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

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

19 Plaintiffs,

20 v.

21 YELP! INC.,

22 Defendant.

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

25 Plaintiffs,

26 v.

27 YELP! INC.,

28 Defendant.

Case No. CV 10-01340 VBF(SSx)

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 DEFENDANT YELP INC.'S MOTION
 TO TRANSFER VENUE (28 U.S.C.
 § 1404(a))**

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

Case No. CV 10-01578 VBF (SSx)

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1 **I. INTRODUCTION**

2 The two actions pending before this Court have little relevant connection
3 with the Central District of California; instead, they have many close connections—
4 including a related pending action—with the Northern District of California. Under
5 28 U.S.C. § 1404(a), the convenience of the parties and the witnesses and the
6 interest of justice strongly favor transfer to the Northern District.

7 *First, all* named Plaintiffs have agreed to forum selection clauses in
8 agreements with Defendant Yelp! Inc. (“Yelp”), in which Plaintiffs have consented
9 to jurisdiction and venue in the Northern District of California. Such forum
10 selection clauses, even if permissive rather than mandatory, are a substantial
11 consideration in assessing a § 1404(a) transfer. *Second*, transfer to the Northern
12 District strongly supports the interest of justice, since it would allow potential
13 consolidation of these actions with a closely related action currently pending in the
14 Northern District, thus achieving an efficient, economical, and expeditious
15 determination of all three actions, while avoiding inconsistent judgments. *Third*,
16 the majority of the relevant conduct—Yelp’s business and sales practices related to
17 the solicitation of advertising—took place in the Northern District where Yelp
18 maintains its corporate headquarters. The majority of Yelp witnesses are located in
19 the Northern District, including almost all of those witnesses most likely to be
20 involved in the subject of Plaintiffs’ lawsuits, while Yelp has only four employees
21 and no offices in the Central District. Plaintiffs themselves have only modest
22 contact with the Central District; in fact, *seven out of eleven* Plaintiffs are located
23 outside of the Central District, with *three of eleven* being residents of the Northern
24 District to which Yelp seeks transfer. *Finally*, although a plaintiff’s choice of
25 forum is generally given considerable deference, where (as here) a plaintiff seeks to
26 represent a nationwide class of plaintiffs, plaintiff’s choice is given “little” or
27 “minimal” consideration. Furthermore, where (as here) the operative facts occurred
28 in another district, plaintiff’s choice is given “substantially less deference.”

1 Together, the fact that Plaintiffs seek to represent a nationwide class and the fact
2 that their claims concern conduct that took place largely in the Northern District of
3 California, Plaintiffs’ choice of forum is merely fortuitous and entitled to little, if
4 any, deference.

5 Accordingly, Yelp asks that these two actions be transferred to the Northern
6 District of California.

7 **II. FACTUAL AND PROCEDURAL BACKGROUND**

8 **A. The Parties**

9 Yelp is the registered owner and provider of a popular website,
10 www.yelp.com (the “Yelp Website”), which allows Internet users to find local
11 businesses, read and write reviews about them, and rate them on a scale of one to
12 five stars. (First Amended Complaint (“FAC”) in *Cats and Dogs Animal Hospital,*
13 *Inc., et al. v. Yelp! Inc.* (“*Cats and Dogs*”) ¶¶ 13, 16-17, 29.) The Yelp Website
14 features information on and reviews of businesses throughout the United States and
15 is visited by approximately 30 million people per month. (*Cats and Dogs* FAC
16 ¶ 38; Declaration of Bryan Byrne (“Byrne Decl.”) ¶ 13.) Yelp makes money by,
17 *inter alia*, selling ads to local businesses, which appear as “Sponsored Results” on
18 Yelp’s website. (*Cats and Dogs* FAC ¶¶ 43-44.) Yelp’s headquarters are in San
19 Francisco, within the Northern District, where 70 percent of its 362 employees
20 work. In the Central District, Yelp has no offices and has only 4 employees.
21 (Byrne Decl. ¶ 14.)

22 Plaintiff in *LaPausky d/b/a D’ames Day Spa v. Yelp! Inc.* (“*LaPausky*”) is
23 Christine LaPausky, who does business as D’ames Day Spa in San Diego, which is
24 in the Southern District of California. (*LaPausky* Compl. ¶ 3.) She has not
25 purchased advertising from Yelp. (*LaPausky* Compl. ¶ 19.)

