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14 **UNITED STATES DISTRICT COURT**
 15 **CENTRAL DISTRICT OF CALIFORNIA**

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

18 Plaintiffs,

19 v.

20 YELP! INC.,

21 Defendant.

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

25 Plaintiff,

26 v.

27 YELP! INC.,

28 Defendant.

Case No: 2:10-cv-01340-VBF-SS
 Pleading Type: Class Action

**PLAINTIFFS' OPPOSITION TO
 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. 2:10-cv-01578-VBF-SS

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1 **I. INTRODUCTION**

2 Defendant Yelp! Inc. (“Yelp”) falls well shy of its *heavy burden* to justify
3 transferring these cases to the Northern District of California. Key factors in the
4 transfer analysis strongly support maintaining these cases in the Central District of
5 California, including (1) the considerable deference owed to Plaintiffs’ choice to
6 file suit here, *see Section III.B.1, infra*; (2) the first-to-file rule, *see Section*
7 *III.B.2, infra*; (3) Yelp’s extensive contacts with the Central District, *see Section*
8 *III.B.1, infra*; and (4) the Central District’s strong interest in deciding this
9 controversy, *see Section III.B.3, infra*. Meanwhile, the main factors cited by
10 Yelp to be in its favor – presence of a permissive forum selection clause and ease
11 of access to proof/difference in cost of litigation – carry “little weight” in the
12 analysis, and, in any event, Yelp has failed to demonstrate that even these minor
13 factors balance in its favor for purposes of the transfer motion.

14 Yelp exacts a tremendous impact on the Central District of California’s
15 business community. Based on the geographic distribution of businesses listed on
16 Yelp.com, it is highly probable that the number of class members found here will
17 well exceed the number in any other federal judicial district. More specifically,
18 Yelp has consciously reached into the Central District of California and
19 unilaterally foisted its rating and reviews system upon some 1,137,562 businesses
20 located here. That is roughly *double* the number of businesses listed on Yelp
21 which are situated in the Northern District of California, and very likely far
22 outstrips the number of Yelp-listed businesses in any other federal judicial district.
23 By contrast, there are 377,345 Yelp-listed businesses in the Northern District of
24 Illinois, 103,452 in the Southern District of New York, and 10,539 in the District
25 of Columbia.

26 In addition to California, the 11 named Plaintiffs in the *Cats and Dogs* and
27 *LaPausky* actions hail from New York, Chicago, and Washington, D.C.
28 Notwithstanding the geographic reach, a plurality of them – four of the 11 – are

1 based in the Central District of California, reflecting the concentration of class
2 members located here. By fighting Yelp’s extortionate conduct in this Court, they
3 have aligned the Plaintiffs’ choice of forum with the Central District of
4 California’s robust interest in adjudicating this controversy. Moreover, of the three
5 class actions currently pending against Yelp, *Cats and Dogs* and *LaPausky* are the
6 first- and second-filed, respectively. All of these factors strongly support
7 upholding Plaintiffs’ choice of forum and maintaining these cases in the Central
8 District.

9 Yelp’s arguments for transferring this suit to the Northern District of
10 California are based largely on a permissive (not mandatory) forum selection
11 clause buried in Yelp’s Terms of Service (“TOS”) and advertising contracts (the
12 TOS is, in turn, buried on Yelp’s website). Yelp also states—without ample
13 support—that the convenience of witnesses and access to proof favor transfer.
14 Yelp’s arguments are unavailing and cannot overcome the key factors which
15 strongly favor Plaintiffs’ chosen forum. The Court should deny Yelp’s motion.

16 **II. FACTUAL AND PROCEDURAL BACKGROUND**

17 Plaintiff *Cats and Dogs Animal Hospital, Inc.*, which is based in Long
18 Beach, filed its original Complaint against Yelp on February 23, 2010 (hereinafter,
19 “*Cats and Dogs*”). A First Amended Complaint (“FAC”) was filed on March 16,
20 2010, adding 9 more representative Plaintiffs, including three additional Plaintiffs
21 situated in the Central District.

22 Two copycat cases were filed after *Cats and Dogs: LaPausky v. Yelp! Inc.*
23 on March 3, 2010, also in the Central District (hereinafter, “*LaPausky*”); and *Levitt*
24 *v. Yelp! Inc.* on March 12, 2010 (hereinafter, “*Levitt*”), originally filed in San
25 Francisco County Superior Court, and subsequently removed by Yelp to the
26 Northern District of California.

