10-0911

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRADECOMET.COM LLC,

Plaintiff-Appellant,

v.

GOOGLE, INC.,

Defendant-Appellee.

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT TRADECOMET.COM LLC

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INTRODUCTION

Google's brief provides lots of heat, but sheds little light on the issue before this Court. Much of Google's brief is inappropriately devoted to introducing "facts" that are irrelevant and outside the record.[1] The remainder is a collection of unsupported assertions (for example, that the language of 28 U.S.C. § 1406(a) contradicts TradeComet's arguments, *see* Section I.C, *supra*) and a plethora of citations to cases that on close inspection are irrelevant. But after all that, Google's argument comes down to this: whether or not a district court's obligation to employ the broad, "interest of justice" balancing inherent in 28 U.S.C. § 1404(a) depends entirely on whether a defendant chooses to enforce a forum selection clause pursuant to a motion to transfer, in which case § 1404(a) balancing is required, or pursuant to a motion to dismiss, in which case such balancing is not allowed and the complaint must be dismissed if a forum selection clause is enforceable under *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

The problem with Google's position is that it is directly contrary to the *ratio decidendi* of the leading Supreme Court precedent. *Stewart Org., Inc. v. Ricoh*

[1] Most egregiously, Google reprints a screen shot of the current SourceTool.com four years after it was reduced to a shadow of its former self by Google's depredations, apparently in an effort to persuade the Court that there is a little at stake in this case. Such a blatant attempt to color the Court's views of the legal issues are transparent and designed to prejudice TradeComet.

Corp., 487 U.S. 22 (1988). In *Stewart*, the Supreme Court made clear that through § 1404(a) Congress has given courts broad discretion to decide whether to enforce private forum selection clauses where, as here, venue is proper in the federal court in which the complaint is filed and where the forum selection clause designates a federal forum. Although a forum selection clause is relevant to the inquiry under *Stewart*, it is not dispositive. *Stewart* makes clear that Congress intended that the public interest as reflected in the federal statutes, not private interests as reflected in forum selection clauses, determine whether and where venue is proper within the federal court system.

Quite remarkably, Google waves off *Stewart* on the ground that the case involved a motion to transfer under § 1404(a) and then here Google filed, and the court below granted, a motion to dismiss under Rule 12(b). However, Google's position would eviscerate *Stewart* and would allow a private party, contrary to the rationale of *Stewart*, to divest the district court of the discretion provided by Congress in § 1404(a) to consider interests other than the private parties' agreement in determining whether a transfer, *vel non*, is in the "interest of justice." 487 U.S. at 30-31.

Even more remarkably, despite listing scores of decisions from lower courts and other circuits (as explained below, all of little or no relevance to this case), Google does not address the leading precedents from this Circuit that contradict its

position. *See Jones v. Weibrecht*, 901 F.2d 17, 18-19 (2d Cir. 1990) (indicating that the broad-based balancing is appropriate when the forum selection clause designates another federal forum but not when the clause specifies a non-federal forum to which a transfer is impossible); *Red Bull Assocs. v. Best Western Int'l, Inc.*, 862 F.2d 963 (2d Cir. 1988) (discussed below).

In particular, Google fails even to cite, much less to distinguish, this Court's holding in *Red Bull*. The Court in *Red Bull* stated that "outside the admiralty realm, Section 1404(a) transfer motions are not governed by the standard articulated in Bremen but by the terms of Section 1404(a) itself." 862 F.2d at 966.[2] Applying the broad discretion of § 1404(a) as directed by *Stewart*, this Court refused to transfer a civil rights action to another federal forum designated by a forum selection clause because the Court found the "interests of justice" were best served by maintaining the case in the venue where it was filed. As the Court observed, "[t]he existence of a forum selection clause cannot preclude the district court's inquiry into public policy ramifications of transfer decisions." *Id.* at 967. *A fortiori*, the defendant there could not – and Google here cannot – preclude such an inquiry by the simple and transparent expedient of denominating its motion as

[2]Despite Google's assertions to the contrary, the Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), in no way alters the clear mode of analysis set forth in *Stewart*. *Carnival* is inapposite because it is an admiralty case**.** The distinction between admiralty and non-admiralty cases is well-recognized, including by this Court. *See Red Bull*, 862 F.2d at 966. Moreover, in *Carnival*, the Supreme Court was never presented with the question of what standard to apply in the non-admiralty context.

one to dismiss (under Rule 12(b) or § 1406(a)) rather than as one to transfer (under § 1404(a)). 14 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3803.1 ("The view implicitly adopted by the Court in the *Stewart* case is . . . private parties should not have the power to transcend federal venue statutes that have been duly enacted by Congress and render venue improper in a district where it otherwise would be proper under congressional legislation"); 17 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 111.04[4][c] (3rd ed. 2009) (same).

Following *Red Bull*, the court below in this case should not have focused exclusively on the "convenience of the parties in light of their provision." Rather, the court should also have weighed in the balance the "public policy ramifications of [TradeComet's] acting as a 'private attorney general'" to enforce the antitrust laws against Google's willful monopolization. *See* 862 F.2d at 967.