26 Plaintiffs in *Cats and Dogs* divide themselves into two putative classes: Non-
27 Sponsor Plaintiffs and Sponsor Plaintiffs. The Non-Sponsor Plaintiffs are “those
28 [Plaintiff] businesses to which Yelp offered paid advertising subscriptions, but

1 which declined to purchase any advertising. In other words, ‘Non-Sponsors’ *could*
2 *have become* Sponsors, but elected not to.” (*Cats and Dogs* FAC ¶ 52.) The
3 Sponsor Plaintiffs are “[Plaintiff] businesses that purchase[d] advertising
4 subscriptions.” (*Cats and Dogs* FAC ¶ 44.) Four of the ten *Cats and Dogs*
5 Plaintiffs are located in the Central District of California, while three of them are
6 located in the Northern District of California. (*Cats and Dogs* FAC ¶¶ 3, 6, 8, 12
7 (Central District); 4, 7, 11 (Northern District).)

8 **B. The Lawsuits Against Yelp**

9 In addition to *Cats and Dogs* and *LaPausky*, Yelp is also facing one other,
10 related action entitled *Boris Levitt v. Yelp! Inc.*, Case No. C 10-01321 MHP
11 (“*Levitt*”), which is pending in the United States District Court for the Northern
12 District of California, San Francisco Division, where it has been assigned to the
13 Honorable Marilyn Hall Patel. The *Levitt* action was filed on March 12, 2010 in
14 the Superior Court of the State of California, County of San Francisco. A true and
15 correct copy of the March 12th complaint is attached as Exhibit A to the
16 Declaration of Matthew D. Brown, dated April 9, 2010 (“Brown Decl.”). On
17 March 29, 2010, Yelp removed the action to the United States District Court for the
18 Northern District of California pursuant to 28 U.S.C. § 1453(b). (Brown Decl. ¶ 4.)

19 Plaintiffs in *Cats and Dogs*, *LaPausky*, and *Levitt* allege that Yelp
20 manipulates the reviews for plaintiff businesses depending on whether or not they
21 advertise with Yelp. Plaintiffs in all three actions assert claims for violation of
22 California’s Unfair Competition Law, Business and Professions Code (“B&P”)
23 Section 17200 *et seq.* In addition to a B&P § 17200 claim, plaintiff in the *Levitt*
24 action includes claims for (a) violation of B&P § 17500 (false advertising), (b)
25 negligent misrepresentation, and (c) intentional misrepresentation. Likewise, in
26 addition to a B&P § 17200 claim, plaintiffs in *Cats and Dogs* include claims for (a)
27 violation of Cal. Penal Code §§ 518-19 (extortion), (b) violation of Cal. Penal Code
28

1 § 524 (attempted extortion), and (c) intentional interference with prospective
2 economic advantage.

3 All three actions are styled as class actions against Yelp, and plaintiffs in all
4 three actions seek to represent nearly identically defined putative classes.

5 **C. Forum Selection Clauses in Yelp’s Terms of Service and**
6 **Advertising Agreements**

7 Businesses and individuals who use the Yelp Website may agree to Yelp’s
8 Terms of Service (“TOS”) in at least two ways. First, anyone who uses the Yelp
9 Website agrees to Yelp’s TOS, which are posted on the Yelp Website. Second, any
10 business that registers for Yelp’s business services at biz.yelp.com explicitly agrees
11 to Yelp’s TOS. Apart from the TOS, any business that purchases advertising from
12 Yelp agrees to the terms of an advertising agreement with Yelp (“Advertising
13 Agreement”).

14 The TOS and the Advertising Agreement include nearly identical forum
15 selection clauses, in which the business or individual consents to jurisdiction and
16 venue in the state and federal courts in San Francisco County, California, which
17 includes the Northern District of California. (Byrne Decl. ¶¶ 3-5, 10-11.) For
18 example, the TOS for users of the Yelp Website and the TOS for businesses that
19 register for Yelp’s business services both state:

20 If there is any dispute about or involving the Site or Yelp, you agree
21 that any such dispute will be governed by the laws of the State of
22 California without regard to its conflict of law provisions. You agree
to personal jurisdiction by and venue in the state and federal courts in
San Francisco County, California.

23 (Byrne Decl. ¶¶ 10-11 & Exs. E, F.) Similarly, businesses that sign up to advertise
24 on Yelp agree to the Advertising Agreement, which includes a similar forum
25 selection clause:

26 This Agreement shall be governed by and construed in accordance
27 with the law of California without regard to the conflict of law
28 provisions thereof. The parties consent to jurisdiction and venue for
actions related to the subject matter hereof in the state and federal
courts located in San Francisco County, California.

1 (Byrne Decl. ¶¶ 3-5 and Exs. A, B, C.)

2 All of the Plaintiffs in both *LaPausky* and *Cats and Dogs* have agreed to
3 these forum selection clauses, in some instances more than once. (Byrne Decl. ¶¶
4 2-12 & Exs. A-F.)

