

1 COOLEY LLP
 2 MICHAEL G. RHODES (116127)
 (rhodesmg@cooley.com)
 3 MATTHEW D. BROWN (196972)
 (brownmd@cooley.com)
 4 BENJAMIN H. KLEINE (257225)
 (bkleine@cooley.com)
 5 SARAH R. BOOT (253658)
 (sboot@cooley.com)
 6 NEHA M. MARATHE (252304)
 (nmarathe@cooley.com)
 7 101 California Street
 5th Floor
 San Francisco, CA 94111-5800
 8 Telephone: (415) 693-2000
 Facsimile: (415) 693-2222
 9

10 Attorneys for Defendant
 11 YELP! INC.

12 UNITED STATES DISTRICT COURT
 13 CENTRAL DISTRICT OF CALIFORNIA
 14 WESTERN DIVISION

15 CATS AND DOGS ANIMAL
 16 HOSPITAL, INC., et al., on behalf of
 itself and all others similarly situated,

17 Plaintiffs,

18 v.

19 YELP! INC.,

20 Defendant.

Case No. CV 10-01340 VBF(SSx)

**DEFENDANT YELP! INC.'S REPLY IN
 SUPPORT OF MOTION TO TRANSFER
 VENUE (28 U.S.C. § 1404(a))**

Motion Date: May 10, 2010
 Motion Time: 1:30 p.m.
 Judge: Hon. Valerie Baker Fairbank

21 CHRISTINE LaPAUSKY d/b/a
 22 D'AMES DAY SPA, on behalf of
 herself and all others similarly situated,

23 Plaintiffs,

24 v.

25 YELP! INC.,

26 Defendant.

Case No. CV 10-01578 VBF (SSx)

**DEFENDANT YELP'S REPLY I/S/O
 MOT. TO TRANSFER VENUE
 CASE NOS. CV 10-01340 & 10-01578 VBF (SSx)**

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1 (1) agreement to the terms of an Advertising Agreement; (2) registration for Yelp’s
2 business services at biz.yelp.com; and (3) use of the Yelp Website
3 (www.yelp.com). Yelp described these three ways of agreeing in the Declaration of
4 Bryan Byrne. (*See* Yelp Br. 4-5, 9-11; Byrne Decl. ¶¶ 2, 6, 9.)

5 Disregarding the distinction entirely, Plaintiffs conflate these three methods
6 of agreement—suggesting that all business owners are notified of the TOS solely
7 via a link at the bottom of Yelp’s business home page. (Pls.’ Opp. 14.) They thus
8 obfuscate the fact that every business that registers at biz.yelp.com *affirmatively*
9 *assents* to the TOS¹—which eight of the eleven Plaintiffs have done.² (*See* Yelp
10 Br. 10.) Further, Plaintiffs attach a screenshot of a biz.yelp.com login page, not the
11 registration page described here and in the Byrne Declaration. (*Compare* Lee Beck
12 Decl. Ex. B *and* Byrne Decl. ¶ 6.) Yelp attaches the correct screenshot of the first
13 page of the online registration process. (*See* Decl. of Matthew Tai (“Tai Decl.”)
14 Ex. A.)

15 Plaintiffs also barely mention the fact that all three “Sponsor Plaintiffs” have
16 *affirmatively agreed* to an Advertising Agreement with Yelp.³ (*See* Byrne Decl.

17 ¹ The first page of the online registration process states: “By clicking the button below,
18 you agree to the Yelp Terms of Service.” The “Yelp Terms of Service “ text is in blue
19 font and is hyperlinked to the TOS; the “button below” refers to a red button directly
20 underneath the text that states “Next Step.” A business owner must affirmatively click on
the “Next Step” button to proceed past the first page of the registration process.

21 ² Like the three Sponsor Plaintiffs’ declarations discussed *infra*, Wag My Tail’s owner’s
22 declaration, that to her knowledge she has never agreed to a forum selection clause, is
23 irrelevant. She assented to the TOS by registering for Yelp’s business services on
24 November 16, 2009. (*See* Byrne Decl. ¶¶ 7-8 & Ex. D.) That several Plaintiffs did not
submit any declarations (Astro, Adult Socials, Le Petite Retreat, Scion, and LaPausky)
suggests those Plaintiffs do not dispute that they agreed to the forum selection clause.

