,* 62 F.3d at 36-37 (upholding dismissal notwithstanding expiration of limitations period where plaintiff had not sought transfer in the district court).

Judge Stein committed no error in granting Google's motion pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(3), and dismissing the Complaint in the light of the forum selection clause.

II. THE FORUM SELECTION CLAUSE WAS PROPERLY APPLIED TO TRADECOMET'S CASE

Under this Court's decision in *Phillips*, "[d]etermining whether to dismiss a claim based on a forum selection clause involves a four-part analysis." 494 F.3d at 383. The court must decide (1) "whether the clause was reasonably communicated to the party resisting enforcement," *id.*; (2) whether the clause is mandatory or permissive; (3) whether it covers the matters in dispute; and (4) whether enforcement would be unreasonable or unjust. *Id.* at 383-84; *accord, e.g.*, *S.K.I. Beer*, 2010 WL 2816331, at *2. The district court here analyzed each factor precisely and correctly. SA 7-16.

A. The Clause Was "Reasonably Communicated"

There is no doubt that TradeComet assented – repeatedly – to the August 2006 AdWords agreement, and to the forum selection clause prominently displayed within it.

TradeComet does not dispute that it assented to the agreement's prior versions – versions that also placed venue in Santa Clara County, California. JA 128-29, 132. Its argument here is limited to opposing the applicability of the

August 2006 version. TradeComet Br. 26-28. But TradeComet's assent to the August 2006 Terms and Conditions is beyond reasonable dispute.

TradeComet claims to have at least 14 AdWords accounts. JA 307. Each account's online interface contains a link to the current Terms and Conditions so that they can be reviewed at any time. JA 62; *see also* JA 280-82. The forum selection clause is stated in clear, capitalized language within a nine paragraph contract. JA 65-67. The several district courts that have evaluated Google's forum clause have agreed uniformly that its terms are easy to access and displayed with adequate prominence; and they agree that users are clearly advised that their assent is required in order to participate in the AdWords program. *E.g.*, *Person*, 456 F. Supp. 2d at 496-97; *Feldman*, 513 F. Supp. at 233-36; *see* SA 9.

On August 29, 2006, after the AdWords Terms and Conditions were revised, TradeComet specifically affirmed its assent for its ten AdWords accounts that were created before that date. JA 63, 68-86. It is uncontested that TradeComet continued to advertise on AdWords well after August of 2006 – but could not have done so without having previously assented to that version of the agreement. JA 312-14; *see also* JA 319. In fact, long after August 2006, TradeComet specifically assented to the August 2006 Terms and Conditions on three *additional* occasions – twice on November 28, 2006, and then again on May 20, 2007 – in the course of opening new accounts at those times. JA 89, 323-28.

This evidence of repeated assent is uncontroverted and conclusive. If TradeComet seriously disputed assenting to the August 2006 AdWords Terms and Conditions, it could simply have submitted a declaration to that effect. It did not. Instead, it categorically refused to produce any documents and refused to produce any witness in response to Google's notice under FED. R. CIV. P. 30(b)(6) for the TradeComet witness most familiar with the subject. *See* JA 302-09; Dist. Ct. Dkt. Entry 34, at 2 n3. The district court was on the most solid ground in agreeing that "TradeComet accepted the August 2006 Agreement," and in pointing out that TradeComet "neither denies that its representatives agreed to the user agreement that contained the forum selection clause nor offers any evidence to the contrary." SA 10.

TradeComet raises two arguments in opposition. First, it attempts to cast doubt on its acceptance by pointing out that, on August 29, 2006, the agreement was accepted for ten of the 14 accounts in a span of three seconds. TradeComet Br. 28. But the answer to that point is a simple one. TradeComet has a "My Client Center" ("MCC") account, which acts as an umbrella over individual AdWords accounts. JA 329-30. Accepting the current version in one AdWords account managed through an MCC account at that time allowed the user instantaneously to accept the current version for all other accounts under that MCC. JA 331. And TradeComet's argument fails in any event to address its three subsequent, non-

simultaneous, acceptances of the Terms and Conditions – two on November 28, 2006, and one on May 20, 2007. JA 89, 323-28.

The second argument is no stronger. TradeComet points out that a Google representative assisted TradeComet in opening an AdWords "prepay account." TradeComet Br. 27; JA 227. But that fact has no bearing on whether TradeComet assented to the August 2006 agreement. The prepay account was opened in January 2006 and was associated with a TradeComet e-mail account different from the ones associated with the 14 accounts on which TradeComet's assent to the August 2006 agreement was specifically indicated. *Compare* JA 227 *with* JA 68-86. More importantly, there was no evidence whatsoever that anyone other than TradeComet itself conveyed TradeComet's (repeated) assent to the August 2006 Terms and Conditions. If there had been any such evidence, TradeComet would undoubtedly have supplied it.

Judge Stein committed no error in concluding, on the basis of the uncontroverted evidence before him, that TradeComet accepted the August 2006 terms and conditions.

B. The Clause is Mandatory

The forum clause provides unambiguously that all claims "shall be litigated exclusively" in Santa Clara County, California. JA 67. The district court correctly

held that this language is mandatory. SA 10. *Accord, e.g.*, *S.K.I. Beer*, 2010 WL 2816331, at *2-*3; *Phillips*, 494 F.3d at 386.

C. TradeComet's Claims Are Within the Scope of the Clause

TradeComet's claims plainly are ones "arising out of or relating to [the AdWords] agreement or the Google programs." JA 67. The entire premise of the allegations is that Google acted unlawfully by downgrading the SourceTool.com website for low quality, thereby increasing the bids TradeComet would have to make to gain advertising placement on AdWords. JA 9-11, 18-22, 38-42. Judge Stein analyzed TradeComet's claims in detail, and concluded that they all fall squarely within the scope of the clause. SA 10-15. TradeComet does not argue otherwise on this appeal.

TradeComet's argument is that the court below erred in applying the forum selection clause in the August 2006 agreement and should, instead, have applied the forum clauses in prior versions of the AdWords agreement. It argues further that its claims here are outside the scope of the clauses in those prior versions. TradeComet Br. 30-37. TradeComet is wrong in both respects.

1. Application of the August 2006 agreement is not impermissibly "retroactive"

To begin with, the August 2006 agreement is not being applied retroactively. The agreement states that all claims "shall be litigated" exclusively in California.

JA 67. That language is prospective, not retroactive, applying to suits filed after the agreement has gone into effect. This suit was in fact filed in February 2009, some 30 months after TradeComet's initial assent to the August 2006 terms. Had the suit been filed, say, in February 2006, an attempt to apply the August 2006 agreement would, indeed, have been retroactive. There is nothing of the kind here.[5]

Nor is it correct to say that the clause is being applied "retroactively to conduct that occurred prior to August 29, 2006." TradeComet Br. 30. Three of TradeComet's AdWords accounts were created after August 29, 2006. JA 89, 323-30. Those accounts were never subject to the earlier Terms and Conditions; they were *only* subject to the later, August 2006, version. Moreover, the Complaint demands "equitable relief . . . in the form of an injunction prohibiting the ongoing exclusionary conduct" of which Google is accused, and seeks damages extending from July 2006 to the present. JA 42-43, 318-19. Accordingly, while some of

---

[5] This same point disposes of TradeComet's argument that the language of the agreement is "forward-looking" and therefore cannot apply "retroactively." TradeComet Br. 35. The relevant "forward-looking" language here is that "all claims . . . *shall* be litigated exclusively in the federal or state courts of Santa Clara County, California." JA 67 (emphasis added). TradeComet filed this suit *after* its agreement to that provision.

what TradeComet is complaining about may antedate the August 2006 agreement, most of it does not.