Moreover, TradeComet has raised a justiciable question of fact regarding whether it even assented to the terms in the 8/29/06 Agreement that Google seeks to enforce. Despite contradictory evidence in the record – evidence put forward by Google only in its reply papers to the district court – the district court found affirmatively that TradeComet had indeed assented to the Agreement. Such a finding by a court is impermissible when evaluating a motion to dismiss.

Even if the district court applied the correct standard and considered the presence of a forum selection clause as only one part of the analysis under § 1404(a), for the forum selection clause to be relevant at all, it must be valid and enforceable. As TradeComet explained in its opening brief, the forum selection clause in the 8/29/06 Agreement is unenforceable against TradeComet in this matter because the Complaint alleges that Google's monopolization began well before that date. Moreover, public policy dictates that a forum clause in a form contract drafted and selectively enforced by a monopolist ought not be enforceable against an antitrust plaintiff such as TradeComet.

ARGUMENT

POINT I

DISMISSAL PURSUANT TO RULE 12(B) WAS IMPROPER

A. *Stewart* Mandates the Application of 1404(a) to Google's Motion

This Court has observed that the Supreme Court in *Stewart* "concluded that, outside the admiralty realm, § 1404(a) transfer motions are not governed by the standard articulated in *M/S Bremen* but by the terms of § 1404(a) itself." *Red Bull*, 862 F.2d at 966. As TradeComet explained in its opening brief, despite Google's denomination of its motion as one to dismiss for improper venue, *Stewart* still

controls this case. Given Google's facile attempt completely to discount *Stewart*, it is worth examining that decision in some detail.

Prior to *Stewart*, in *Bremen*, the Supreme Court had held that in the particular context of a case arising under admiralty law, a bargained-for forum selection clause should be enforced to dismiss the complaint unless the counter-party "could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[3] 407 U.S. 1, 15 (1972). *Stewart* was the Supreme Court's first opportunity to consider the relevance of its *Bremen* ruling outside the admiralty realm. 487 U.S. 22.

Relying on *Bremen*, the Court Appeals for the Eleventh Circuit, sitting *en banc*, in *Stewart* had held that a bargained-for forum selection clause required the transfer of a diversity case to the designated federal forum in the Southern District of New York. *Stewart Org. Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1071 (11th Cir. 1987) (*en banc*) (*per curiam*), *superseded by Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). As Google points out, the Supreme Court in *Stewart* granted the petition for certiorari to determine whether Alabama state law (which deemed forum selection clauses unenforceable) or federal law (pursuant to *Erie R. Co. v.*

[3] The selected forum under the clause in *Bremen* was a foreign one, and, as such, transfer under § 1404(a) or § 1406(a) was not an option.

Tompkins, 304 U.S. 64 (1938)) governed the enforceability of the forum selection. *Stewart*¸ 487 U.S. at 26-27. Nevertheless, after affirming that federal law indeed governed the enforceability of the forum clause (as the Eleventh Circuit had ruled), the Supreme Court held that the Eleventh Circuit had erred in its "articulation of the relevant inquiry as 'whether the forum selection clause in this case is unenforceable under the standards set forth in *The Bremen*.'" *Id.* at 28-29.

Outside of admiralty, the Supreme Court held that the narrow *Bremen* standard does not determine the enforceability of a forum selection clause.[4] Rather, "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Id.* (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). Although the "individualized" balancing of § 1404(a) "encompasses consideration of the parties' private expression of their venue preferences," the statute "directs a district court to take account of factors other than those that bear solely on the parties' private ordering of their affairs." 487 U.S. at 30. Thus, the district court "also *must* weigh in the balance the convenience of the witnesses and those public interest factors of systematic

[4] Although *Stewart* came to the Supreme Court as a diversity case, the Court made clear that the analysis is the same in federal-question cases. 487 U.S. at 25 n.2.

integrity and fairness that . . . come under the heading of 'the interest of justice.'" *Id.* (emphasis added).

To be sure, there are limits to the scope of the holding in *Stewart*, though none of those limits apply to TradeComet's complaint. First, *Stewart* did not purport to overrule the narrow *Bremen* rule in the *sui generis* context of admiralty law.[5] So in subsequent admiralty cases such as *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (discussed below), courts have continued to apply the narrow *Bremen* standard. Second, where venue is improper in any federal venue or similarly, where a forum selection clause designates a non-federal forum and makes transfer under § 1404(a) impossible, § 1404(a) is inapplicable and lower courts have continued to apply *Bremen* in those circumstances. *See, e.g.*, *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 382 (2d Cir. 2007) (applying *Bremen* analysis to forum clause that selected fora in England).