25 ³ Business owners generally enter into the Advertising Agreements by: (1) accepting a
26 click-through agreement online; (2) by signing an agreement in paper form; and (3) by
27 agreeing via email by stating “I agree” or a similar statement. Sofa Outlet signed an
28 Advertising Agreement in paper form (Byrne Decl. ¶ 3 & Ex. A), Bleeding Heart
Bakery’s owner typed out “I, Michelle Garcia, agree to these terms” (Byrne Decl. ¶ 5 &
Ex. C), and Celibré owner Kevin DiCerbo accepted through the online purchasing process
(Byrne Decl. ¶ 4 & Ex. B. (DiCerbo email address redacted)). Yelp attaches a screenshot

1 ¶¶ 3-5 & Exs. A-C.) These three Plaintiffs have submitted declarations stating that
2 to their knowledge, they have never agreed to a forum selection clause. (*See*
3 *DiCerbo Decl.* ¶ 2; *Seaton Decl.* ¶ 2; *Blecher*⁴ *Decl.* ¶ 2.) However, not reading the
4 agreements they signed (whether paper, e-mail, or click-through) is of no relevance,
5 and is certainly not a legal defense. *See e.g., Operating Eng’rs Pension Trust v.*
6 *Cecil Backhoe Serv., Inc.*, 795 F.2d 1501, 1505 (9th Cir. 1986); *DeJohn v. The .TV*
7 *Corp. Int’l*, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003) (“The fact that [plaintiff]
8 claims that he did not read the [online] contract is irrelevant because absent fraud
9 (not alleged here), failure to read a contract is not a get out of jail free card.”).

10 The online agreements to register for Yelp’s business services and to
11 advertise on the Yelp Website are valid and enforceable, and Plaintiffs have put
12 forth no authority to the contrary. (*See* Yelp Br. 10 (citing cases).). *See also*
13 *Person v. Google Inc.*, 456 F. Supp. 2d 488, 493 (S.D.N.Y. 2006) (enforcing online
14 forum selection clause where “every customer must click on a box acknowledging
15 that they agree to the terms and conditions of Defendant’s contract” and thus,
16 “Plaintiff’s very existence as an AdWords customer [was] evidence that he had
17 agreed to the [] form contract proffered by Defendant.”); *Novak v. Overture Servs.,*
18 *Inc.*, 309 F. Supp. 2d 446, 451 (E.D.N.Y. 2004) (enforcing forum selection clause
19 in online agreement where plaintiff was required to click button indicating
20 acceptance in order to proceed and therefore had reasonable opportunity to review
21 terms); *DeJohn*, 245 F. Supp. 2d at 918-19 (online agreement enforceable because
22 user “expressly indicated that he read, understood and agreed to those terms when

23 _____
24 of the last page of the online purchasing process. (Tai Decl. Ex. B.)

25 ⁴ Jason Aaron Blecher, manager of Bleeding Heart Bakery, submitted a declaration in
26 support of Plaintiffs’ Opposition. (*See* Blecher Decl. ¶ 1.) However, as stated in Exhibit
27 C to the Byrne Declaration, it was **Michelle Garcia**, owner and operator of Bleeding
28 Heart Bakery, who agreed to the terms of the Advertising Agreement—by typing out in an
email to Yelp “I, Michelle Garcia, agree to these terms.” Plaintiff Bleeding Heart Bakery
cannot escape the terms of its Advertising Agreement by simply attaching a declaration
from an employee without knowledge who did not “sign” the agreement.

1 he clicked the box on [the defendant]’s website,” and user “always had the option to
2 reject [the defendant]’s contract and obtain . . . services elsewhere”); *i.Lan Sys., Inc.*
3 *v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328, 335-36 (D. Mass. 2002) (user
4 “manifested assent to the clickwrap license agreement when it clicked on the box
5 stating ‘I agree’”).