Even if all the relevant conduct antedated the agreement, it would make no difference. The agreement provides in plain and ambiguous terms that it "supersedes and replaces any other agreements, terms and conditions" governing the parties' relationship. JA 67. And, consistently, the prior April 2005 and May 2006 versions of the agreement themselves alerted TradeComet that "Google may modify the [AdWords] Program or these Terms at any time without liability and your use of the Program after notice that Terms have changed indicates acceptance of the Terms." JA 128, 131.

TradeComet seeks to avoid the plain language of the AdWords agreements by denigrating the "supersedes and replaces" language as a mere "merger clause" with no effect other than to bar use of parol evidence to modify the agreement terms. It contends further that the language is "ambiguous," and should be construed against Google. TradeComet Br. 33-37 & n.20. The agreements' language, however, is not ambiguous at all. The text is as clear as possible that there may be a change in terms and that continued participation in the Google programs afterwards is acceptance of those terms as revised. SA 7. TradeComet's contrary reading would not only read out the plain language of "supersede and replace"; it would render the change-in-terms provisions in the prior (and current)

versions of the agreement wholly meaningless. Judge Stein was entirely right in holding that "[t]he plain language of the agreements indicates that TradeComet accepted the modifications to the forum selection clause found in the August 2006 Agreement when it accepted that agreement." SA 7.[6]

The district court's conclusion is fully supported by the relevant case law. In *Flowbee Int'l, Inc. v. Google Inc.*, No. 2:09-cv-00199 (S.D. Tex. Feb. 8, 2010), a district court interpreting these very agreements reached precisely the same result. Slip op. at 12-13 ("The idea that a contract clause can cover events prior to the execution of that clause is entirely unremarkable."). Other courts uniformly uphold contractual provisions allowing one party to effect subsequent modifications if reasonable notice is provided. SA 7; *Asmus v. Pacific Bell*, 23 Cal. 4th 1, 16, 992 P.2d 71 (2000). In a similar context, the district court in *MySpace, Inc. v. The Globe.com, Inc.*, 2007 WL 1686966 (C.D. Cal. Feb. 27, 2007), enforced revised terms and conditions, rather than a prior version, after subsequent modifications had been made. And, in *In re Currency Conversion Fee*

---

[6] The AdWords agreement specifies the application of California law. JA 67. TradeComet too relies on California case law. Although federal, not state, law clearly applies under *Stewart* to the overall analysis of enforceability, 487 U.S. at 28-32, Google agrees with TradeComet and the court below that California law governs questions going to the interpretation of the relevant agreements. SA 6; TradeComet Br. 31 & n.13.

Antitrust Litig., 265 F. Supp. 2d 385 (S.D.N.Y. 2003), antitrust claims were brought based on conduct by Bank of America and others that commenced prior to 2000. In February 2000, however, the Bank modified the plaintiff's cardholder agreement to add an arbitration provision. Suit was filed in 2001. The court held that the change-in-terms was effective and that the plaintiff's claims would have to be arbitrated – even though they were based on conduct commencing before the change-in-terms was made. *Id.* at 398-401; *accord Beneficial Nat'l Bank v. Payton*, 214 F. Supp. 2d 679, 688-89 (S.D. Miss. 2001).

TradeComet cites no case holding that a current forum selection clause is unenforceable as impermissibly "retroactive" based on an agreed-upon change-in-terms provision. All the cases it cites are inapposite:

- In *Bancomer, S.A. v. Superior Court*, 44 Cal. App. 4th 1450, 52 Cal. Rptr. 435 (2d Dist. 1996) (cited at TradeComet Br. 31), the court said nothing about retroactivity. It held, rather, that Bancomer was not a party to, and therefore could not enforce, the forum clause; and that the claim for fraudulent inducement was, in any event, outside the scope of the clause. *Id*. at 1458-60, 1462.
- In *Allez Med. Apps. Inc. v. Allez Spine LLC*, 2007 WL 927905 (Cal. App., 4th Dist., Mar. 29, 2007) (unpublished; citation prohibited under California rules) (cited at TradeComet Br. 31), the arbitration clause was unenforceable because the agreement containing it was not effective "until *after* . . . the instant lawsuit" was filed. *Id*. at *1.

- In *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009) (cited at TradeComet Br. 31), the claims at issue had "no connection to" the parties' revised agreement and, therefore, did not arise out of that agreement. *Id.* at 1118-19.
- In both *Security Watch, Inc. v. Sentinel Systems, Inc.*, 176 F.3d 369 (6th Cir. 1999), and *Choice Sec. Sys. v. AT&T*, 1998 WL 153254 (1st Cir. Feb. 25, 1998) (cited at TradeComet Br. 35-36 & n.19), there were seriatim one-year agreements. Performance under the prior agreements had been *completed*. The courts held that the forum clause in the *new* agreements did not apply to *products shipped under the prior agreements* because disputes as to the prior agreements did not "arise under" the current agreements as the contractual language required. 176 F.3d at 372 ("provision plainly refers to disputes related to products delivered under the [new] 1994 Agreement").
- In *Prim Securities, Inc. v. McCarthy*, 2006 WL 2334836 (N.D. Ohio Aug. 10, 2006) (cited at TradeComet Br. 36 n.19), it was clear that the indemnity clause did "not apply to acts prior to the date of its execution." *Id.* at *4.
- Finally, in *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278 (2d Cir. 2005) (cited at TradeComet Br. 36), this Court held only that a merger clause did not operate to extinguish prior agreements that were unrelated to the subject matter of the agreement at issue. *Id*. at 283.

2. The claims at issue here are in any event within the scope of the prior agreements

Even if TradeComet had never assented to the August 2006 agreement, the claims at issue here fall within the scope of the forum clauses in the prior

Agreements, dated April 2005 (JA 128-29) and May 2006 (JA 132). As relevant here, both agreements provided that "[t]he Agreement must be . . . adjudicated in Santa Clara County."

The injuries alleged by TradeComet all result from alleged increases in minimum bid requirements within AdWords for SourceTool.com based on Google's LPQ adjustments. According to TradeComet, these adjustments made it more difficult for it to attract Google searchers to SourceTool.com. This, in turn, is alleged to have weakened SourceTool's ability to compete, in violation of Section 2 of the Sherman Act. JA 9-10, 19-22, 35-36, 38-40.[7]

It is beyond dispute that any adjustments to SourceTool's Landing Page Quality and any resulting increases in minimum bid requirements would all have occurred within the context of the contractual AdWords relationship between Google and TradeComet, and would have affected TradeComet only to the extent it

---

[7] For purposes of this appeal, Google limits its arguments to the issues decided below. Google of course disputes TradeComet's allegations on the merits, including its allegations as to the relevant market, Google's purported monopoly power, and alleged exclusionary conduct. The district court preserved Google's right to seek dismissal for failure to state a claim under Rule 12(b)(6) once the venue issues in the case have been resolved. JA 370-71. *See generally Pacific Bell Tel. Co. v. linkLine Commc'ns*, 129 S. Ct. 1109, 1118 (2009) (holding that price increases by monopolist, even if they impair plaintiff's ability to compete effectively, cannot support a claim for relief under Sherman Act § 2); *Person v. Google Inc.*, 346 Fed. Appx. 230 (9th Cir. 2009), *aff'g* 2007 WL 1831111 (N.D. Cal. June 25, 2007).

sought to purchase advertising through that contractual relationship. Likewise, TradeComet's Sherman Act Section 1 allegations concerning the "relaxation of the Landing Page Quality methodology for certain 'search partners,'" JA 37, are meaningless unless viewed in reference to the parties' actions under the AdWords agreements and the context in which the quality adjustments allegedly occurred. *See*, *e.g*., JA 36-37, 41. None of the other activities alleged by TradeComet – Google's acquisitions, "exclusive arrangements," and expansion of its search functions, JA 26, 32-33 – is alleged to be an independent source of injury to TradeComet. These allegations are advanced, instead, to support the (incorrect) allegation that "there [is] no realistic alternative" (JA 20) to AdWords.