5 **III. ARGUMENT**

6 **A. Legal Standard**

7 28 U.S.C. § 1404(a) provides that “[f]or the convenience of parties and
8 witnesses, in the interest of justice, a district court may transfer any civil action to
9 any other district or division where it might have been brought.” The statutory
10 provision thus provides two requirements: (1) that the action could have been
11 brought in the transferee district; and (2) that transfer be for the convenience of the
12 parties and witnesses and the interest of justice. *See Amazon.com v. Cendant Corp.*,
13 404 F. Supp. 2d 1256, 1259 (W.D. Wa. 2005).

14 Concerning what constitutes “the convenience of parties and witnesses” and
15 “the interests of justice,” the Ninth Circuit has instructed that:

16 Under § 1404(a), the district court has discretion to adjudicate
17 motions for transfer according to an ‘individualized, case-by-case
18 consideration of convenience and fairness.’ A motion to transfer
19 venue under § 1404(a) requires the court to weigh multiple factors in
20 its determination whether transfer is appropriate in a particular case.
21 For example, the court may consider: (1) the location where the
22 relevant agreements were negotiated and executed, (2) the state that is
23 most familiar with the governing law, (3) the plaintiff’s choice of
24 forum, (4) the respective parties’ contacts with the forum, (5) the
25 contacts relating to the plaintiff’s cause of action in the chosen forum,
26 (6) the differences in the costs of litigation in the two forums, (7) the
availability of compulsory process to compel attendance of unwilling
non-party witnesses, and (8) the ease of access to sources of proof.
Additionally the presence of a forum selection clause is a ‘significant
factor’ in the court’s § 1404(a) analysis.

27 *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000) (internal
28 quotation marks and footnotes omitted). *See also Stewart Org., Inc. v. Ricoh Corp.*,

1 487 U.S. 22, 29 (1988) (“presence of a forum-selection clause . . . will be a
2 significant factor that figures centrally in the district court’s calculus” in
3 determining whether to transfer venue under § 1404(a)).

4 **B. *Cats and Dogs* and *LaPausky* Could Have Been Brought in the**
5 **Northern District of California.**

6 The Northern District of California (“Northern District”) can properly
7 exercise both personal jurisdiction over the parties and subject matter jurisdiction
8 over this dispute. Yelp has its principal place of business in San Francisco,
9 California and therefore would be subject to the Northern District’s jurisdiction.
10 (*Cats and Dogs* FAC ¶ 13.) Plaintiffs have already consented to jurisdiction in the
11 state of California by virtue of their lawsuits filed in this district.¹ Like this Court,
12 the Northern District would also have subject matter jurisdiction over these actions
13 under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). (*LaPausky* Compl.
14 ¶ 1; *Cats and Dogs* FAC ¶ 1.)

15 For venue selection purposes, an action based on diversity of citizenship may
16 be brought only in “a judicial district where any defendant resides, if all defendants
17 reside in the same State.” 28 U.S.C. § 1391(a)(1). A corporate defendant is
18 “deemed to reside in any judicial district in which it is subject to personal
19 jurisdiction at the time the action is commenced” 28 U.S.C. § 1391(c). Here,
20 Yelp, the sole defendant, is subject to the personal jurisdiction in the Northern
21 District because it has its principal place of business in San Francisco, California.
22 (*Cats and Dogs* FAC ¶ 13.)

23
24 _____
25 ¹ Moreover, “as matter of law, a transferee forum need not have personal
26 jurisdiction over a plaintiff in order for transfer to be appropriate under § 1404(a).”
27 *Morrow v. Vertical Doors, Inc.*, No. CV 09-0256-PHX-DGC, 2009 WL 1698560,
28 at *2 (D. Ariz. June 17, 2009). *See also* *FTC v. Watson Pharms., Inc.*, 611 F. Supp.
2d 1081, 1090 (C.D. Cal. 2009) (“[I]t is not necessary for the transferee forum to
have personal jurisdiction over the plaintiff.”).

1 Thus, both *Cats and Dogs* and *LaPausky* could both have been brought in the
2 Northern District.

3 **C. The Convenience of the Parties and Witnesses and Interest of**
4 **Justice Strongly Favor Transfer to the Northern District.**

5 Many of the factors that courts consider in assessing a § 1404(a) transfer
6 strongly weigh in favor of transferring these actions to the Northern District of
7 California. The only factor Plaintiffs might cite as weighing against transfer—
8 Plaintiffs’ choice of forum—is of no or minimal consideration in this case, because
9 Plaintiffs have (a) already agreed that the Northern District is a convenient forum,
10 (b) purport to represent a nationwide class of plaintiffs, and (c) bring this action in a
11 forum where few of the operative facts of the actions took place.