Notwithstanding these limitations, the rule in *Stewart* is clear, where as in the present non-admiralty case, venue is properly laid in the federal forum in which a complaint is filed and the defendant seeks to enforce a forum selection clause

[5] Admiralty law has yielded its own specific body of jurisprudence in the federal courts. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 836 (6th ed. 2009) ("Historically, admiralty was considered to be a distinct body of jurisprudence separate from law or equity").

that designates a different federal forum, the district court "must weigh in the balance . . . public interest factors," under § 1404(a), rather than considering only the enforceability of the parties' forum selection clause. *Stewart*, 487 U.S. at 30; *see* 17 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 111.04[4][c] (3rd ed. 2009) ("Based on *Stewart*, the applicable venue statute, and not a forum selection clause, should control whether venue is proper or not. Thus, a motion to dismiss for improper venue is not the appropriate vehicle by which to give effect to the clause when the forum selection clause designates another federal court, or either a state or federal court in a particular state, as the exclusive forums").

B. Google's Attempts to Distinguish *Stewart* Are Nonsensical

In an effort to distinguish *Stewart*, Google raises two deceptively simple, but ultimately nonsensical arguments. First, Google states that, unlike its motion to dismiss here, "[n]o suggestion of dismissal was before the [*Stewart*] Court." [Appellee's Br. 18]. *Stewart*, then, only applies to motions to transfer and not to motions to dismiss, and the "interests of justice" standard in § 1404(a) can be rendered moot so long as the moving party is clever enough to style its motion as one for dismissal (and not for transfer). Second, according to Google, the Supreme Court in *Stewart* could not have meant what it said because three years later in *Carnival*, it dismissed an admiralty case based on the narrow *Bremen* standard

rather than the broader § 1404(a) balancing test described in *Stewart*. Both arguments fail.

1. Although it is technically correct that in *Stewart* the Supreme Court was confronted with a motion to transfer pursuant to § 1404(a), the Court's opinion notes that the defendant had sought to enforce the forum selection clause pursuant to both a motion to transfer under § 1404(a) *and* a motion to dismiss under § 1406(a). 487 U.S. at 24. Moreover, the Court explicitly noted that "[t]he parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business in [the district where the complaint was filed]" and under the relevant federal venue statute, venue was proper there. *Id.* at 28 n.8. Contrary to Google's assertion that *Stewart* has no bearing on the propriety of a motion dismiss under § 1406(a), lower courts have cited this language in *Stewart* to support a conclusion that a motion to dismiss under § 1406(a) is inappropriate "where venue would be proper in the initial forum court, provided no forum selection clause covered the subject matter of the lawsuit."[6] *See, e.g.*, *Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 298 (3d Cir. 2001) ("[w]here venue would be proper

[6] Google points out that decisions by this Court allow motions to dismiss for improper venue or lack of subject matter jurisdiction pursuant to Rule 12(b)(3) and Rule 12(b)(1) respectively, [Appellee's Br. 21], but all the cases to which it cites involved situations either where transfer was impossible (because, *e.g.*, a non-federal forum was designated in the forum selection clause) or were decided before *Stewart*.

in the initial forum court, provided no forum selection clause covered the subject matter of the lawsuit, it is inappropriate to dismiss pursuant to 28 U.S.C. 1406"); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995) (§ 1406(a) not appropriate because forum is proper).

More fundamentally, reading the holding of *Stewart* as limited to cases in which the defendant has chosen to file a motion to transfer under § 1404(a) and therefore as not applicable when the defendant chooses to file a motion to dismiss under § 1406(a) or Rule 12(b) is nonsensical.[7] The entire premise of the Supreme Court's holding in *Stewart* is that, under § 1404(a) (and presumably in directing transfers even under § 1406(a) when the interests of justice so dictate), Congress invested the federal courts with broad discretion to serve the "interests of justice" and precluded the courts from rendering decisions purely on the basis of the private concerns of the parties. In the face of this Congressional mandate, "[t]he forum-selection clause . . . should receive neither dispositive consideration . . . nor no consideration . . ., but rather the consideration for which Congress provided in § 1404(a)." 487 U.S. at 31. In light of the Court's holding that a private forum selection clause cannot divest the district court of the discretion mandated by

[7] Mystifyingly, Google argues that the language of 1406(a) on its face is inconsistent with application of the "interests of justice" balancing mandated by *Stewart*. [Appellee's Br. 27]. Google fails to cite a single case in support. In fact, § 1406(a), like § 1404(a) requires the district court, as an alternative to dismissal, to transfer the case "*if it be in the interest of justice*."

Congress under § 1404(a), it is simply not credible to assert that a court's discretion can be circumscribed, and the interests of justice thwarted, by the simple expedient of styling a motion as one for dismissal rather than for transfer. *See Carrano v. Harborside Healthcare Corp.*, 199 F.R.D. 459, 463 (D. Conn. 2001) ("The issue ... is, can [the movant] limit the court to considering only dismissal rather than transfer solely by virtue of the language in which it casts its motion? This court ... concludes that such a result is inappropriate." (internal quotation marks omitted)).