TradeComet's allegations therefore require an "adjudication" of the AdWords agreement, as the agreement is the "source of the right, duty and injury" forming the basis of the case. *Phillips*, 494 F.3d at 392; JA 9-11, 19-22, 29, 34-37. Claims such as TradeComet's, where the source of the alleged injury is conduct undertaken by Google pursuant to the AdWords agreement, require "adjudication" of the agreement to determine the rights and obligations of the parties and, thus, whether any kind of claim exists. Otherwise, the "adjudicated in" venue clause has no meaning. Under either the current or prior versions of the AdWords agreement, therefore, the correct forum is in Santa Clara County. *Feldman*, 513 F. Supp. 2d at 246-47 (transferring "click-fraud" action to Santa Clara County under "adjudicated

in" language); *Person*, 456 F. Supp. 2d at 493 (treating old and new Google forum selection clause language identically).[8]

D. Enforcement of the Forum Clause Is Neither Unreasonable Nor Unjust

Once, as here, it has been demonstrated that a forum selection clause was reasonably communicated, is mandatory, and covers the matters in dispute, the "resisting party can rebut the presumption of enforceability [only] by clearly showing 'that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.'" *S.K.I. Beer*, 2010 WL 2816331, at *5 (quoting *M/S Bremen*, 407 U.S. at 15); *see Altvater Gessler - J.A.*

[8] TradeComet accuses Google of "rel[ying] upon an earlier version of its AdWords agreement" not containing the "adjudicated in" language, rather than the version then in effect, in an outcome-driven manner in the *Person* case. TradeComet Br. 34 n.16. The accusation is false. Google in fact moved to dismiss in *Person* based on the "adjudicated in" language in the then-current May 2006 version. JA 183. Only when Mr. Person denied signing that agreement did Google additionally submit the agreement that Mr. Person signed in 2003 when he created his AdWords account. *See Person*, 456 F. Supp. 2d at 493. In any event, the court in *Person* interpreted the forum selection clause in both versions identically: "Initially, Defendant produced a copy of the current agreement. Plaintiff, however, objected that the 2006 agreement is not the same as the one he signed when he became an AdWords customer in 2003. In response, Defendant produced a copy of the contract users were asked to sign in 2003. Both contracts contain a forum selection clause stating that disputes or claims arising out of the contract are to be adjudicated in Santa Clara County, California." *Id.* (citations omitted).

Baczewski Int'l (USA) Inc. v. Sobieski Destylarnia, S.A., 572 F.3d 86, 89 (2d Cir. 2009). TradeComet has plainly not satisfied that burden here.

TradeComet does not argue that Google's forum clause was procured by fraud. It argues instead that the clause is unenforceable (i) because of overreaching, (ii) under antitrust policy, and (iii) because neither Google nor its adversary chose to invoke the clause in one recent case. TradeComet Br. 37-41. None of these arguments provides any basis to refuse enforcement here.

There is no overreaching. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), is the governing precedent on the implications of an imbalance of bargaining power in enforcing forum clauses. There, individual consumers from the State of Washington sued for injuries sustained on a cruise. Carnival's form contract ticket had a forum selection clause designating Florida, the location of Carnival's headquarters. The Court recognized that "a ticket of this kind will [necessarily] be a form contract the terms of which are not subject to negotiation, and . . . an individual purchasing the ticket will not have bargaining parity with the cruise line." *Id*. at 593. That, however, did not bar enforcement of the clause. Given Carnival's Florida location, there was "no indication that [Carnival] set Florida as the forum . . . as a means of discouraging cruise passengers from pursuing legitimate claims." *Id*. at 595. The clause was therefore enforceable.

Carnival applies with at least equal force here. This case involves a *commercial* arrangement among businesses. In contrast to *Carnival*, where individuals purchased a ticket in a single transaction, this case involves sophisticated businesses in an ongoing relationship of significant magnitude – with TradeComet grossing AdSense revenues in excess of $600,000 per month. JA 319. And it can hardly be described as overreaching for Google to enforce its forum clause against TradeComet. After all, it was TradeComet that expressly volunteered to raise *the same claims* against Google in the *KinderStart* case *in the very same federal court located in Santa Clara County, California*. JA 318-19.

Moreover, a venue selection clause is especially beneficial – and cannot be viewed as overreaching – in the context of an advertising agreement used by numerous advertisers. A company cannot be reasonably expected to have to litigate in courts throughout the country, with advertisers of all sizes, each time there is an advertising dispute. The cost of doing so and the risk of inconsistent interpretations of universally applicable agreements would create a real risk of impeding the company's operations and harming its users. As the Supreme Court recognized in an analogous context in *Carnival*: "a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum,

and conserving judicial resources that otherwise would be devoted to deciding those motions"; and it also "stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued." 499 U.S. at 593-94.

Google's forum selection clause has been repeatedly upheld over suggestions of unenforceability, and TradeComet is in no position to argue otherwise here. *See, e.g.*, *Flowbee* , slip op. at 13-14; *Feldman*, 513 F. Supp. 2d at 239-43; *Person*, 456 F. Supp. 2d at 494-97; *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 451-52 (E.D.N.Y. 2004).

The clause is consistent with antitrust policy. TradeComet next argues that enforcement of the forum clause by a "monopolist" would contravene antitrust policy – relying in this respect on *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968). The argument is meritless.

To begin with, *American Safety* is not good law. The decision was sharply limited – expressly – by *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-40 (1985). It also was effectively overruled by *JLM Indus. v. Stolt-Nielsen SA*, 387 F.3d 163, 171-76 (2d Cir. 2004), and has repeatedly been rejected since *Mitsubishi* as bad law. *See, e.g.*, *Seacoast Motors v. DaimlerChrysler Motors Corp.*, 271 F.3d 6, 10 (1st Cir. 2001) (noting that courts of appeals have

repeatedly "abandoned the *American Safety* doctrine in its entirety."); *In re Currency Conversion*, 265 F. Supp. 2d at 409.

In the wake of *M/S Bremen* and *Mitsubishi*, courts now invariably enforce forum selection clauses in antitrust cases – even ones where, as here, there is an assertion of a bargaining power imbalance. Thus, in *Bense v. Interstate Battery System of America, Inc.*, 683 F.2d 718 (2d Cir. 1982) – even before *Mitsubishi* – this Court enforced a forum selection clause in an antitrust suit by an individual plaintiff (located in Vermont) against a company (located in Dallas) with franchise operations throughout the country. And, since then, the cases have uniformly enforced forum clauses notwithstanding allegations of "monopoly" or other antitrust violations. *E.g.*, *Universal Grading Serv. v. eBay, Inc.*, 2009 WL 2029796, at *17-*20 (E.D.N.Y. June 10, 2009) (monopoly claim); *Person*, 456 F. Supp. 2d at 497 (monopoly claim); *Strategic Mktg. & Commc'ns v. Kmart Corp.*, 41 F. Supp. 2d 268, 270-71 (S.D.N.Y. 1998) (monopoly claim); *see also Crown Beverage Co. v. Cerveceria Moctezuma, S.A.*, 663 F.2d 886, 888 (9th Cir. 1981). TradeComet cites no contrary authority.

The "selective enforcement" argument has no basis. TradeComet relies on the fact that, in the pending case of *Google Inc. v. myTriggers.com LLC*, 09 CV 014836 (Ohio Common Pleas), Google filed suit in Ohio state court, rather than in

Santa Clara County. TradeComet asserts that this means Google has "reserved for itself the ability to seek redress in multiple fora." TradeComet Br. 40.