12 **1. Plaintiffs’ Agreement to the Forum Selection Clause**
13 **Strongly Supports Transfer to the Northern District.**

14 Plaintiffs’ agreement to the forum selection clause in Yelp’s TOS and
15 Advertising Agreement, in which Plaintiffs agreed to jurisdiction and venue in the
16 Northern District, strongly favors transfer.

17 **a. The Forum Selection Clause Is a “Significant Factor”**
18 **Entitled to “Substantial Consideration” in the**
§ 1404(a) Analysis.

19 Although the forum selection clause contained in Yelp’s TOS and
20 Advertising Agreement is most likely permissive (rather than mandatory) in nature,
21 it is nevertheless a “significant factor” entitled to “substantial consideration” under
22 § 1404(a). As the Ninth Circuit has held, “the presence of a forum selection clause
23 is a ‘*significant factor*’ in the court’s § 1404(a) analysis.” *Jones*, 211 F.3d at 498-
24 99 (emphasis added). Even where a forum selection clause is permissive, “the fact
25 that the parties contemplated [a particular state] as a possible forum is entitled to
26 ‘*substantial consideration*’ in this [§ 1404(a)] analysis.” *Unisys Corp. v. Access*
27 *Co., Ltd.*, No. C05-3378 TEH, 2005 WL 3157457, at *5 (N.D. Cal. Nov. 23, 2005)
28 (emphasis added) (finding permissive forum selection clause weighed in favor of

1 § 1404(a) venue transfer). This is because, “while courts normally defer to a
2 plaintiff’s choice of forum, such deference is inappropriate where the plaintiff has
3 already freely contractually chosen an appropriate venue” and thus “the plaintiffs
4 bear the burden of demonstrating why they should not be bound by their contractual
5 choice of forum.” *Id.* (quoting *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880
6 (3d Cir. 1995)) (internal quotations omitted); *see also Jumara*, 55 F.3d at 880
7 (giving substantial, though not dispositive, weight to a permissive forum selection
8 clause); *Orix Credit Alliance, Inc. v. Mid-South Materials Corp.*, 816 F. Supp. 230,
9 234 (S.D.N.Y. 1993) (“although a permissive forum clause is entitled to less weight
10 than a mandatory one, the fact that both parties initially accepted the jurisdiction of
11 the courts of [a particular jurisdiction] must count”); *General Electric Credit*
12 *Corp. v. Toups*, 644 F. Supp. 11, 15 (S.D.N.Y. 1985) (“In fact, by enforcing the
13 [permissive forum selection] clause, this court would encourage the policy of
14 requiring parties to freely negotiate contracts to live up to their terms.”).

15 Furthermore, even where permissive, “[a] forum selection clause is
16 *determinative* of the convenience to the parties.” *Orix*, 816 F. Supp. at 234
17 (emphasis added); *General Electric Credit*, 644 F. Supp. at 15 (same); *Pfeiffer v.*
18 *Himax Technologies, Inc.* 530 F. Supp. 2d 1121, 1125 n.4 (C.D. Cal. 2008)
19 (“Although not dispositive, a forum selection clause is *determinative* of the
20 convenience to the parties and is entitled to substantial consideration.”) (citations
21 and internal quotation marks omitted). While the forum selection clause is thus not
22 dispositive of whether the case should be transferred, it nevertheless forecloses
23 Plaintiffs from arguing that the Central District is more convenient to the parties
24 than the Northern District. *Id.*

25 Thus, the forum selection clause, which each Plaintiff in these actions agreed
26 to in at least one form, although not dispositive, strongly favors transfer to the
27 Northern District and is *determinative* of the issue of convenience to the parties.
28

1 **b. All Plaintiffs Have Agreed to the Forum Selection**
2 **Clause.**

3 All of the Plaintiffs in both *LaPausky* and *Cats and Dogs* have agreed to
4 Yelp’s forum selection clause (in some cases, multiple times) and thus have
5 consented to jurisdiction and venue in the Northern District of California.