27 On March 16, 2010, *LaPausky* was transferred to the Honorable Valerie
28 Baker Fairbank, before whom *Cats and Dogs* was already pending. On April 16,

1 2010, counsel for the *Cats and Dogs* Plaintiffs filed a notice substituting
2 themselves as counsel for the Plaintiff in *LaPausky*.

3 On April 9, 2010, Yelp moved to transfer both *Cats and Dogs* and *LaPausky*
4 to the Northern District of California. As discussed below, Yelp’s motion lacks
5 merit and should be denied.

6 **III. ARGUMENT**

7 **A. Defendant Must Make A “Strong Showing Of Inconvenience To**
8 **Warrant Upsetting The Plaintiff’s Choice Of Forum”**

9 **1. Section 1404(a) Requires The Court To Balance Private And**
10 **Public Interest Factors Affecting Convenience**

11 To prevail on a § 1404(a) venue transfer motion, the defendant bears a heavy
12 burden of making a “strong showing of inconvenience to warrant upsetting the
13 plaintiff’s choice of forum.” *Decker Coal Co. v. Commonwealth Edison Co.*, 805
14 F.2d 834, 843 (9th Cir. 1986). In deciding the motion, the court should balance
15 private and public interest factors affecting the convenience of the forum. *Id.*

16 Private factors include the relative ease of access to sources of proof;
17 availability of compulsory process for attendance of unwilling, and
18 the cost of obtaining attendance of willing, witnesses; possibility of
19 view of premises, if view would be appropriate to the action; and all
20 other practical problems that make trial of a case easy, expeditious
21 and inexpensive Public factors include the administrative
22 difficulties flowing from court congestion; the local interest in having
23 localized controversies decided at home; the interest in having the trial
24 of a diversity case in a forum that is at home with the law that must
25 govern the action; the avoidance of unnecessary problems in conflict
26 of laws, or in the application of foreign law; and the unfairness of
27 burdening citizens in an unrelated forum with jury duty.

28 *Id.* (quotation marks and citations omitted).

1 **2. Unless The Balance Is *Strongly* In Favor Of The Defendant, The**
2 **Plaintiff’s Forum Choice Should Rarely Be Disturbed**

3 “[U]nless the balance is strongly in favor of the defendant, the plaintiff’s
4 choice of forum should rarely be disturbed.” *Ellis v. Costco Wholesale Corp.*, 372
5 F. Supp. 2d 530, 545 (N.D. Cal. 2005) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S.
6 501, 508 (1947)). Underscoring the defendant’s weighty burden on a motion to
7 transfer venue is the principle that, “it is not appropriate to transfer a case from a
8 plaintiff’s chosen forum simply because another forum, in the court’s view, may be
9 superior to that chosen by the plaintiff.” *Forest Guardians v. Kempthorne*, 2007
10 WL 2572287, *4 (S.D. Cal. Sept. 5, 2007) (quotation marks and citation omitted).
11 Indeed, even where courts find another forum to be more convenient, they may not
12 transfer a case unless the defendant meets its significant burden of demonstrating
13 that the § 1404(a) factors are ***strongly*** in its favor. *See, e.g., Cantrell v. City of*
14 *Murphy*, 2010 WL 786591, *5 (E.D. Tex. Mar. 1, 2010) (denying defendant’s
15 transfer motion where defendant’s preferred forum was “at least slightly more
16 convenient”); *Graff v. Qwest Comm. Corp.*, 33 F. Supp. 2d 1117, 1121 (D. Minn.
17 1999) (transfer should be denied “if the factors are evenly balanced or weigh only
18 slightly in favor of transfer”).

19 Additionally, where the requested forum is geographically close to the
20 current forum, any “convenience” factors, such as the location of witnesses and
21 documents, are substantially less important. *See Barr v. Nat’l R.R. Passenger*
22 *Corp.*, 2009 WL 3497776, *4 (E.D. Pa. Oct. 28, 2009).

23 In class actions such as this one, courts also consider the distribution of
24 putative class members as a key factor in deciding venue transfer motions. *See,*
25 *e.g., Ellis*, 372 F. Supp. 2d 530 (Patel, J.) (denying venue transfer motion where
26 Northern District of California was “home to a proportionately large segment of
27 the putative class”); *Brody v. Am. Med. Ass’n*, 337 F. Supp. 611, 613 (S.D.N.Y.
28 1971) (“Where a large percentage of class members comes from or near New

1 York, transfer to another district will be denied.”); *Berenson v. Nat’l Fin. Servs.,*
2 *LLC*, 319 F. Supp. 2d 1, 4 (D.D.C. 2004) (transferring class action to district with
3 “largest amount of potential class members”); *King v. Johnson Wax Assocs., Inc.*,
4 565 F. Supp. 711, 719-20 (D. Md. 1983) (transferring class action to the Central
5 District of California upon finding that “should a class eventually be certified, the
6 interests of the class would seem better served by a trial in Los Angeles than by
7 one in Baltimore, as many more class members would likely reside in close
8 proximity to the courthouse”).