What TradeComet neglects to point out, however, is that the *myTriggers* case, as filed by Google, was a simple collection case based on myTriggers' failure to pay on an overdue account. The suit became more involved only when myTriggers hired new counsel – the same counsel representing TradeComet here (and Microsoft elsewhere) – who then raised purported antitrust counterclaims. TradeComet also fails to point out that there was no one-sided forum "reservation" by Google.[9] Nothing prevented myTriggers from invoking the forum clause to proceed in Santa Clara County; it simply chose not to.

myTriggers aside, TradeComet provided the district court with no instance in which Google "selectively enforced" its forum clause; nor did it provide any legal authority suggesting that selective enforcement of an otherwise valid clause provides a ground for denying enforcement in other cases. The district court was therefore on entirely firm ground in concluding that "TradeComet offers neither evidence to support its allegation of selective prosecution nor legal authority

---

[9] The cases cited by TradeComet, therefore, are wholly inapplicable. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285 (9th Cir. 2006) (arbitration clause unenforceable where defendant had option of arbitral or judicial forums but plaintiff was limited to arbitration); *Armendariz v. Found. Health Psychcare Servs.*, 6 P.3d 669 (Cal. 2000) (same).

indicating that such behavior – if true – would make a forum selection clause unconscionable and thus unenforceable." SA 15.

III. THE DISTRICT COURT DID NOT ERR IN REVIEWING THE FACTS

TradeComet asserts that the district court erred in declining to hold an evidentiary hearing. TradeComet Br. 26-28 (citing *New Moon Shipping Co. v. MAN B&W Diesel AG*, 121 F.3d 24 (2d Cir. 1997)).

TradeComet's argument is meritless. It fails to acknowledge that there was no evidentiary hearing because neither side requested one. As this Court has often explained, "[w]hen parties are content in the district court to rest on affidavits, the right to an evidentiary hearing is waived." *Drywall Tapers & Pointers v. Local 530*, 954 F.2d 69, 77 (2d Cir. 1992); *accord, e.g.*, *Consolidated Gold Fields v. Minorco, S.A.*, 871 F.2d 252, 256 (2d Cir. 1989). That is especially so where, as here, the appellant did not seek an "evidentiary hearing until [after] it had lost at the trial court level." *Drywall Tapers*, 954 F.2d at 77. TradeComet never even raised the possibility of an evidentiary hearing before filing this appeal.

The concern expressed in *New Moon* was that "no disputed fact should be resolved against [a] party [opposing a forum clause] until it has had an opportunity to be heard." 121 F.3d at 29. That concern was fully satisfied here. TradeComet *had* every opportunity to be heard. It was TradeComet, not Google, that refused to

produce any documents, to submit any declaration, or to provide any witness for deposition.

The court below, citing *New Moon*, took "the facts in the light most favorable to the party resisting enforcement of the forum selection clause." SA 5. On the one factual issue that TradeComet purported to dispute – whether TradeComet assented to the August 2006 agreement – the court found assent based on Google's uncontroverted proof of assent and the fact that TradeComet "neither denie[d] that its representatives agreed to the user agreement that contained the forum selection clause nor offer[ed] any evidence to the contrary." SA 10. Had these questions arisen in the context of a pretrial dispositive motion, TradeComet would have not been entitled to a trial as there was no "genuine issue as to any material fact." *See* FED. R. CIV. P. 56(c)(2). The same outcome is appropriate here.

IV. IF THE FORUM CLAUSE MAY BE ENFORCED ONLY UNDER § 1404, THIS COURT SHOULD TRANSFER TO SAN JOSE WITHOUT REMAND

In Point I above, Google explained why enforcement of its forum selection clause under Rule 12(b) was procedurally correct and why, therefore, the proper disposition of this appeal is to affirm the judgment below. However, were this Court to conclude that a forum clause is *only* enforceable under 28 U.S.C. § 1404(a), the appropriate result would be to transfer this case, without remand, to the Northern District of California, San Jose Division – the federal court located in Santa Clara County, California. The following considerations are relevant.

First, this Court has long recognized its "statutory and inherent authority to transfer" a case to a different district court. *Minnette v. Time Warner*, 997 F.2d 1023, 1026 (2d Cir. 1993); *see Bolar v. Frank*, 938 F.2d 377, 379-80 (2d Cir. 1991). There is therefore no doubt that this Court has the power to transfer without remand.

Second, under § 1404(a), Google's forum clause is entitled to considerable weight. As the Supreme Court said in *Stewart*, "[t]he presence of a forum-selection clause . . . will be a significant factor that figures centrally in the district court's calculus" under § 1404(a). 487 U.S. at 29; *see id.* at 33 (Kennedy, J., concurring) ("a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases."). Courts applying Google's clause in the § 1404 context have regularly given it significant weight, and the same result is appropriate here. *E.g.*, *Parts Geek*, 2010 WL 1381005, at *7-*9 (applying AdWords forum clause); *Flowbee*, slip op. at 16; *Feldman*, 513 F. Supp. 2d at 245-47; *Digital Envoy*, 319 F. Supp. 2d at 1380-81.

Third, the normal convenience factors favor transfer to San Jose in any event. That is where Google is headquartered, JA 11, and, therefore, where the overwhelming majority of witnesses and documents are located. It is also the "plaintiff's choice of forum" in the important sense that it is where TradeComet committed contractually to bring its claims. New York is TradeComet's business

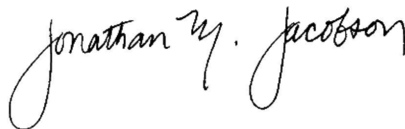
location, of course, but that factor is entitled to little weight here. TradeComet executives easily traveled to Google's headquarters to lodge their business complaint and, most critically, TradeComet previously volunteered to raise these identical claims in a class action against Google filed in the Northern District of California in San Jose. JA 318-19. TradeComet's evident willingness to pursue these same claims against Google in San Jose demonstrates that the objections it now raises to that venue are spurious.

Fourth, if § 1404(a) is the only vehicle for enforcement of Google's clause, the range of appellate outcomes here is narrow. The relief sought by TradeComet is a "reman[d] for consideration under the standard announced in § 1404(a)." TradeComet Br. 18. TradeComet does not seek, nor could it plausibly seek, any disposition that would preclude transfer to the Northern District of California if § 1404(a) were deemed applicable. In these circumstances, Google respectfully suggests that remand would involve a waste of the district court's time, and an unnecessary expenditure of the parties' resources. The relevant factors here are the presence of the forum clause in the August 2006 agreement; the location of Google's headquarters and the majority of the witnesses and documents; and TradeComet's demonstrated willingness to bring these very claims in Northern California. Given those factors, the outcome of any § 1404(a) analysis would be preordained. Transfer would be the only possible outcome.

CONCLUSION

TradeComet agreed – and agreed repeatedly – that any dispute relating to its AdWords agreement, or to the Google programs, would be litigated, if at all, in Santa Clara County, California. And, indeed, prior to launching the present case, TradeComet even volunteered to be a class action plaintiff – raising these same claims – in the *KinderStart* case in Santa Clara County. Its filing of this case in the Southern District of New York was improper. Judge Stein's ruling enforcing the forum selection clause by dismissing TradeComet's case under Rules 12(b)(1) and 12(b)(3) was entirely consistent with precedent established by this Court, the Supreme Court, and the other courts of appeals. It should, in all respects, be AFFIRMED.

Respectfully submitted,



____

JONATHAN M. JACOBSON
SARA CIARELLI WALSH
Wilson Sonsini Goodrich & Rosati
Professional Corporation
1301 Avenue of the Americas, 40th Floor
Telephone: (212) 497-7758
Facsimile: (212) 999-5899

Attorneys for Defendant-Appellee
Google Inc.