6 **B. By Virtue of Their Own Allegations, All Eleven Plaintiffs Have**
7 **Agreed to the Forum Selection Clause.**

8 As the FAC makes clear, by repeated use of the Yelp Website, all Plaintiffs
9 have agreed to Yelp’s TOS and the forum selection clause therein. (*See* Yelp Br.
10 9.)⁵ Plaintiffs’ contention that such browse-wrap agreements have “rarely been
11 enforced or upheld by a court” (Pls.’ Opp. 19) does not square with the line of cases
12 nationwide upholding such agreements. (*See* Yelp Br. 9 (citing cases).) Further,
13 Plaintiffs’ few cases do not stand for the proposition that browse-wrap agreements
14 are rarely enforced. *Douglas v. U.S. Dist. Court for C.D. of Cal.*, 495 F.3d 1062
15 (9th Cir. 2007), does not concern the enforceability of browse-wrap agreements.
16 There, plaintiff contracted for long distance service with America Online, which
17 then changed the terms of the contract by posting a revised contract on its website.
18 The court held that the plaintiff was not bound by the revised contract because (1)
19 *he never visited the website*; and (2) he had no notice of the proposed *changes* such
20 that his continued use of the website could be considered assent. *Id.* at 1065-66.
21 Here, all Plaintiffs have used the Yelp Website and there is no revision at issue,
22 since the forum selection clause has remained virtually identical since 2004.

23 Plaintiffs’ citation to *Specht v. Netscape Communications Corp.*, 306 F.3d 17
24 (2d Cir. 2002), is equally unavailing. In *Specht*, there was no basis for imputing

25 _____
26 ⁵ The Yelp Website homepage (*i.e.*, the initial webpage displayed at www.yelp.com) and
27 every webpage on the Yelp Website states: “Use of this site is subject to express **Terms of**
28 **Service**. By continuing past this page, you agree to abide by these terms” (the “TOS
Notice”). (Byrne Decl. ¶ 9.) The “Terms of Service” text is in bold and is hyperlinked—if
a user clicks on the text, the user is directed to the TOS in effect on that date. (*Id.*)

1 knowledge of the license terms to users who downloaded Netscape’s software only
2 once. *See Specht*, 306 F.3d at 33 n.16. Here, Plaintiffs made repeated use of the
3 Yelp Website and even referenced the TOS in their communications with Yelp.
4 (*See* FAC ¶¶ 96, 103, 104, 126, 131; *see also id.* at ¶¶ 57, 58, 93.)

5 **C. Permissive Forum Selection Clauses Are Entitled to Substantial**
6 **Consideration.**

7 Plaintiffs claim there is a “long line of federal decisional authority granting
8 little weight to permissive forum selection clauses within the analysis under
9 1404(a).” (Pls.’ Opp . at 13.) This position cannot be reconciled with the line of
10 cases from numerous circuits which hold that such clauses are entitled to
11 “substantial consideration” in the venue transfer analysis. *See, e.g., Unisys Corp. v.*
12 *Access Co., Ltd.*, No. C05-3378 TEH, 2005 WL 3157457, at *5 (N.D. Cal. Nov. 23,
13 2005) (finding permissive forum selection clause was “entitled to ‘substantial
14 consideration’” and weighed in favor of § 1404(a) transfer).⁶

15 Likewise, the Third Circuit and district courts within other circuits (such as
16 the Second, Seventh, and Eleventh Circuits) have accorded great weight to
17 permissive forum selection clauses in the venue transfer analysis. *See Jumara v.*
18 *State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995) (giving substantial, though not
19 dispositive, weight to a permissive forum selection clause); *Stateline Power Corp.*
20 *v. Kremer*, 404 F. Supp. 2d 1373, 1380-81 (S.D. Fla. 2005) (“the [permissive]
21 forum selection clause suggests that, at the time of signing the contract, [the party]
22 did not consider the possibility of litigation in Florida to be impermissibly

23 _____
24 ⁶ Plaintiffs contend that *BrowserCam Inc. v. Gomez, Inc.* criticized the *Unisys* opinion and
25 its reasoning. Not so. The *BrowserCam* court criticized the defendant’s use of *Unisys* to
26 support its position, but did not criticize *Unisys* itself or its reasoning. The defendant in
27 *BrowserCam* failed to make a showing, beyond the presence of a permissive forum
28 selection clause, that the other § 1404(a) factors favored transfer of venue. No. C 08-
02959 WHA, 2008 WL 4408053, at *5-*6 (N.D. Cal. Sept. 26, 2008). Yelp, in contrast,
has set forth ample evidence to show that the other § 1404(a) factors, in addition to the
forum selection clause, supports transfer to the Northern District.

