

January 24, 2011

BY CM/ECF

Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: TradeComet.com LLC v. Google Inc., No.: 10-0911 - Letter under Rule 28(j)

Dear Ms. Wolfe,

Plaintiff-Appellant TradeComet.com LLC ("TradeComet") submits this letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure to advise this Court of the most recent decision by a district court in the Southern District of New York relating to the issues raised by TradeComet in this appeal.

In *Chiste v. Hotels.com LP*, Nos. 08 Civ. 10676, 08 Civ. 10744, 08 Civ. 10746, 10 Civ. 07522, 2010 WL 4630317 (S.D.N.Y. Nov. 15, 2010), Judge Colleen McMahon was presented with a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(3) or, in the alternative, to transfer pursuant to 28 U.S.C. § 1404(a), based upon a forum provision that selected state and federal forums in Texas as the only permissible fora. *Id.* at *1.

With regard to a motion to dismiss under Rule 12(b)(1), the court held "[a] forum-selection clause does not divest a federal court of subject matter jurisdiction, so it would not be appropriate to dismiss the case pursuant to Rule 12(b)(1)." *Id.* at *5.

With regard to Rule 12(b)(3), the court held that "[v]enue is governed by statute, and the parties' agreement to litigate elsewhere does not change the fact that venue is statutorily proper here. It is therefore misleading to dismiss [the] suit for improper venue under Rule 12(b)(3)." *Id.*

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Ultimately, the court concluded that “[s]ince the case cannot be dismissed for lack of either subject-matter jurisdiction or venue, *the only mechanism for enforcing the forum-selection clause is a transfer pursuant to 28 U.S.C. § 1404(a).*” *Id.* at *6 (emphasis supplied).

As Google admits in its letter dated January 19, 2011, the supplemental authorities it has brought to the Court’s attention “do not address[] specifically the argument advanced in TradeComet’s briefs that transfer under 28 U.S.C. § 1404(a) is the only means of enforcing a forum selection clause when transfer to a domestic federal forum is possible.” *Chiste*, by contrast, addresses precisely those arguments, *see* TradeComet Br. 17-21; TradeComet Reply Br. 5-9, and concludes that § 1404(a) is the only proper procedural vehicle by which to consider whether to enforce such a provision.

Sincerely,



Charles F. Rule

cc: All Counsel (by CM/ECF)