6 All of the eleven Plaintiffs in both actions have used the Yelp Website and
7 proceeded past the homepage (*i.e.*, the initial webpage displayed at
8 www.yelp.com), thus agreeing to Yelp’s TOS, including the forum selection clause.
9 (Byrne Decl. ¶ 9; *LaPausky* Compl. ¶¶ 17, 20; *Cats and Dogs* FAC ¶¶ 94, 97, 101-
10 102, 105-106, 109, 112, 117, 119-120, 125-126, 129, 131-132, 136, 142, 144-145,
11 150, 156-157, 165, 169.) Notice to users of their agreement to Yelp’s TOS, and a
12 link to the TOS, is given both on the Yelp Website homepage *and on every other*
13 *Yelp webpage*. (Byrne Decl. ¶ 9.) Such browse-wrap agreements have been held to
14 be enforceable by courts nationwide. *See, e.g., Burcham v. Expedia, Inc.*, No.
15 4:07CV1963 CDP, 2009 WL 586513, at *4 (E.D. Mo. Mar. 6, 2009) (plaintiff
16 bound by user agreement because link to full text of user agreement found at
17 bottom of every web page); *Molnar v. 1-800-Flowers.com, Inc.*, No. CV 08-0542
18 CAS (JCx), 2008 WL 4772125, at *7 (C.D. Cal. Sept. 29, 2008) (“[C]ourts have
19 held that a party’s use of a website may be sufficient to give rise to an inference of
20 assent to the Terms of Use contained therein (so called ‘browsewrap contracts’).”);
21 *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C 04-4825 JW, 2005 WL 756610, at *2
22 (N.D. Cal. Apr. 1, 2005) (repeated use of a website with link to terms of service
23 constituted actual or imputed knowledge and acceptance of such terms);
24 *Register.com, Inc. v. Verio, Inc.*, 356 F. 3d 393, 403 (2d Cir. 2004) (finding plaintiff
25 who regularly used website was bound by its terms).

26 Not only have all Plaintiffs alleged that they used the Yelp Website, but the
27 *Cats and Dogs* First Amended Complaint makes it clear that at least three Plaintiffs
28 had *actual knowledge* of the TOS, since they allege contacting Yelp to complain

1 about violations of the TOS or the “review guidelines” incorporated therein. (*See*
2 *Cats and Dogs* FAC ¶¶ 96, 103, 104, 126, 131; *see also id.* at ¶¶ 57, 58, 93.) Each
3 of these three Plaintiffs was thus not only on notice of the TOS by virtue of the
4 notification at the bottom of every webpage, but each was actually familiar with the
5 Yelp TOS and communicated with Yelp about the TOS.

6 Furthermore, eight of the eleven Plaintiffs have registered at biz.yelp.com,
7 thus agreeing again to Yelp’s TOS, including the forum selection clause. (Byrne
8 Decl. ¶¶ 7-8 and Ex. D.) When registering at biz.yelp.com, each of these eight
9 Plaintiffs affirmatively clicked on a button below the statement, “By clicking the
10 button below, you agree to the Yelp Terms of Service.” (Byrne Decl. ¶ 6.) Such
11 click-through agreements are also enforceable. *See e.g., Burcham*, 2009 WL
12 586513, at *2 (“[click-through] agreements have been routinely upheld by circuit
13 and district courts”) (collecting cases); *Guadagno v. E*Trade Bank*, 592 F. Supp.
14 2d 1263, 1271 (C.D. Cal. 2008) (assent given by website user clicking on
15 acknowledgement icon); *Koresko v. Realnetworks, Inc.*, 291 F. Supp. 2d 1157,
16 1162-63 (E.D. Cal. 2003) (assent to forum selection clause given by clicking on
17 clickbox on website).

18 Finally, all three of the Sponsor Plaintiffs have purchased advertising from
19 Yelp and have thus, again, explicitly agreed to the forum selection clause in Yelp’s
20 Advertising Agreement. (Byrne Decl. ¶¶ 2-5 & Exs. A, B, C at 4-5; *Cats and Dogs*
21 FAC ¶¶ 10-12, 44.)
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1 Plaintiffs’ agreement to the forum selection clauses contained in Yelp’s TOS
 2 and Advertising Agreement is summarized in the following chart:

3	4 Plaintiff ²	5 Agreed to TOS by Using Website	6 Communicated with Yelp about TOS	7 Agreed to TOS by Registering for Yelp’s Business Services	8 Agreed to Advertising Agreement (<i>i.e.</i> , was a “Sponsor”)
9	LaPausky	Yes		Yes	
10	Cats and Dogs	Yes	Yes		
11	Astro	Yes		Yes	
12	Adult Socials	Yes		Yes	
13	Le Petite Retreat	Yes	Yes	Yes	
14	Mermaids Cruises	Yes	Yes		
15	Wag My Tail	Yes		Yes	
16	Scion	Yes		Yes	
17	Bleeding Heart Bakery	Yes		Yes	Yes
18	Sofa Outlet	Yes			Yes
19	Celibré	Yes		Yes	Yes

20 Thus, each plaintiff in *LaPausky* and *Cats and Dogs* has assented to the
 21 forum selection clause, most of them more than once. Their agreement is thus a
 22 “substantial consideration” weighing towards transfer to the Northern District.