August 18, 2010

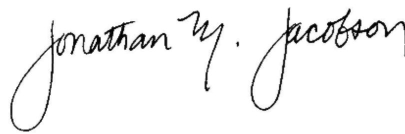
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 12,100 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

August 18, 2010

Respectfully submitted,



Jonathan M. Jacobson

#4007245 v.1

ADDENDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FLOWBEE INTERNATIONAL, INC., *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. C-09-199
	§	
GOOGLE, INC.,	§	
	§	
Defendant.	§	

ORDER

On this day came on to be considered Defendant Google Inc.'s motion to dismiss this case for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3), or alternatively, to transfer this case to the Northern District of California pursuant to 28 U.S.C. § 1406(a) or § 1404(a). (D.E. 11.) After hearing oral argument from counsel and for the reasons set forth below, the Court hereby DENIES Defendant's motion to dismiss this case for improper venue and the Court hereby GRANTS Defendant's alternative motion to transfer this case pursuant to 28 U.S.C. § 1404(a). (D.E. 11.)

I. Jurisdiction

This Court has federal question subject matter diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332, because the action arises in part under the Lanham Act, 15 U.S.C. § 1114.

II. Factual Background

Plaintiffs Flowbee International, Inc. and Flowbee Haircutter L.P. (collectively, "Flowbee") manufacture vacuum haircutters worldwide. Flowbee sells its goods primarily over the Internet. (D.E. 1, p. 6.)

Defendant Google, Inc. owns and operates an Internet search engine, which, in response to user queries, displays listings of websites generated from a database of websites using an algorithm. (D.E. 1, p. 2.) Google's search results display both what Plaintiff calls "natural" or "organic" results and also advertisements labeled "Sponsored Links." (D.E. 1, p. 2, 9.)

According to Flowbee, Google allows advertisers who contract with Google to select certain "keywords" that will trigger a Sponsored Link to the advertiser's chosen website. (D.E. 1, p. 15.) Advertisers agree to pay Google each time a web user clicks on the keyword-targeted Sponsored Links. (Id.) Flowbee alleges that Google purposely sponsors websites for its "Sponsored Links" section that infringe on Flowbee's trademarks. (D.E. 1, p. 14.) Further, Flowbee contends that Google improperly permits advertisers to select proprietary terms as keyword triggers. (D.E. 1. p. 15.)

In March 2004, the President of Flowbee, Rick Hunts, sent a "cease and desist" letter to Google "complaining of Google's improper use of a trademark owned by Flowbee and demanding that Google cease and desist its improper use of the trademark." (D.E. 24, Ex. 2, p. 3.)

Also in March 2004, Flowbee itself entered into an advertising contract with Google in order to participate in Google's advertising program. (D.E. 11, p. 2; D.E. 24, p. 1; D.E. 24, Ex. 2, p. 3.) The terms of this contract were revised on February 2007. (D.E. 24, Ex. 2, p. 3.) The revised contract states:

> **Introduction.** The following sections set forth the terms and conditions ("Terms") that govern your participation in Google's AdWords Select Advertising Program.

The contract also contained the following forum selection clause:

> **Miscellaneous**. THE AGREEMENT MUST BE CONSTRUED AS IF BOTH PARTIES JOINTLY WROTE IT AND GOVERNED BY CALIFORNIA LAW EXCEPT FOR ITS CONFLICTS OF LAWS PRINCIPLES. ALL CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE GOOGLE PROGRAM(S) SHALL BE LITIGATED EXCLUSIVELY IN THE FEDERAL OR STATE COURTS OF SANTA CLARA COUNTY, CALIFORNIA, USA, AND GOOGLE AND CUSTOMER CONSENT TO PERSONAL JURISDICTION IN THOSE COURTS.

(D.E. 11, Ex. 2, p. 6)

III. Procedural Background

Flowbee sued Google on August 13, 2009, alleging that Google unlawfully "sold to third parties the 'right' to use the trademark and service mark of Flowbee … as 'keyword' triggers that cause paid advertisements … to appear above or alongside the 'natural results.'" (D.E. 1, p. 2) Flowbee accordingly sued Google for trademark infringement, contributory trademark infringement, false representation, and trademark dilution under the Lanham Act, 15 U.S.C. § 1114 et al. Flowbee also sued Google for trademark infringement, unfair competition and misappropriation under Texas state law. (D.E. 1.)

Google brought this motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(3), or, in the alternative, to transfer this action to the Northern District of California pursuant to 28 U.S.C. § 1406 or § 1404. In its motion to dismiss, Google argues that the forum selection clause in the contract between Flowbee and Google requires the present action to be "litigated exclusively in the federal or state courts of Santa Clara County, California, USA." (D.E. 11, p. 2)

IV. Analysis

A. Motion to dismiss under 12(b)(3)

A party may move to dismiss an action based on improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). See also 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or 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.") However, "[t]he majority of courts which have considered the issue have held that when a federal court is the agreed forum under an enforceable forum selection clause the proper way to enforce such a clause is through a motion to transfer venue pursuant to 28 U.S.C. § 1404(a), and not a motion to dismiss for improper venue pursuant to Rule 12(b)(3) and § 1406(a). Ellington Credit Fund, Ltd. v. Select Portfolio, 2007 WL 3256210 at *4 (W.D. Tex. 2007) (citing Southeastern Consulting Group, Inc., 387 F.Supp.2d at 684; Speed v. Omega Protein, Inc., 246 F.Supp.2d 668, 671 (S .D.Tex.2003); Wal-Mart Stores, Inc. v. Qore, Inc., 2007 WL 2769835 at *2 (N.D.Miss. Sept. 20, 2007); Canvas Records, Inc. v. Koch Entertainment Distribution, LLC, 2007 WL 1239243 at * 5 (S.D. Tex. April 27, 2007); Gutermuth Investments, Inc. v. Coolbrands Smoothies, 2006 WL 2933886 at * 3 (W.D.Tex. Oct. 11, 2006); Youngblood, 2006 WL 1984656 at * 3; Dorsey v. Northern Life Ins. Co., 2004 WL 2496214, at *9 (E.D.La. Nov. 5, 2004)); see also Canales v. Telemundo, 2008 WL 110446 (S.D. Tex. 2008.) ("This Court has held that "the proper procedure to enforce a forum selection clause that provides for suit in another federal court is through § 1404(a) ....") (citations omitted); Southeastern Consulting Group, Inc. v. Maximus, Inc., 387 F.Supp.2d 681, 683-84 (S.D. Miss. 2005) ("The vast majority of [Fifth Circuit district

courts] have … decide[d] that a motion to dismiss for improper venue, either under § 1406 or Rule 12(b)(3), is inappropriate when a motion to transfer venue pursuant to § 1404 is an alternative.") "Because [Defendant] moved to dismiss this case based on a forum selection clause designating another federal court as the agreed forum, the Court finds that the proper procedure for enforcing the clause is through a motion to transfer venue pursuant to 28 U.S.C. § 1404(a), and not a motion to dismiss for improper venue pursuant to Rule 12(b)(3)." Accordingly, this Court will analyze Google's motion to transfer venue under § 1404. Ellington Credit Fund, Ltd. v. Select Portfolio, 2007 WL 3256210 at *4 (W.D. Tex. 2007); see Southeastern Consulting Group, Inc. v. Maximus, Inc., 387 F.Supp.2d 681, 683-84 (S.D. Miss. 2005) ("[W]hether a forum-selection clause should be enforced is a matter of contract, not an issue of proper venue.") (citing Kerobo v. Southwestern Clean Fuels, Corp., 285 F.3d 531, 535 (6th Cir. 2002)). In order to analyze Google's § 1404 motion to transfer, the Court must first analyze the forum selection clause at issue in this matter. Gutermuth Investments, Inc. v. Coolbrands Smoothies, 2006 WL 2933886 at *2 (W.D. Tex. 2006) ("When a forum selection clause forms the basis of a motion to … transfer venue, the first step is for the Court to determine whether the clause applies to plaintiffs' claims.")