1 inconvenient” and such party “[b]y signing the forum selection clause . . . lost his
2 ability to validly assert inconvenience in litigating a case in Florida”); *Haagen-*
3 *Dazs Shoppe Co., Inc. v. Born*, 897 F. Supp. 122, 125 (S.D.N.Y. 1995) (“In
4 deciding whether to transfer venue, forum selection clauses are afforded
5 considerable weight. The permissive nature of the forum selection clause need not
6 affect the weight it is given.”) (internal citations omitted); *Berry Floor USA, Inc. v.*
7 *Faus Group, Inc.*, No. 08-CV-0044, 2008 WL 4610313,*6 (E.D. Wis. Oct. 15,
8 2008) (“even a permissive forum selection clause is a manifestation of the parties
9 assent to the fact that litigation in [the agreed upon] Court would be proper and
10 convenient” and thus “the deference due the [permissive] forum selection clause
11 outweighs the preference ascribed [plaintiff’s] choice of forum”) (internal citations
12 and quotations omitted).

13 All but one of Plaintiffs’ authorities are unpublished opinions from district
14 courts outside the Ninth Circuit,⁷ mainly the Sixth Circuit. (*See* Pls.’ Opp 12.)
15 They merely state that a permissive forum selection clause must still be considered
16 with the other § 1404(a) factors but that permissive clauses will not shift the burden
17 to the plaintiff to show that transfer is not warranted. *See Watson v. John K. Burch*
18 *Co.*, No. 3:02-CV-2555, 2003 WL 21145744, at *4 (N.D. Tex. May 14, 2003)
19 (permissive forum selection clause “does not shift burden of persuasion . . . as it
20 would if a mandatory forum selection clause were involved”); *Atlas Oil Co. v.*

21 _____
22 ⁷ The sole case Plaintiffs cite from within the Ninth Circuit, *BRC Group, LLC v. Quepasa*
23 *Corp.* is readily distinguishable. In *BRC Group*, defendant relied solely on the permissive
24 forum selection clause at issue in support of transfer under §1404(a): “[Defendant] elected
25 not to develop the balancing factors in its argument and instead relied on the tit-for-tat
26 argument that plaintiff’s choice of forum should simply be ignored because plaintiff chose
27 not to bring suit in Arizona.” No. C 09-01506 WHA, 2009 WL 2424669, at *4 (N.D. Cal.
28 Aug. 7, 2009). On that basis, the court found the defendant failed to meet its burden and
denied the motion to transfer venue to the forum in the forum selection clause. *Id* at *7.
The court did not state how much weight to give a permissive forum selection clause.
Here, Yelp has given due consideration to each of the other factors in the § 1404(a)
analysis, in addition to the forum selection clause. (*See* Yelp Br. 11-18.)

1 *Micro-Design, Inc.*, Civ. No. 2:08-cv-12467, 2009 WL 411763, at *3 (E.D. Mich.
2 Feb. 17, 2009) (“[W]hile the forum selection clause is an admission by [plaintiff]
3 that the [forum] is an acceptable venue, the clause does not constitutes [sic] an
4 agreement to litigate there. As a result, this Court will only consider the permissive
5 forum selection clause within the framework of the *Sixth Circuit* § 1404 factors and
6 will not shift the burden of demonstrating that this Court is the proper venue to
7 [Plaintiff].”) (emphasis added); *Flight Solutions, Inc. v. Club Air, Inc.*, No. 3:09-cv-
8 1155, 2010 WL 276094, at *3 (M.D. Tenn. Jan. 14, 2010) (“District courts in the
9 *Sixth Circuit* generally assign permissive forum-selection clauses little weight in
10 deciding whether to transfer venue”) (emphasis added).⁸

11 **D. The Forum Selection Clause Is Valid and Enforceable.**

12 As an initial matter, it is federal law—not state law⁹—that determines
13 whether a forum selection clause is enforceable. *Stewart Org., Inc. v. Ricoh Corp.*,
14 487 U.S. 22, 28 (1988) (federal law governs enforceability of forum selection
15 clause in § 1404(a) transfer). *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858
16 F.2d 509, 515 n.2 (9th Cir. 1998) (“In *Stewart*, the Court decided that federal law
17 applies to a motion to transfer venue under [§ 1404(a)] when venue is designated in
18 a contractual forum selection clause . . . because there was a federal statute []

19 ⁸ One of the cases Plaintiffs cite, *JFE Steel Corp. v. ICI Americas, Inc.*, even states:

20 [J]ust as the permissive forum clause does not strongly weigh in favor of
21 transfer, it also does not weigh strongly (or provide any weight at all)
22 against transfer. If anything, the permissive forum [selection] indicates the
23 parties’ intent and a forum (perhaps among others) where the parties
voluntarily submit to jurisdiction. In the interest of convenience and
fairness, this must be afforded some weight.