23 **2. The Presence of Related Litigation in the Northern District
 24 and the Potential for Consolidation Weighs Strongly in
 25 Favor of Transfer.**

26 Another factor that courts consider is the “pendency of related actions in the
 27 transferee forum,” which “is a *significant factor* in considering the interest of
 28 justice factor.” *Amazon.com*, 404 F. Supp. 2d at 1261 (emphasis added). The
 pendency of the *Levitt* action in the Northern District—in which plaintiffs assert
 similar causes of action as Plaintiffs in *Cats and Dogs* and *LaPausky*, and which is

² For simplicity, Yelp refers in this chart to the abbreviated names for Plaintiffs used in the *LaPausky* Complaint and the *Cats and Dogs* FAC.

1 based on very similar allegations of Yelp’s conduct—thus strongly favors transfer
2 to the Northern District. If *LaPausky* and *Cats and Dogs* are transferred to the
3 Northern District, Yelp would seek consolidation of the three actions—conserving
4 the Courts’ and the parties’ resources and promoting an efficient determination of
5 all three actions. See *Amazon.com*, 404 F. Supp. 2d at 1262 (“While consolidation
6 of the two cases is a matter for the [transferee] court to decide, the feasibility of
7 such consolidation is a factor that this Court may consider in deciding whether to
8 allow a transfer.”).

9 Transfer to the Northern District would thus serve the convenience of the
10 parties and the interest of justice by (a) lowering the costs to the courts and to the
11 parties, (b) facilitating expeditious pre-trial proceedings and discovery, and (c)
12 avoiding duplicative litigation and inconsistent results. As the U.S. Supreme Court
13 stated in *Ferens v. John Deere Co.*, “to permit a situation in which two cases
14 involving precisely the same issues are simultaneously pending in different District
15 Courts leads to the wastefulness of time, energy and money that § 1404(a) was
16 designed to prevent.” 494 U.S. 516, 531 (1990) (internal quotations and citation
17 omitted). Furthermore, as a recent district court in the Ninth Circuit similarly held,
18 “[I]itigation of related claims in the same tribunal is strongly favored because it
19 facilitates efficient, economical and expeditious pre-trial proceedings and discovery
20 and avoids duplic[ative] litigation and inconsistent results.” *Amazon*, 404 F. Supp.
21 2d at 1261 (internal citations and quotations omitted); see also *Data Retrieval*
22 *Tech., LLC v. Sybase, Inc.*, No. C08-1702 RSM, 2009 WL 960681, at *5 (W.D.
23 Wa. Apr. 8, 2009) (finding “efficiency will not be served by retaining the case” due
24 to related action pending in Northern District of California).

25 While Plaintiffs may argue that transfer of *Cats and Dogs* and *LaPausky* to
26 the Northern District is not appropriate under the “first-to-file” rule, since these
27 actions were filed before the *Levitt* action, the first-to-file rule does not apply “if the
28 balance of convenience weighs in favor of the later-filed action.” *Ward v. Follett*

1 Corp., 158 F.R.D. 645, 648 (N.D. Cal. 1994). Here, the rule should not apply to
2 bar transfer to the Northern District, since the balance of convenience weighs so
3 strongly in favor of litigation in that district. See, e.g., *Calloway Golf Co. v.*
4 *Corporate Trade, Inc.*, No. 09cv384 L(POR), 2010 WL 743829, *8 (S.D. Cal. Mar.
5 1, 2010) (transferring first-filed action to district where second-filed action was
6 pending because convenience of the parties and witnesses and the interest of justice
7 weighed in favor of transfer).

8 Thus, the related *Levitt* action in the Northern District and the potential for
9 consolidation is a “significant factor” weighing in favor of transfer of these actions.

10 **3. Most of the Relevant Conduct Took Place in the Northern**
11 **District, While Minimal, If Any, Took Place in the Central**
12 **District.**

13 Another factor that courts consider is where the relevant conduct took place.
14 *Jones*, 211 F.3d at 498-99 (listing “the location where the relevant agreements were
15 negotiated and executed” and “the contacts relating to the plaintiff’s cause of action
16 in the chosen forum” as factors). Plaintiffs complain about Yelp’s business and
17 sales practices related to the solicitation of advertising from businesses and the
18 subsequent effect of purchasing or declining to purchase such advertising on the
19 display of consumer reviews that appear on the businesses’ Yelp webpages. Yelp is
20 headquartered in San Francisco, and the majority of Yelp’s employees, including
21 management and the bulk of Yelp’s sales force, is located in San Francisco. (Byrne
22 Decl. ¶ 14.) Furthermore, Yelp’s user operations department, which handles
23 complaints about reviews of businesses, is located in San Francisco. (*Id.*) Finally,
24 Yelp’s engineering department, which develops and maintains the review filter
25 algorithm³ that will be a significant aspect of Yelp’s defense, is located in San
26 Francisco. (*Id.*)