B. The forum selection clause covers Plaintiff's claims

"In determining whether the forum selection clause applies in this case, the court first considers whether [Plaintiff's] claims fall within the scope of the clause, and it then turns to whether the clause is enforceable under the instant circumstances." TGI Fridays Inc. v. Great Northwest Restaurants, 2009 WL 2576374 at *5 (N.D. Tex. 2009). In other words, the Court "must first determine 'whether the clause applies to the type of claims

asserted in the lawsuit.'" Braspetro Oil Servs. Co.-Brasoil v. Modec (USA), Inc., 240 Fed.Appx. 612, 616 (5th Cir. 2007) (quoting Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688, 692 (8th Cir. 1997.)) To do this, the Court must "look to the language of the parties' contracts to determine which causes of action are governed by the forum selection clauses." Marinechance Shipping, Ltd. v. Sebastian, 143 F.3d 216, 222 (5th Cir. 1998.) The court must "examine[] the language of the forum-selection clause with a common-sense view of the causes of actions to determine whether the clause was broad enough to cover [the claims]." Ginter ex. rel. Ballard v. Belcher, Prendergast, 536 F.3d 439, 444-45 (5th Cir. 2008)

By its plain language, the contract's forum selection clause applies to "all claims arising out of or relating to this Agreement or the Google Program(s)" (D.E. 11, Ex. 2, p. 6) "Forum selection clauses covering claims 'relating to' an agreement are broad in scope." TGI Fridays Inc. v. Great Northwest Restaurants, 2009 WL 2576374 at *5; see MaxEn Capital, LLC v. Sutherland, 2009 WL 936895, at *6 (S.D. Tex. Apr. 3, 2009); and Greer v. 1-800-Flowers.com, Inc., 2007 WL 3102178 (S.D. Tex. 2007) (applying the forum selection clause broadly to encompass claims arising out of a telephone order even though the forum selection clause came from the defendant's website because the forum selection clause was broadly worded to include "any 'claim *relating to* this Web Site' or its content.") (emphasis added). Here, the language of the forum selection clause covers not only claims related to the agreement, but also claims related to the Google Programs. (D.E. 11, Ex. 2, p. 6.) The "Google Programs" are defined within the contract to mean "Google's advertising program(s)." (D.E. 11, Ex. 2, p. 4.) Within Flowbee's complaint, each allegation of Google's wrongdoing is premised on Google's advertising programs.

Plaintiff alleges the following in its complaint: the "natural results" on Google are "influenced by advertising (D.E. 1, p. 10); "Google specifically sponsors complete websites that contain Flowbee's trademark … as advertising agents (D.E. 1, p. 13); the 'Sponsored Links' is … substantially influenced by the amount of money the sponsors of these links are willing to pay Google (D.E. 1, p. 13); "Google … falsely communicates to consumers that Google's advertisers are official Flowbee affiliates, or that Flowbee sponsors … Google's advertisements (D.E. 1, p. 13); "Google disclaims responsibility for the advertisements that it publishes (D.E. 1, p. 17); Google makes "infringing use of proprietary marks as part of its keyword-triggered advertising program (D.E. 1, p. 18). Plaintiff's complaint thus makes clear that Plaintiffs claims all relate to Google's advertising programs. (D.E. 1.) Because they each relate to Google's advertising programs, Flowbee's claims all fall within the purview of the forum selection clause.

The forum selection clause specifies that these claims "shall be litigated exclusively" in California state or federal court. (D.E. 11, Ex. 2, p. 6.) As such, the forum selection clause is mandatory. See Park Place LX of Texas, Ltd. v. Market Scan, 2004 WL 524944 (N.D. Tex. 2004) ("The phrase 'shall have exclusive jurisdiction' [in a forum selection clause] makes the clause mandatory and not permissive.") See Von Graffenreid v. Craig, 246 F.Supp.2d 553, 560 (N.D.Tex.2003) ("Where the agreement contains clear language showing that jurisdiction is appropriate only in a designated forum, the clause is mandatory.") (citing Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 321 (10th Cir.1997)); Docksider, Ltd. v. Sea Tech., Ltd., 875 F.2d 762, 763-64 (9th Cir.1989); First Nat'l of N. Am., LLC v. Peavy, No. 3-02-CV-0033-R, 2002 WL 449582, at *1 (N.D.Tex. Mar.21, 2002).

Given both the broad scope of the "relating to" language and the mandatory nature of the "shall be litigated exclusively" language, Flowbee's claims against Google are all subject to the forum selection clause. Flowbee nonetheless makes three arguments for why the forum selection clause does not apply to Plaintiff's current claims. Each argument is addressed below.

i. The claims need not depend on the existence of the contractual relationship between the parties in order to fall under the purview of the forum selection clause

Plaintiff argues that the forum selection clause does not apply to Plaintiff's claims because the claims do not depend on any contractual relationship between Flowbee and Google. (D.E. 24, p. 8.) Plaintiff's argument lacks merit. "The scope of a forum-selection clause is not necessarily limited to claims for breach of the agreement in which the clause is found. See [Marine Chance Shipping v. Sebastian, 143 F.3d 216, 222-23 (5th Cir. 1998)].; see also Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1361 (2d Cir.1993) (noting there is "ample precedent" that the scope of a forum-selection clause is not restricted to claims for breach of the contract containing the clause). Instead, a court "must look to the language of the parties' contract[ ]" to determine whether a cause of action is governed by a forum-selection clause. Sebastian, 143 F.3d at 222." Dos Santos v. Bell Helicopter Textron, Inc. Dist., 2009 WL 2474771 *8 (N.D. Tex. 2009)

In defense of its argument, Plaintiff sets forth three cases in which claims were found to be outside the scope of the forum selection clause at issue.[1] For the reasons set

[1] Plaintiff cites to a few other cases, but each of those are easily distinguishable. The first one, an unpublished district court case from the Eastern District of Virginia, is Rosetta Stone Ltd. v. Google, Inc., No. 1:09-cv-736 (E.D. Va. Sept. 21, 2009). In Rosetta Stone, the court specifically noted that it was not bound by Fifth Circuit law. (D.E. 26, Ex. 3, p. 24.) This Court is. Accordingly, Plaintiff's reliance on this case is entirely misplaced. Similarly, Plaintiff, in a footnote, cites to three other cases, also from other circuits. Not only are those courts bound by different case law, but each of those three cases involve materially more restrictive forum selection clauses, thus rendering them inapplicable to the present case.

forth below, however, each of these three cases is entirely inapplicable to the present case.

The first case Plaintiff cites is an unreported district court case, discussing a forum selection clause that was limited to "any action commenced *hereunder*." Gullion v. JLG Serviceplus, Inc., 2007 WL 294174 at *6 (S.D. Tex. 2007) (emphasis added). In Gullion, the court cites to the second case, an Eighth Circuit case, which explains that "[the word] '[h]ereunder' refers to the relations that have arisen as a result of *this contract*." Terra Intern., Inc. v. Mississippi Chemical Corp., 119 F.3d 668, 694 (8th Cir. 1997) (emphasis added). Indeed, "'hereunder' typically signifies 'under the agreement'…." Terra, 119 F.3d at 692. Because the forum selection clause in the present case is not limited to actions arising "hereunder," neither Gullion nor Terra, nor any other case concerning a forum selection clause limited to claims arising "hereunder," is applicable to the present case.[2]

The third case Plaintiff cites, an unpublished Fifth Circuit case, is similarly inapplicable. In that case, American Airlines sued Yahoo! Inc. in the Northern District of Texas for trademark, misappropriation, and tort violations. In re Yahoo!, 313 Fed.Appx. 722 (5th Cir. 2009). Yahoo! moved to transfer the case to California pursuant to a forum selection clause written by Yahoo! that read:

See Manetti-Farrow v. Gucci America, 858 F.2d 509, 510 (9th Cir. 1988) (considering a forum selection clause that applied only to claims "regarding interpretation or fulfillment" of the contract); Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 193 (3d Cir.) (considering a forum selection clause that applied only to claims about the contract "conditions."); and Lambert v. Kysar, 983 F.2d 1110, 1112 (considering a forum selection clause that applied only to "enforce[ment]" of "the terms and conditions" of the contract).