2. Google's citation to *Carnival* adds nothing to its argument. First, that case arose under admiralty law, and as discussed above, *Stewart* did not change the applicability of the narrow rule in *Bremen* to admiralty cases.[8] *See Red Bull*, 862 F.2d at 966 ("outside the admiralty realm, § 1404(a) transfer motions are not governed by the standard articulated in *Bremen*"). Second, any argument that *Carnival sub silentio* eviscerated *Stewart* is inconsistent with the Supreme Court's rules, which "require[] that a subsidiary question be fairly included in the question presented for . . . review." *Wood v. Allen*, 130 S.Ct. 841, 851 (2010) (citing Sup. Ct. R. 14.1(a)). Other than a single "*cf.*" citation, *Stewart* is not even cited much

[8] Both the petitioner and the respondent in *Carnival* argued that the standard elucidated in *Bremen* applied to the dispute in that case and each argued that standard weighed in its favor. The petitioner cited *Stewart* in its brief, but only for the proposition that "[w]ith respect to non-admiralty cases, this Court indicated a policy in favor of forum selection clauses in *Stewart*." Pet.'r's Br. at *21 n. 19, *Carnival*, 499 U.S. 585 (No. 89-1647), 1990 WL 508099.

less discussed in *Carnival*. *See* 17 MOORE'S FEDERAL PRACTICE § 111.04[a][iii] (explaining *Carnival* did not overrule *Stewart* because Court would not have done so without explanation and because *Carnival* is an admiralty case).

C. Google Ignores The Relevant Precedent of This Court

Google then treats this Court to more than six pages of case citations and discussion, which, Google insinuates, provide support for its argument that *Stewart* can be side-stepped by simply styling a motion to enforce a forum selection clause as a motion to dismiss rather than as a motion to transfer. [Appellee's Br. 20-26]**.** Upon careful examination, all the cases can be set aside as either 1) pre-dating *Stewart*,[9] 2) involving forum-selection clauses that designate non-federal fora (making transfer impossible),[10] 3) cases where the parties did not brief the distinction between the *Bremen* and *Stewart* standards or the court did not address the issue,[11] or 4) inconsistent with *Stewart* and *Red Bull*.[12] Google's citation of

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[9] *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718 (2d Cir. 1982).

[10] *United States ex rel. Pittsburgh Tank & Tower, Inc. v. G & C Enters., Inc.*, 62 F.3d 35 (1st Cir. 1995) (forum clause required case be brought in Burlington County, NJ, which does not house a United States court); *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320 (9th Cir. 1996); *Asoma Corp. v. SK Shipping Co.*, 467 F.3d 817 (2d Cir. 2006); *New Moon Shipping Co. v. MAN B&W Diesel AG*, 121 F.3d 24 (2d Cir. 1997); *AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148 (2d Cir. 1984); *Phillips v. Audio Active Ltd.*, 494 F.3d 378 (2d Cir. 2007).

[11] *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385 (1st Cir. 2001); *Servewell Plumbing, LLC v. Federal Ins. Co.*, 439 F.3d 786 (8th Cir. 2006); *M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d 750 (8th Cir. 1999) (cites only the Eleventh Circuit's opinion in *Stewart*); *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

numerous irrelevant or inapposite decisions cannot overcome and should not obscure its inability to cite a single relevant apposite precedent for its argument.

Google's failure to cite any relevant post-*Stewart* decisions by this Court is not due to the absence of such precedents, however. As TradeComet discussed in its opening brief, there are apposite Second Circuit precedents, but Google chose to ignore them.[13] *See Jones v. Weibrecht*, 901 F.2d 17, 18 (2d Cir. 1990); *Red Bull*, 862 F.2d at 967 ("[I]t is clear that a district court has even broader discretion to decide transfer motions under § 1404(a) than was provided by *Bremen*").

Most notable among the precedents that Google ignores is this Court's decision in *Red Bull*. *Red Bull* involved allegations that the defendant had terminated the plaintiff's affiliation agreement in violation of the federal civil rights laws. The affiliation agreement contained a forum selection clause, and, on

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25, 2010); *Mercer v. Raildreams, Inc.*, 2010 WL 1342915 (E.D.N.Y. Apr. 7, 2010); *NY Metro Radio Korea, Inc. v. Korea Radio U.S.A., Inc.*, 2008 WL 189871 (E.D.N.Y. Jan. 18, 2008); *Weingrad v. Telepathy, Inc.*, 2005 WL 2990645 (S.D.N.Y. Nov. 7, 2005).

[12] *Nutter v. New Rents, Inc.*, 1991 WL 193490 (4th Cir. Oct. 1., 1991) (unpublished); *Chudner v. TransUnion Interactive, Inc.*, 626 F. Supp. 2d 1084 (D. Or. 2009); *Salovarra v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289 (3rd Cir. 2001); *Langley v. Prudential Mortg. Capital Co.*, 546 F.3d 365 (6th Cir. 2008); *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430 (S.D.N.Y. 2007).