27 ³ Because anyone can register with Yelp to write reviews of and rate businesses,
28 Yelp has taken steps to guard against improper and disruptive reviews. For
example, business owners are known to write the occasional fake review to either

1 Thus, the vast majority of relevant conduct took place in or from the
2 Northern District, which weighs in favor of transfer. By contrast, Plaintiffs chose
3 to bring both actions in the Central District, where little of the relevant conduct took
4 place. (*Id.*)

5 **4. The Parties Have Greater Contact with the Northern**
6 **District than the Central District.**

7 Yelp has minimal contact with Plaintiffs' chosen forum, whereas Yelp has
8 very substantial contact with the Northern District. No fewer than 251 of Yelp's
9 362 employees, including 143 salespeople, work at Yelp's corporate headquarters
10 in San Francisco within the Northern District. (Byrne Decl. ¶ 14.) Comparatively,
11 Yelp has only four employees in the Central District, none of whom are
12 salespeople, and has no offices in the Central District. (*Id.*)

13 Additionally, most of the Plaintiffs themselves have little relevant contact
14 with their chosen forum. The sole plaintiff in *LaPausky* maintains her principal
15 place of business in the *Southern* District of California and likely has little or no
16 relevant contact with the Central District. (*LaPausky* Compl. ¶ 3.) Only four of the
17 ten plaintiffs in *Cats and Dogs* maintain their principal place of business in the
18 Central District. (*Cats and Dogs* FAC ¶¶ 3, 6, 8, 12.) However, nearly that same
19 number of plaintiffs—three—maintain their principal place of business in the
20

21 burnish their own image or tarnish that of their competitors, and disgruntled former
22 employees sometimes write negative reviews about their former employers. This
23 problem permeates most online review sites, artificially inflating or deflating a
24 business's rating and misleading consumers. Yelp internally and informally refers
25 to such reviews as "spam," in reference to the common term used to describe
26 unwanted online communications, especially email. Yelp has developed a
27 sophisticated and confidential review filter algorithm that attempts to identify and
28 suppress spam reviews. The review filter runs on a nearly continual basis and, as
circumstances change over time (*e.g.*, the review filter gleans new information
about a particular review or reviewer), a review may be designated and
undesigned as spam.

1 Northern District. (*Cats and Dogs* FAC ¶¶ 4, 7, 11.) Thus, since both Yelp and
2 seven of the eleven Plaintiffs have little or no relevant contact with Plaintiffs’
3 chosen forum, the matter should be transferred to a forum that both Yelp and
4 Plaintiffs *do* have significant contact with—the Northern District. *Jones*, 211 F.3d
5 at 498-99 (listing “the respective parties’ contacts with the forum” as a factor).

6 **5. There is Easier Access to Proof in the Northern District than**
7 **in the Central District.**

8 The ease of access to proof also supports transfer to the Northern District.
9 Most of the witnesses are likely to be located in the Northern District. *See A.J.*
10 *Indus., Inc. v. U.S. Dist. Court*, 503 F.2d 384, 386-87 (9th Cir. 1974) (discussing
11 the importance and history of the convenience of witnesses in evaluating a § 1404
12 transfer). Since discovery has yet to commence and initial disclosures have not yet
13 been made, the identity of specific witnesses remains to be determined. However,
14 the majority of such witnesses are likely to be located in the Northern District of
15 California.

16 Yelp’s witnesses are likely to include employees in the following
17 departments and roles:

18 Category of Witnesses	Subject of Testimony
19 Yelp Salespeople and Sales Trainers	Yelp’s sales practices
20 Yelp Engineers	Yelp’s review filter algorithm
21 Yelp Executives	Yelp’s overall sales policies
22 Yelp User Operations	Yelp’s customer service and
23	communications with business owners
24	and users

25
26
27
28

1 The vast majority of these witnesses are located in the Northern District.
2 (Byrne Decl. ¶ 14.)⁴ Furthermore, since Yelp is headquartered in the Northern
3 District, its primary servers and most documents are also located in the Northern
4 District. (Byrne Decl. ¶ 14.) Thus, the information, and more importantly, the
5 witnesses relevant to Plaintiffs’ causes of action are most likely to be in the
6 Northern District.

7 **6. Transfer of the Action to the Northern District Will Save the**
8 **Parties and the Court Considerable Time and Expense.**

9 For the reasons stated above with respect to the location of most of the likely
10 witnesses and documents, the difference in costs of litigation in the two forums also
11 weighs in favor of transfer to the Northern District. *See Jones*, 211 F.3d at 498-99
12 (“the differences in the costs of litigation in the two forums” is a factor).