24 No: 1:06-CV-2386, 2008 WL 4449080, at *3 (N.D. Ohio Sept. 30, 2008).

25 ⁹ Plaintiffs’ reliance on California law or federal cases applying California law regarding
26 unconscionability is wholly inapplicable here. As the Supreme Court held in *Stewart*,
27 federal law 28 U.S.C. § 1404(a) controls the issue before the court and precludes
28 application of state law. In *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006),
the court applied California law to a contract dispute to determine whether an arbitration
provision was enforceable. *Nagrampa* is inapplicable to a venue transfer under § 1404(a).

1 directly on point”). Under federal law, forum selection clauses are
2 presumptively valid, and the party resisting enforcement has a “heavy burden of
3 proof” and must “clearly show that enforcement would be unreasonable and unjust,
4 or that the clause was invalid for such reasons as fraud or overreaching.” *M/S*
5 *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Manetti-Farrow*, 858 F.2d
6 at 512; *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 281
7 (9th Cir. 1984). In order to meet this standard, courts require that the opponent
8 must submit evidence to establish that the provision should not be enforced.
9 *Pelleport*, 741 F.2d at 280 (“Absent some evidence submitted by the party opposing
10 enforcement of [a forum selection] clause [establish *The Bremen* factors] the
11 provision should be respected as the expressed intent of the parties.”).

12 Plaintiffs do not even come close to meeting this standard. Labeling the TOS
13 and the Advertising Agreements¹⁰ as “contracts of adhesion” is unavailing because
14 it is well established that neither a differential in the parties’ bargaining power nor
15 the non-negotiability of a contract is sufficient to invalidate a forum selection
16 clause. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (“it would
17 be entirely unreasonable for us to assume that [cruise ship passengers] would
18 negotiate with [cruise line] the terms of a forum-selection clause . . . Common sense
19 dictates that a ticket of this kind will be a form contract the terms of which are not
20 subject to negotiation, and that an individual . . . will not have bargaining parity
21 with the cruise line”); *Murphy v. Schneider Nat’l, Inc.*, 362 F.3d 1133, 1141 (9th
22 Cir. 2004) (“Under *Carnival Cruise*, a differential in power or education on a non-
23 negotiated contract will not vitiate a forum selection clause.”).

24 _____
25 ¹⁰ Plaintiffs argue that “[t]he terms of Service date only to 2007 or 2008 . . . even though
26 this action is brought for claims arising out of Yelp’s conduct beginning in 2004.” (Pls.’
27 Opp. 16.) This argument ignores the fact that the named Plaintiffs which registered at
28 biz.yelp.com all did so in 2008 and 2009 (Byrne Decl. ¶ 7) and the three Plaintiffs who
entered into Advertising Agreements did so in 2008 and 2010 (which agreements are
attached as Exhibits A-C of the Byrne Declaration).

1 Plaintiffs further argue that “Plaintiffs had no idea they had ever agreed to
2 the forum selection clause.” (Pls.’ Opp. 21.) But the fact is that nine of the eleven
3 Plaintiffs affirmatively agreed to the contracts, and “[a] party who signs a contract
4 is bound by its terms regardless of whether he reads it or considers the legal
5 consequences of signing it.” *Operating Eng’rs*, 795 F.2d at 1505.