[13] Google similarly ignores the uniform view of the principal commentators that in federal cases outside the realm of admiralty, an effort to enforce a forum selection clause that designates a federal forum must be evaluated under the "interests of justice" balancing analysis of § 1404(a) and *Stewart* regardless of how the moving party styles its motion. 14 CHARLES A. WRIGHT, ET. AL., , FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3803.1 ("Section 1404(a) should be applied to the exclusion of a *M/S Bremen* analysis"); 17 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 111.04[4][c] (3rd ed. 2009).

the basis of that clause, the defendant moved to transfer the case to Arizona pursuant to § 1404(a). Purporting to follow *Bremen*, the district court refused to enforce the clause on the ground that "public policy would obviously be hindered by enforcing a contract which would prevent or seriously discourage the pursuit of such litigation." *Id.* at 966.

The Court of Appeals affirmed, but on the basis of *Stewart*, not *Bremen.* The Court announced that "outside the admiralty realm, Sec. 1404(a) transfer motions are not governed by the standard in *Bremen* but by the terms of Sec. 1404(a) itself." *Id.* at 966. Moreover, according to the Court, "[p]ost . . . *Stewart*, it is clear that a district court has even broader discretion to decide transfer motions under Sec. 1404(a) than was provided by *Bremen*." *Id.* at 967. The Court noted approvingly that in deciding the motion the district court considered not only the convenience of the parties given their forum selection clause but also the "public policy implications of Red Bull's acting as a 'private attorney general' enforcing [the civil rights laws], and the strength of the evidence of discrimination." *Id.* As this Court noted,

> "While individuals are free to regulate their purely private disputes by means of contractual choice of forum, we cannot adopt a per se rule that gives these private arrangements dispositive effect where the civil rights laws are concerned. Congress declared two factors decisive on a motion for transfer pursuant to Sec. 1404(a). The private convenience of the parties . . . was only one of the elements to be considered. *The other component of the*

> *analysis – the interest of justice – is not properly within the power of private individuals to control.* The existence of a forum selection clause cannot preclude the district court's inquiry into the public policy ramifications of transfer decisions."

Id. (emphasis added).

As in *Stewart, Red Bull* involved a motion to transfer under § 1404(a). It is simply inconceivable, however, that this Court would have come to a different conclusion and held that the defendant could have blocked the district court's power to consider "the interest of justice" if only the defendant had styled its motion one for dismissal under § 1406(a) or Rule 12(b) (as opposed to a motion to transfer under § 1404(a)).

D. Under *Stewart* and *Red Bull*, Section 1404(a) Balancing is Required Here

Similar to the statutory structure of the civil rights laws that were at issue in *Red Bull*, TradeComet's Complaint against Google involves the important federal policy of enforcing the Sherman Act through "private attorneys general." *Compare Red Bull*, 862 F.2d at 966 ("Appellees also adduced evidence sufficient to persuade the district court of their role as 'private attorneys general' carrying out important community civil rights imperatives by maintaining this litigation") *with Alpine Pharm., Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir. 1973) (recognizing award of attorneys' fees as "particularly applicable in the area of the

antitrust class action, which depends heavily on the notion of the *private attorney general* as the vindicator of the public policy" (emphasis added)). The district court's failure to consider TradeComet's role as a private attorney general entrusted to enforce the antitrust laws would contravene Congress's purpose in providing incentives to private plaintiffs to bring antitrust actions, such as allowing for an award of treble damages,[14] attorney's fees to a prevailing party,[15] and a broad venue provision.[16] Moreover, as in *Red Bull*, enforcement of Google's forum selection clause creates a serious threat to this litigation.[17]

POINT II

THE DISTRICT COURT ERRED BY MAKING FACTUAL DETERMINATIONS ADVERSE TO TRADECOMET

Google argues the district court did not err by deciding facts adverse to TradeComet without first holding an evidentiary hearing because TradeComet made no request for one. [Appellee's Br. 48-49]. This argument does not cure the

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[14] 15 U.S.C. §15.

[15] 15 U.S.C. §26.

[16] In adopting the private right of action for antitrust plaintiffs, Congress made a considered decision to permit private plaintiffs to "sue . . . in any district court of the United States in the district in which the defendant resides or is found or has an agent." 15 U.S.C. § 15(a); *see also* 15 U.S.C. § 22 ("Any suit . . . under the antitrust laws against a corporation may be brought . . . in any district wherein it may be found or transacts business").

[17] In addition to the public policy favoring "private attorneys general" in antitrust suits, there are several reasons to favor TradeComet's chosen venue, such as the convenience of the likely witnesses, both parties' counsel, and the fact that Google has much greater financial means than TradeComet (not least because TradeComet's financial well-being was destroyed by Google's anticompetitive conduct). [JA 118].

district court's error. The court based its decision to dismiss TradeComet's complaint on a factual determination that was disputed. This is an error regardless whether TradeComet asked for an evidentiary hearing; it is axiomatic, as this Court has stated, that "[a] party seeking to avoid enforcement of [a forum selection] clause is ... entitled to have the facts viewed in the light most favorable to it." *New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24, 29 (2d Cir. 1997).[18]

The two cases Google cites for the proposition that TradeComet has forfeited this argument because it did not request an evidentiary hearing are inapposite. In both cases, unlike this one, there was a "voluminous and comprehensive record" that provided "a more than adequate source" for the judges' factual findings. *See Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 256 (2d Cir. 1989); *Drywall Tapers & Pointers v. Local 530*, 954 F.2d 69, 76-77 (2d Cir. 1992).