13 **7. Plaintiffs’ Choice of Forum is Entitled to No or “Minimal**
14 **Consideration.”**

15 Finally, although a plaintiff’s choice of forum is generally entitled to
16 considerable deference, here, Plaintiffs’ choice of forum here is entitled to no or, at
17 best, minimal weight.

18
19 ⁴ For the same reason, the Northern District is more likely to be convenient for any
20 non-party witnesses and is thus less likely to encounter motions to quash subpoenas
21 by such non-party witnesses. *See Jones*, 211 F.3d at 498-99 (listing “the
22 availability of compulsory process to compel attendance of unwilling non-party
23 witnesses” is a factor for courts to consider in a motion for a Section 1404(a)
24 transfer). While Yelp has not thus far identified any likely non-party witnesses,
25 because Yelp is headquartered in San Francisco, such witnesses (who may include,
26 *e.g.*, former Yelp employees or other parties with whom Yelp has contracted or
27 done business), if any, are more likely to be located in or around the Northern
28 District. The Northern District is therefore less likely than the Central District to
face motions to quash brought by reluctant non-party witnesses. *See Fed. R. Civ. P.*
45(c)(3)(A)(ii), (B)(iii) (detailing mandatory and permissive quashing of subpoenas
for third parties located more than 100 miles away). Thus, the availability of
compulsory process weighs in favor of transfer to the Northern District.

1 *First*, a plaintiff’s choice of forum is a “convenience of the parties” factor.
2 *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir.
3 1986). However, as discussed above (Section III.C.1, *supra*), Plaintiffs’ agreement
4 to jurisdiction and venue in the Northern District of California “is determinative of
5 the convenience to the parties.” *Orix*, 816 F. Supp. at 234; *General Electric Credit*,
6 644 F. Supp. at 15 (same); *Pfeiffer*, 530 F. Supp. 2d at 1125 n.4 (same). Plaintiffs’
7 agreement to the Northern District of California as a convenient forum thus ends
8 the “convenience of the parties” analysis and negates any weight their choice of
9 forum would otherwise be given.

10 *Second*, Plaintiffs in both actions seek to represent putative classes that span
11 the entire country, and the Ninth Circuit has held that in such situations, Plaintiffs’
12 chosen forum is largely fortuitous and must be given less weight. *See Lou v.*
13 *Belzburg*, 834 F.2d 730, 739 (9th Cir. 1987) (“Although great weight is generally
14 accorded plaintiff’s choice of forum, when an individual brings a derivative suit or
15 represents a class, the named plaintiff’s choice of forum is given less weight.”)
16 (internal citations omitted); *see also Gomez v. Wells Fargo Bank, NA*, No. CV-09-
17 00181-PHX-GMS, 2009 WL 1936790, at *2 (D. Ariz. July 2, 2009) (deference to
18 plaintiff’s choice of forum “is relatively minimal in class action suits”).

19 *Third*, when the chosen forum is neither the plaintiffs’ residence nor the
20 place where the operative facts occurred—as here—plaintiffs’ choice of forum is
21 entitled only to “minimal consideration.” *See Lou*, 834 F.2d at 739 (“If the
22 operative facts have not occurred within the forum and the forum has no interest in
23 the parties or subject matter, [plaintiff’s] choice is entitled to only minimal
24 consideration.”). *See also IBM Credit Corp. v. Definitive Computer Servs., Inc.*,
25 No. C-95-3927 SI, 1996 WL 101172 , at *2 (N.D. Cal. Feb. 28, 1996) (“Ordinarily,
26 where the forum lacks any significant contact with the activities alleged in the
27 complaint, plaintiff’s choice of forum is given considerably less weight, *even if the*
28 *plaintiff is a resident of the forum.*”) (emphasis added). As discussed above, the

1 sole plaintiff in *LaPausky* resides in the *Southern* District of California and only
2 four of the ten plaintiffs in *Cats and Dogs* reside in the Central District of
3 California, whereas nearly that many (three) reside in the Northern District.
4 Furthermore, the majority of the operative facts occurred in the Northern District,
5 while few occurred in the Central District.

6 These reasons, taken together, should fully negate any deference that
7 otherwise may have been afforded to Plaintiffs' choice of forum and, at most,
8 should entitle Plaintiffs' choice to minimal deference.

9 **IV. CONCLUSION**

10 For the foregoing reasons, Yelp respectfully submits that "the convenience of
11 parties and witnesses" and "the interest of justice" strongly support a transfer of
12 *LaPausky* and *Cats and Dogs* to the Northern District of California under 28 U.S.C.
13 § 1404(a).

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