6 Plaintiffs also make the rather striking claim that the forum selection clause
7 would “would effectively bar nearly all potential plaintiffs from pursuing claims
8 against the company.” (Pls.’ Opp. 22.) But this argument has no merit here. First,
9 Yelp is not arguing that all litigation must be in San Francisco, only that San
10 Francisco is a proper venue for litigation between the parties, and that the agreed-to
11 permissive forum selection clause is given substantial weight in a § 1404(a)
12 transfer. Second, for purposes of this putative class action, named Plaintiffs will
13 not be put to such a burden by litigating in the Northern District that Yelp will be
14 “shielded from liability” (in fact, 3 of the 11 Plaintiffs reside in the Northern
15 District and 4 of the 11 reside in other districts altogether). And the unnamed
16 putative class members will be under no burden whatsoever in litigating in the
17 Northern District. Indeed, most such class members will have contractually agreed
18 to the Northern District as an appropriate forum (unlike the Central District).

19 Plaintiffs argue that they entered into the contracts under “coercion.” (Pls.’
20 Opp. 23.) But Plaintiffs have put forward no evidence of such coercion. *See*
21 *Pelleport*, 741 F.2d at 280 (opposing party must submit “some evidence” to
22 establish undue influence). All they have put forward is argument of counsel.¹¹
23 (Pls.’ Opp. 23.) Despite having submitted six declarations from various individuals
24 associated with Plaintiffs, it is particularly telling that not a single Plaintiff
25

26 ¹¹ Plaintiffs’ allegations in the complaint regarding coercion are all stated in general
27 language, completely untied to any particular plaintiff and most likely constitute argument
28 of counsel. (FAC ¶¶ 92, 179-180.) In any case, in opposition to a forum selection clause,
Plaintiffs must put forward evidence, not allegation, and they have failed to do so.

1 mentions that he or she was coerced or threatened into signing the contracts. Nor
2 have Plaintiffs made any argument that the forum selection clause itself was the
3 result of fraud or coercion, and the Ninth Circuit has explained that “simply
4 alleging that one was duped into signing the contract is not enough. . . . For a party
5 to escape a forum selection clause on the ground of fraud, it must show that ‘the
6 *inclusion of that clause in the contract* was the product of fraud or coercion.’”
7 *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1297 (9th Cir. 1998).

8 **II. Plaintiffs Miscalculate Yelp’s Relevant Contacts with the Central**
9 **District.**

10 Plaintiffs miscalculate Yelp’s relevant contacts with the Central District.
11 Unlike the cases they cite,¹² Plaintiffs have only proffered a tally of the total
12 number of businesses in each district with business pages on the Yelp Website.
13 They have made no showing regarding the specific number of putative class
14 members residing in each district. The two putative classes are a fraction of this
15 pool: businesses which purchased advertising on the Yelp Website (Sponsor
16 Plaintiffs); and businesses which Yelp contacted regarding advertising but refused
17 to purchase advertising (Non-Sponsor Plaintiffs). First, Yelp has contacted
18 substantially more businesses in the Northern District (62,417) than in the Central
19 District (36,246).¹³ (Decl. of Marla Landa ¶¶ 2-3.) Second, Yelp has sold
20 advertising subscriptions to 6,896 businesses in the Northern District, more than

21 ¹² See *Ellis v. Costco Wholesale Corp.*, 372 F. Supp. 2d 530, 543 (N.D. Cal. 2005)
22 (plaintiffs identified specific number of potential class members in two districts such that
23 court could determine the transferor district was “home to a proportionately large segment
24 of the putative class”); *Brody v. Am. Med. Ass’n*, 337 F. Supp. 611, 613 (S.D.N.Y. 1971)
25 (45 percent of the 1000 total class members came from or near New York); *Berenson v.*
26 *Nat’l Fin. Servs., LLC*, 319 F. Supp. 2d 1, 4 (D.D.C. 2004) (chart of potential members of
the class showed exact percentage residing in transferee district); *King v. Johnson Wax*
27 *Assocs., Inc.*, 565 F. Supp. 711, 720 n. 12 (D. Md. 1983) (comparison of total sales in
transferee and transferor districts’ forum states).

28 ¹³ Additionally, 33,713 businesses in the Northern District have claimed their business
pages, compared to 23,154 businesses in the Central District. (Tai Decl. ¶¶ 5-6.)