[18] Moreover, Google ignores the fact that it made certain factual arguments for the first time in its reply brief in support of its motion to dismiss. These factual arguments were inconsistent with Google's own evidence. [JA 295 at n. 9; JA 329-330].

POINT III

THE ADWORDS FORUM SELECTION CLAUSES ARE NOT ENFORCEABLE AGAINST TRADECOMET

A. The 8/29/06 Agreement is Not Enforceable

Google failed to address the case law supporting TradeComet's position that it is an egregious breach of public policy to permit a monopolist – there is no factual dispute for the purpose of this motion that Google is a monopolist – to violate the antitrust laws and thereafter to use its monopoly power retroactively to eviscerate the Congressionally mandated venue rights of the aggrieved party through an unavoidable contract of adhesion. As noted in Section I.A, *supra*, an inquiry into the public interest is a necessary component of the balancing inquiry the district court should have conducted under § 1404(a).

Google cites *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985), for the broad proposition that courts enforce forum selection clauses in antitrust cases.[19] [Appellee's Br. 46]. Google fails to point out, however, that in *Mitsubishi*, the Supreme Court stated that courts should "remain attuned to well-supported claims that the agreement . . . resulted from the sort of . .

[19] In *Mitsubishi*, the Supreme Court itself limited its holding only to international transactions, 473 U.S. at 629, and the decision thus does not apply by its own terms to a domestic transaction such as the one between TradeComet and Google. *But see Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1441(9th Cir. 1994); *Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 757 F. Supp. 283, 286 (S.D.N.Y. 1991). Moreover, Congress has given *arbitration* clauses, like the one at issue in *Mitsubishi*, special, favored status. *Stewart*, 487 U.S. at 36 (Scalia, J., dissenting).

. overwhelming economic power that would provide grounds for the revocation of any contract." *See* (cited in Appellant's Br. at 38).[20]

Google's suggestion that *Carnival* controls here is also wrong: *Carnival* did not concern a monopolist's imposition of an adhesion contract, much less a monopolist's imposition of an adhesion contract only *after* the monopolist undertook anticompetitive conduct to harm the plaintiff. Moreover, *Carnival* does not hold that forum selection clauses can never be against public policy under *Bremen*; rather, the Supreme Court conducted a careful analysis of the record in *Carnival* to conclude that enforcement of the clause was not unjust. To cite but one distinction between this case and *Carnival*, because Google maintains a monopoly in search advertising, TradeComet, unlike the plaintiffs in *Carnival*, did not "retain[] the option of rejecting the contract with impunity." 499 U.S. at 595.[21]

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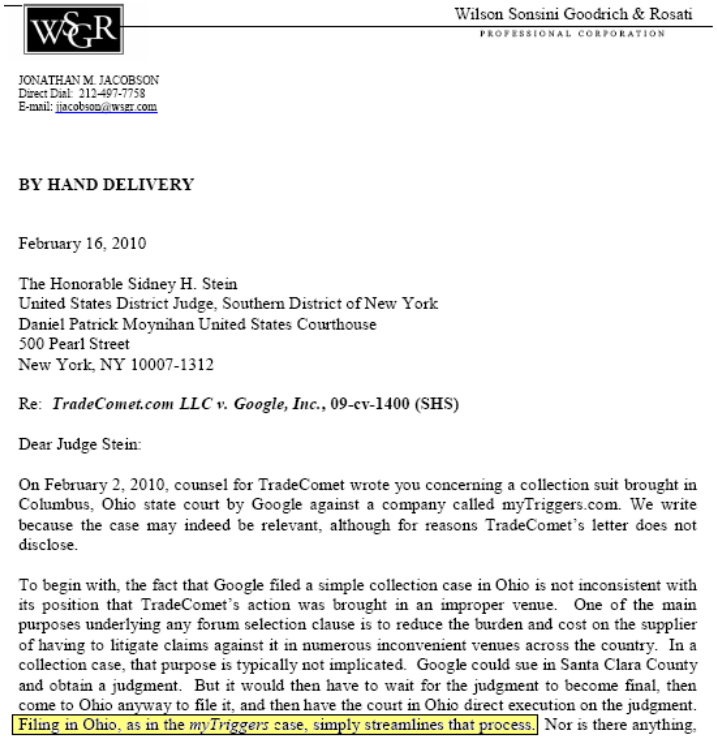
[20] As explained in its opening brief, TradeComet's claims of Google's monopoly power are "well-supported" not least because both federal agencies charged with enforcing the antitrust laws have come to the same conclusion after extensive and repeated investigations. [Appellant's Br. 4-5]. Google is under scrutiny elsewhere in the world for the same conduct at issue here. Press Release, Autorité de la concurrence, The Autorité de la concurrence orders Google to implement in an objective, transparent and non discriminatory manner the content policy of its AdWords service (June 30, 2010), *available at* http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=368&id_article=1420 (French regulator finding Google dominant); Eric Pfanner, *In Europe, Challenges for Google*, N.Y. TIMES, Feb. 1, 2010, http://www.nytimes.com/2010/02/02/technology/companies/02google.html.