[2] In fact, the Gullion court specifically points out that "The forum selection clause – which applies to 'any action commenced hereunder' – is '*not worded as broadly as some forum selection clauses*." Gullion, 2007 WL 294174 at *6 (emphasis added). This is exactly why courts must "look 'to the language of the parties' contracts to determine which causes of action are governed by the forum selection clause[]." Id. (citing Marinechance Shipping, Ltd. v. Sebastian, 143 F.3d 216, 222 (5th Cir.1998)).

> … You agree to submit to the exclusive jurisdiction of the state and federal courts located in Los Angeles County or Santa Clara County, California, or another location designated by us.

Id. The district court denied Yahoo!'s motion to transfer, explaining that the forum selection clause "makes no mention that American's claims must be brought exclusively in a forum of Yahoo!'s choosing, only that American itself will submit to a California (or other designated) court's jurisdiction." American Airlines, Inc. v. Yahoo!, Inc., 2009 WL 381995 (N.D. Tex. 2009.) Yahoo!'s subsequent petition for the writ of mandamus was denied in an unpublished opinion by the Fifth Circuit, which held that the district court did not abuse its discretion. In re Yahoo! Inc., 313 Fed. Appx. 722 (5th Cir. 2009.) As with the other cases Plaintiff cites, the Yahoo! case is distinguishable from the present case on the basis of the forum selection clause language. As the district court noted, the Yahoo! forum selection clause did not require California to be the sole location in which American could bring its claims; it just required that American "submit" to the jurisdiction of a court designated by Yahoo!. Id. "A party's consent to jurisdiction in one forum does not necessarily waive its right to have an action heard in another." City of New Orleans v. Mun. Admin. Servs., 376 F.3d 501, 504 (5th Cir.2004). Accordingly, the forum selection clause in the Yahoo! case was not mandatory. Id.

On the other hand, in the present case, the forum selection clause mandates that "all claims … relating to … the Google Program(s) *shall be litigated exclusively* in the federal or state courts of Santa Clara County…." (D.E. 11, Ex. 2, p. 6.) (emphasis added). "The phrase 'shall have exclusive jurisdiction' [in a forum selection clause] makes the clause mandatory and not permissive." Park Place LX of Texas, Ltd. v. Market Scan, 2004 WL 524944 (N.D. Tex. 2004) "Where the agreement contains clear language

showing that jurisdiction is appropriate only in a designated forum, the clause is mandatory." Von Graffenreid v. Craig, 246 F.Supp.2d 553, 560 (N.D.Tex.2003) (citing Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 321 (10th Cir.1997)); Docksider, Ltd. v. Sea Tech., Ltd., 875 F.2d 762, 763-64 (9th Cir.1989); First Nat'l of N. Am., LLC v. Peavy, No. 3-02-CV-0033-R, 2002 WL 449582, at *1 (N.D.Tex. Mar.21, 2002). Accordingly, whereas the Yahoo! forum selection clause was not mandatory, the forum selection clause in the present case is. Plaintiff's reliance on the Yahoo! case to establish the inapplicability of the forum selection clause is therefore misguided.

ii. The contract preamble does not limit the scope of the forum selection clause

Flowbee's second argument as to why the forum selection clause does not apply to Flowbee's claims concerns the preamble to the contract between Flowbee and Google. The preamble states, in pertinent part, that "[t]hese Terms govern Customer's participation in Google's advertising program(s)." Flowbee argues that this preamble language somehow limits the scope of the forum selection clause. Flowbee does not explain this argument, other than to say that the forum selection clause "does *not* apply to all matters concerning Google's AdWords Program, but is limited to matters concerning the 'Customer's participation in Google's advertising program.'" (D.E. 24, p. 10.)

The Court does not agree with Plaintiff's interpretation. The statement in the preamble that "the[contract] terms govern Customer's participation in Google's advertising program[s]," is entirely consistent with the fact that the forum selection clause covers matters outside the Customer's participation in Google's advertising program. This is because, according to the preamble language, the contract terms "*govern* [Plaintiff's] participation in Google's advertising program(s)." (emphasis added).

In other words, the terms of the contract are not restricted by Flowbee's participation in Google's advertising programs; rather, Flowbee's participation in Google's advertising programs is restricted by the terms of the contract. (D.E. 24, p. 10.) See Black's Law Dictionary 824 (4th ed. 1968) (defining "govern" as "to direct and control the actions or conduct of")

Moreover, to read the preamble language as Plaintiff proposes, would negate the plain language of the forum selection clause. Such an interpretation would therefore be "unreasonable." Cautillo Independent School Dist. V. National Union, 99 F.3d 695, 706 (5th Cir. 1996) ("[A]n interpretation is unreasonable if it would strip a provision of meaning.") (citing Lafarge Corp. v. Hartford Casualty Ins. Co., 61 F.3d 389, 396 (5th Cir. 1995); Ideal Mut. Ins. Co. v. Last Days Evangelical Assoc., 783 F.2d 1234, 1238 (5th Cir. 1986)). Accordingly, Plaintiff's argument that the preamble should be read in such a way so as to ignore its plain language and negate the plain language of the forum selection clause is also without merit.

iii. The forum selection clause applies to events occurring before contract was entered into

Plaintiff's third and final argument as to why the forum selection clause does not apply to Plaintiff's claims is that the forum selection clause cannot apply to claims that pre-date its execution. This argument is without merit. The forum selection clause at issue in this case specifically covers not only "all claims … relating to this agreement" but it also covers "all claims … relating to … the Google Program(s)." (D.E. 11, Ex. 2, p. 6.) Because the Google Programs were indisputably in effect before the execution of the agreement between Flowbee and Google, the scope of the forum selection clause covers claims pre-dating its execution. (D.E. 11, Ex. 2, p. 6.) Needless to say, Plaintiff's

reliance on authority analyzing forum selection clauses specifically limited in scope to the agreements in which they were contained is entirely misplaced.[3]

The idea that a contract clause can cover events prior to the execution of that clause is entirely unremarkable. Beneficial Nat. Bank, U.S.A. v. Payton, 214 F.Supp.2d 679, 688-89 (S.D. Miss. 2001.) (applying an arbitration clause to events occurring before the contract was entered into.) This is especially the case where, as here, there is an integration clause explaining that the contract "supersedes and replaces any other agreements, terms and conditions applicable to the subject matter hereof." (D.E. 11, Ex. 2, p. 6, ¶ 9.) Accordingly, Plaintiff's final argument as to why the forum selection clause does not apply to Plaintiff's claims is without merit.

C. The forum selection clause is enforceable

Having determined that the forum selection clause applies to the claims alleged by Plaintiff in this case, the Court next determines whether the forum selection clause is enforceable. TGI Fridays Inc. v. Great Northwest Restaurants, 2009 WL 2576374 at *5 (N.D. Tex. 2009). ("In determining whether the forum selection clause applies in this case, the court first considers whether [Plaintiff's] claims fall within the scope of the clause, and it then turns to whether the clause is enforceable under the instant circumstances.")

Forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the

[3] Specifically, Plaintiff relies on the following three distinguishable cases: (1) Gullion v. JLG Serviceplus, Inc., 2007 WL 294174 at *6 (S.D. Tex. 2007) (in which the forum selection clause was limited to "any action commenced *hereunder*") (emphasis added); (2) Anselmo v. Univision Station Group, Inc., 1993 WL 17173 (S.D.N.Y. 1993) (in which the forum selection clause was limited to "litigation *relating to this Agreement*") (emphasis added); and (3) Armco Inc. v. North Atlantic Ins. Co. Ltd., 68 F.Supp.2d 330 (S.D.N.Y. 1999) (in which the forum selection clause was limited to claims connected "with *this Agreement*") (emphasis added). Given that each of these cases concerns a forum selection clauses that is tied to the agreement in which it is located, none of these cases are applicable to the present case.

circumstances." Braspetro Oil Servs. Co., 240 Fed. Appx. at 615 (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, (1972). "Mandatory forum-selection clauses that require all litigation to be conducted in a specified forum are enforceable if their language is clear." UNC Lear Services, Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210, 219 (5th Cir. 2009) (citing City of New Orleans v. Mun. Admin. Servs., Inc., 376 F.3d 501, 504 (5th Cir. 2004)). "The party resisting application of the forum selection clause has a 'heavy burden of proof.' " Braspetro Oil Servs. Co., 240 Fed. Appx. at 615 (quoting M/S Bremen, 407 U.S. at 17); see Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 592 (1991) (noting that the contracting party seeking to avoid the consequences of a forum selection clause bears "a heavy burden of proof.") Here, Plaintiff disputes only the scope of the forum selection clause, not its enforceability. The forum selection clause is thus enforceable.

D. Motion to transfer this case pursuant to 28 U.S.C. § 1404(a)

Having determined that the forum selection clause applies to Plaintiff's claims and is enforceable, the Court must now consider whether to transfer this case to the designated forum pursuant to 28 U.S.C. § 1404(a). Canales v. Telemundo, 2008 WL 110446 (S.D. Tex. 2008.) ("'the proper procedure to enforce a forum selection clause that provides for suit in another federal court is through § 1404(a) ....'") (citations omitted). Section 1404(a) states 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 or division where it might have been brought." 28 U.S.C. § 1404(a). "There can be no question but that the district courts have broad discretion in deciding whether to order a transfer." In re Volkswagen of America, Inc., 545 F.3d 304, 311 (5th Cir. 2008).

The threshold question under 28 U.S.C. § 1404(a) is whether the case "might have been brought" in the Northern District of California. In re Horseshoe Entertainment, 337 F.3d 429, 433 (5th Cir. 2003); see also In re Volkswagen AG, 371 F.3d 201, 202 (5th Cir. 2004) ("[T]he first determination to be made is whether the judicial district to which transfer is sought would have been a district in which the claim could have been filed.") Here, Google's headquarters as well as the documents relating to Google's advertising programs are located in the Northern District of California. (D.E. 26, Ex. 4, Decl. R. Hagan.) Moreover, Plaintiff does not dispute that this the case might have been brought in the Northern District of California pursuant to 28 U.S.C. § 1391(b)(2). (D.E. 24, p. 13; D.E. 33, p. 9; 28 U.S.C. § 1391(b)(2) (venue is proper in "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."). This case thus might have been brought in the Northern District of California.

Accordingly, this Court must analyze the "private and public factors" to determine "whether a § 1404(a) venue transfer is for the convenience of parties and witnesses and in the interest of justice." In re Volkswagen of America, Inc., 545 F.3d 304, 315 (5th Cir. 2008.) The private interest factors are "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." In re Volkswagen AG, 371 F.3d 201, 203 (5th Cir. 2004.) The public interest factors are: "(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 [or in] the application of foreign law." Id. Although these factors are "appropriate for most transfer cases, they are not necessarily exhaustive or exclusive. Moreover … 'none … can be said to be of dispositive weight.'" Id. citing Action Indus., Inc. v. U.S. Fid. & Guar. Corp., 358 F.3d 337, 340 (5th Cir. 2004).

"In addition to the traditional factors, the Court in the instant action must also take into consideration the forum selection clause." Southeastern Consulting Group, Inc. v. Maximus, Inc., 387 F.Supp.2d 681 (S.D. Miss. 2005). "The presence of a forum-selection clause …figures centrally in the district court's calculus [in] resol[ving] the § 1404 motion in this case." Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988).

i. Private interest factors

The private interest factors weigh in favor of transferring the case. Google's headquarters are located in the Northern District of California whereas Flowbee's headquarters are located in the Southern District of Texas. (D.E. 26, Ex. 4, Decl. R. Hagan; D.E. 1, p. 4.) Both parties have presented evidence that it would be more convenient for them to litigate in the district in which they are headquartered, given the location of witnesses and other evidence. (D.E. 26, Ex. 4, Decl. R. Hagan; D.E. 24, Ex. 2, Decl. R. Hunts.) Whether this case is litigated in the Northern District of California or in the Southern District of Texas, "both parties have equally compelling interests in having the case heard in the venue closest to them." U.S. v. Ross Group Const. Corp., 2007 WL 3119691 at *5 (W.D. Tex. 2007) However, "the addition of the valid forum selection clause tips the scales in favor of transferring the case to the United States District Court for the Northern District of [California.]" Id. Elliot v. Carnival Cruise Lines, 231

F.Supp.2d 555, 561 (S.D. Tex. 2002) ("The forum-selection clause 'provides some indication that the convenience of the parties would presumably be better served by transfer' to [California.]") (citing LaFargue v. Union Pacific R.R., 154 F.Supp.2d 1001 (S.D. Tex. 2001)). Accordingly, the private interest factors weigh in favor of transferring the case to the Northern District of California.

ii. Public interest factors

The public interest factors are neutral with respect to transferring the case. Plaintiff presents some evidence that the Southern District of Texas would be a better venue in that the Northern District of California is a more congested district, and that, in addition to federal law claims, Plaintiff has brought claims under Texas state law. (D.E. 24, Ex. E; D.E. 1.) Both of these facts would tip in favor of not transferring the case under the public interest factors. However, Defendant presents evidence that the Northern District of California would be a better venue in that the contract specifically states that it is "governed by California law except for its conflicts of laws principles." (D.E. 11, Ex. 2, p. 6.) Accordingly, when viewed altogether, the public interest factors are neutral.

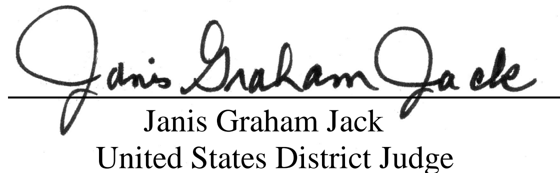
Given that the public interest factors are neutral and the private interest factors weigh in favor of transferring the case, especially in light of the valid, enforceable forum selection clause requiring all claims to be litigated in federal or state court in Santa Clara, California, this Court finds that this case should be transferred to the Northern District of California, pursuant to 28 U.S.C. § 1404(a). U.S. v. Ross Group Const. Corp., 2007 WL 3119691 (W.D. Tex. 2007) ("The presence of the forum-selection clause, while not dispositive, does represent the parties' agreement as to the most proper forum, and should

be a significant factor that figures centrally in the district court calculus.") (citing Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988)

V. Conclusion

For the reasons set forth above, the Court hereby DENIES Defendant's motion to dismiss this case for improper venue. (D.E. 11.) The Court hereby GRANTS Defendant's alternative motion to transfer this case, pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Northern District of California. (D.E. 11.) It is therefore ORDERED that this matter be TRANSFERRED to the Northern District of California.

SIGNED and ORDERED this 8th day of February, 2010.



Janis Graham Jack
United States District Judge

CERTIFICATE OF SERVICE & CM/ECF FILING

10-911

I hereby certify that I caused the foregoing Brief for Defendant-Appellee to be served on counsel for Plaintiff-Appellant via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1 and two hard copies by Federal Express Next Business Day delivery:

Charles Frederick Rule
Joseph J. Bial
Daniel J. Howley
Jonathan S. Kanter
CADWALADER, WICKERSHAM & TAFT LLP
700 Sixth Street, N.W.
Washington, DC 20001
(202) 862-2200

Attorneys for Plaintiff-Appellant

I certify that an electronic copy was uploaded to the Court's electronic filing system. Six hard copies of the foregoing Brief for Defendant-Appellee were sent to the Clerk's Office by hand delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8500

on this 18th day of August 2010.

/s/ Natasha Monell Arez
Natasha Monell Arez