1 *double* the 3,249 subscriptions it has sold in the Central District. (Tai Decl. ¶¶ 2-3.)
2 Thus, the Northern District, not the Central District, is home to a proportionately
3 larger segment of the putative class. Further, Plaintiffs conveniently discount the
4 fact that three out of the eleven Plaintiffs *reside in the Northern District* and four
5 named Plaintiffs *reside in other districts altogether*. Given that the bulk of the
6 putative classes, including seven of the named Plaintiffs themselves, are non-
7 residents of the Central District, Plaintiffs’ choice of forum is indeed “largely
8 fortuitous” and must be given minimal weight.¹⁴

9 **III. Plaintiffs’ Remaining Arguments Regarding Geography and Related**
10 **Litigation in the Northern District Are Unavailing.**

11 Plaintiffs’ citation to *Barr*—in support of their argument that where the
12 requested forum is geographically close to the current forum, any “convenience”
13 factors are substantially less important—is misleading. In *Barr*, the court discussed
14 venue transfers only between *Third Circuit* districts—specifically in that case, a
15 transfer from the Eastern District of Pennsylvania to the District of Delaware. *See*
16 *Barr v. Nat’l R.R. Passenger Corp.*, No. 08-CV-2529, 2009 WL 3497776, at *4
17 (E.D. Pa. Oct. 28, 2009). The Third District encompasses about 54,188 square
18 miles, while the Ninth Circuit covers 1,348,634 square miles. Moreover, the
19 distance between the courthouses in *Barr* is 30.5 miles, while the distance from this
20 Court to the San Francisco courthouse in the Northern District is more than *ten*
21 times that distance—382 miles.¹⁵ Plaintiffs do not cite *any* case within the Ninth

22 ¹⁴ Plaintiffs cite to *Bibo*, arguing plaintiffs’ choice of forum remains significant in a class
23 action where it is “preferable” to other forums in administering the action and protecting
24 the class. (Pls.’ Opp. 5.) In *Bibo*, the court found plaintiffs’ choice of forum was
25 “preferable” because (1) all of the named plaintiffs and (2) many important witnesses,
26 including defendant’s employees, lived in the chosen forum. No. C07-2505 TEH, 2007
27 WL 2972948, at *2 (N.D. Cal. Oct. 10, 2007). Here, only four of eleven Plaintiffs reside
28 in the chosen forum and most relevant Yelp employees are in the Northern District.

¹⁵ Geographical facts, including the distance between specified points, are properly
subject to judicial notice. *See United States v. Perez*, 776 F.2d 797, 801-02 (9th Cir.
1985) (taking judicial notice of minimum distance between Rota and Guam), *overruled on*

1 Circuit for this “geographical” argument.

2 The pendency of related litigation in the Northern District also strongly
3 supports transfer to that district. The three actions should be consolidated in some
4 fashion. If the two instant actions are transferred to the Northern District, Plaintiff
5 Levitt in the related action will stipulate to having all three cases consolidated in the
6 Northern District. (Decl. of Matthew D. Brown ¶ 4.) Plaintiffs argue that the
7 “first-to-file” rule weighs “strongly” and “heavily against transfer.” (Pls.’ Opp. 7-
8 8.) But Plaintiffs cite no law for the weight to be accorded the first-to-file rule.
9 And as Yelp explained in its moving brief (Yelp Br. 12-13), the argument merely
10 begs the question of convenience to the parties, since one of the firmly established
11 exceptions to the first-to-file rule is where “the balance of convenience weighs in
12 favor of the later-filed action.” *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D.
13 Cal. 1994); *Callaway Golf Co. v. Corporate Trade Inc.*, No. 09-cv-384, 2010 WL
14 743829, at *8 (S.D. Cal. Mar. 1, 2010) (transferring first-filed action to district
15 where second-filed action pending because convenience factors weighed in favor of
16 transfer). The balance of convenience not only weighs strongly in favor the
17 Northern District, but the forum selection clause Plaintiffs entered into is
18 determinative of the convenience factors.

19 **CONCLUSION**

20 For the foregoing reasons, Yelp respectfully submits that “the convenience of
21 parties and witnesses” and “the interests of justice” strongly support a transfer of
22 *LaPausky* and *Cats and Dogs* to the Northern District under 28 U.S.C § 1404(a).

23 Dated: April 26, 2010

COOLEY LLP

24 /s/ Matthew D. Brown

25 Matthew D. Brown (196972)

26 Attorneys for Defendant YELP! INC.

27
28 *other grounds by United States v. Cabaccang*, 332 F.3d 622, 634-35 (9th Cir. 2003).