[21] Other language cited by Google highlights meaningful differences between *Carnival* and the present case: The *Carnival* Court relied on the fact that "respondents have conceded that they were given notice of the forum provision." 499 U.S. at 590. TradeComet, on the other hand, does not concede that it was given notice. Similarly, the *Carnival* Court relied on the fact that it "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." [*See* Appellee's Br. 45 (*quoting* 499 U.S. at 593-94)]. Here, TradeComet received no such benefit. In fact,

Selective Use of the Forum Clause. In its brief, Google admits that it has sued on the 8/29/06 Agreement outside of California. [*See* Appellee's Br. 47]. Google sued a company called myTriggers in state court in Ohio for breach of a contract identical to the 8/29/06 Agreement. Google does not contend this was a mistake; instead, Google contends that it sues outside of California because it "streamlines" Google's lawsuits:



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BY HAND DELIVERY

February 16, 2010

The Honorable Sidney H. Stein
United States District Judge, Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: ***TradeComet.com LLC v. Google, Inc.*, 09-cv-1400 (SHS)**

Dear Judge Stein:

On February 2, 2010, counsel for TradeComet wrote you concerning a collection suit brought in Columbus, Ohio state court by Google against a company called myTriggers.com. We write because the case may indeed be relevant, although for reasons TradeComet's letter does not disclose.

To begin with, the fact that Google filed a simple collection case in Ohio is not inconsistent with its position that TradeComet's action was brought in an improper venue. One of the main purposes underlying any forum selection clause is to reduce the burden and cost on the supplier of having to litigate claims against it in numerous inconvenient venues across the country. In a collection case, that purpose is typically not implicated. Google could sue in Santa Clara County and obtain a judgment. But it would then have to wait for the judgment to become final, then come to Ohio anyway to file it, and then have the court in Ohio direct execution on the judgment. Filing in Ohio, as in the *myTriggers* case, simply streamlines that process. Nor is there anything,

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Google's alleged anticompetitive campaign to squelch the nascent threat posed by vertical search sites (including TradeComet) operated by, among other things, raising prices. Moreover, far from being a situation where consumers benefited, the crux of this case is the claim that Google's actions harmed consumers by destroying competition. Finally, the Supreme Court noted that the forum selection clause in *Carnival* promoted litigation certainty and efficiency in the realm of admiralty disputes. In contrast Congress has given "private attorneys general" in antitrust suits broad latitude in deciding where to sue.

Selecting a forum for reasons such as "streamlining" is classic forum shopping. Courts do not (and should not) countenance forum shopping by a defendant through selective invocation of its forum selection clause. *See, e.g.*, *E. & J. Gallo Winery v. Encana Energy Servs., Inc.*, 388 F. Supp. 2d 1148, 1162 (E.D. Cal. 2005) (refusing to enforce a forum clause where defendant engaged in improper "forum shopping" by invoking forum selection clause late). Moreover, the fact that Google has not enforced the forum selection clause consistently indicates that the clause itself is not mandatory, and is therefore unenforceable. *See, e.g., John Boutari & Son, Wines and Spirits, S.A. v. Attiki Imp. and Distrib. Inc.*, 22 F.3d 51, 53 (2d Cir. 1994) (refusing to enforce clause where permissive).

Google seemingly argues that the district court was correct because if one were to put "*myTriggers* aside," then the district court would be justified in stating that there was no "evidence to support [the] allegation of selective prosecution." [*See* Appellee's Br. 47]. As in its § 1404(a) arguments, Google hopes to prevail by persuading the Court simply to disregard – or "put aside" – all the inconvenient facts and precedent that contradicts its arguments. The rules of procedure ensure that Google's hope will go unrealized.[22]

[22] Google's contention that it does not have a "one-sided forum 'reservation'" because "nothing prevented myTriggers from invoking the forum clause" adds little because this contention also requires the Court to

Google makes two further "arguments" to justify its selective enforcement: (1) that the same attorneys who represent TradeComet in this matter also represent myTriggers in its lawsuit and the Microsoft Corporation "elsewhere"; and (2) that TradeComet has not provided legal authority that serves to preclude a party from enforcing a forum selection clause against one party but not another. The first point is entirely irrelevant. It is hardly surprising that lawyers – and large international law firms – have multiple clients. Google's second point is wrong. TradeComet provided legal authority supporting the point that contracts that provide one party with its choice of fora while denying it to the other party are unenforceable. *See, e.g.*, *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285 (9th Cir. 2006); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 693-94 (Cal. 2000).

B. District Court Erred by Applying Contract Retroactively

Google's argument that the 8/29/06 Agreement governs TradeComet's lawsuit because this lawsuit was filed after the implementation of that latest version of the AdWords agreement is without any legal basis. [*See* Appellee's Br. 34-36]. It cannot possibly be the case that the date a lawsuit is filed is determinative of a party's rights under a contract. Not surprisingly, Google cites

ignore reality – no victim of Google's monopoly would seek to transfer a suit brought by Google into Google's backyard.

no case law to support this untenable position. Indeed, Google simply ignores the cases TradeComet cites on this point. *See, e.g.*, *Bancomer S.A. v. Super. Ct. Los Angeles*, 44 Cal. App. 4th 1450, 1461 (Cal. App. Ct. 1996); [Appellant's Br. 31-32].

In the Complaint here, TradeComet alleges that Google's anticompetitive conduct began before 8/29/06 and, to the extent any forum selection clause in an AdWords contract has any bearing on this Complaint, it is not the clause in the 8/29/06 Agreement. The proper rule, as TradeComet has argued, is that for a contract to apply retroactively, the terms of the contract itself must clearly demonstrate that the parties intended the contract to apply retroactively. [Appellant's Br. 30-37].

To overcome the default rule against retroactive application, Google points to a simple merger clause as evidence the contract is intended to apply retroactively. [Appellee's Br. 36-38]. As TradeComet explained in its opening brief, citing *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278, 283 (2d Cir. 2005), such clauses do not replace prior agreements between the parties. [Appellant's Br. 37]. Google attempts to mischaracterize *Bank Julius* by arguing that the merger clause in the later contract did not extinguish a prior contract because the prior contract was "unrelated to the subject matter" of the later contract. [Appellee's Br. at 39]. This is not the case. In *Bank Julius*, the

agreements were related because the first agreement governed the parties' general relationship while the later agreements plainly addressed specific transactions flowing from the first agreement. 424 F.3d at 280. In no way were the two agreements "unrelated" as Google claims.

Google's attempts to distinguish other cases cited by TradeComet are similarly unpersuasive. With regard to *Security Watch*, Google confuses the court's discussion of an arbitration clause with a merger clause. The court specifically noted, addressing the merger clause, that "it is inappropriate to read the . . . merger clause as superseding prior annual contracts." 176 F.3d at 372. The court observed that it would be "nonsensical to suggest that [a party] simply would abandon its established right to litigate disputes arising under the [previous] contracts." *Id*. The First Circuit's decision in *Choice Sec. Sys. v. AT&T*, No. 97-1774, 1998 WL 153254, at *1 (1st Cir. 1998), reaches the same conclusion, notwithstanding Google's attempt to mischaracterize its holding.

Next, Google attempts to confuse the Court by suggesting TradeComet has argued the 8/29/06 Agreement is ambiguous. [Appellee's Br. 36-37]. TradeComet did no such thing. *See* Brief of Appellants at 33. TradeComet argued only that, *if* the 8/29/06 Agreement was ambiguous, then prevailing law and extrinsic evidence intimates against retroactive application. First, any ambiguity in a contract must be interpreted against the drafter. CAL. CIV. CODE § 1654 (West 2010). Because

Google drafted the 8/29/06 Agreement, the Court must construe the Agreement as applying only prospectively. Moreover, extrinsic evidence shows that Google itself does not view its AdWords Agreements as applying retroactively. Google's own witness agreed that the contract would "dictate the way that the account would be run moving forward" and proceeded to confirm that the new version of the contract would supersede previous terms and conditions only "on a going-forward basis." [JA 244, 247]. There is no evidence that this agreement applies retroactively, which also (as discussed above) is contrary to the case law. Finally, in other lawsuits Google chose to apply the earlier version of its contracts, notwithstanding that the later version was already in existence. *See Person v. Google*, No. 06-CV-4683 (S.D.N.Y. July 27, 2006), [JA 204] (applying Nov. 2003 agreement); Amended Complaint, *Google Inc. v. MyTriggers.com, Inc.*, 09-CV-14836 (Ct. Common Pleas, Franklin Cnty, Ohio Jan. 20, 2010), *available at* http://www.franklincountyohio.gov/clerk/cio.htm. [23]

CONCLUSION

For the foregoing reasons, plaintiff-appellant TradeComet respectfully submits that the judgment entered below should be REVERSED.

[23] Google references the fact that earlier versions of the AdWords contract also specify Santa Clara County, California as the forum for disputes. [Appellee's Br. 39-42]. The earlier agreements, however, do not have the same broad language as the 8/29/06 Agreement. *See* [SA 7-11].

Respectfully submitted this 1st day of September, 2010.

By: /s/ Charles F. Rule
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Federal Rules of Appellate Procedure Form 6.
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(s) Charles F. Rule _____

Attorney for TradeComet _____

Dated: Sept. 1, 2010 _____