9 **B. Plaintiffs’ Choice Of The Central District Of California Should Not Be**
10 **Disturbed**

11 **1. Plaintiffs’ Chosen Venue Is Entitled To Great Deference,**
12 **Especially Given Yelp’s Active And Deep Intrusion Into The**
13 **Central District Of California**

14 Yelp argues the 11 named Plaintiffs’ collective decision to file suit in this
15 forum should not be accorded considerable deference, as is customary, because this
16 is a class action where the chosen forum is purportedly “largely fortuitous.” Yelp
17 Mot. at 17 (citing *Lou v. Belzburg*, 834 F.2d 730, 739 (9th Cir. 1987)). But
18 “Plaintiffs’ choice of forum remains significant in a class action where it is
19 preferable to other forums in administering the action and protecting the class.”
20 *Bibo v. Fed. Express, Inc.*, 2007 WL 2972948, *2 (N.D. Cal. Oct. 10, 2007). In
21 this case, Yelp’s own conduct buttresses and warrants considerable deference to
22 Plaintiffs’ selection of the Central District of California as the proper forum to hear
23 this controversy.

24 Indeed, Plaintiffs’ chosen venue is not “largely fortuitous”—rather, it is a
25 forum made preferable by Yelp’s actively reaching into the Central District of
26 California and choosing to create listings on its website for some 1,137,562
27 businesses located here. *See* Lee Beck Decl. ¶ 5. That number—which feeds the
28 pool from which potential class members must be drawn—dwarfs, by almost two-

1 to-one, the number of businesses listed on Yelp.com situated in Yelp’s preferred
2 forum, the Northern District of California. *See id.* The Central District of
3 California also greatly eclipses other especially populous districts in terms of Yelp-
4 listed businesses, including the Southern District of New York (103,452), and the
5 Northern District of Illinois (377,345). *See id.*

6 Because, as a result of Yelp’s own conduct deliberately targeted at this
7 forum, the Central District of California is likely to hold the most—and a
8 disproportionately higher share of—class members, considerable deference to
9 Plaintiffs’ venue choice is warranted by virtue of it being preferable to other
10 forums “in administering the action and protecting the class.” *Bibo*, 2007 WL
11 2972948, at *2. Such a result is reinforced by the fact that a plurality of four of the
12 11 named Plaintiffs in *Cats and Dogs* and *LaPausky* are based here.¹ *See Ellis*,
13 372 F. Supp. 2d at 544 (“In judging the weight to be accorded to the choice of
14 forum, consideration must be given to the named plaintiffs’ contacts with the
15 forum, including those relating to plaintiffs’ cause of action.”).

16 Moreover, Yelp’s protestation that it has minimal contact with the Central
17 District of California and that little relevant conduct took place there, *see* Yelp
18 Mot. at 13-15, should not be believed. Yelp has thrust itself into this forum by
19 unilaterally listing over 1.1 million Central District of California businesses on its
20 website. As detailed in the First Amended Complaint, the process by which new
21 businesses become listed on Yelp is a markedly active one in which Yelp
22 commissions “Ambassadors” or “Scouts” to find and write reviews of businesses
23 in a given location. *See* FAC ¶ 67. And the process by which Yelp extorts
24

25 ¹ Yelp incorrectly states that “the chosen forum is neither the plaintiffs’ residence
26 nor the place where the operative facts occurred [.]” Yelp Mot. at 17. The four
27 Plaintiffs located in this district are: *Cats and Dogs Animal Hospital, Inc.* (Long
28 Beach), *Le Petite Retreat Day Spa, LLC* (Los Angeles), *Wag My Tail, Inc.*
(Tujunga), and *Celibré, Inc.* (Torrance). *See* FAC ¶¶ 3, 6, 8, 12.

1 businesses into buying advertising contracts occurs, as alleged, when Yelp’s
2 employees and its Elite Squad members place telephone calls to their victims, and
3 e-mail or personally visit them. *See id.* ¶¶ 80, 98, 99, 109, 118, 123, 136, 142, 149,
4 162. Accordingly, Yelp cannot claim, after having purposely availed itself of the
5 privilege of conducting extensive business in this forum, that it lacks sufficient
6 contact with the Central District of California or that “minimal” relevant conduct
7 occurred here.

8 For all of these reasons, the Court should afford considerable deference to
9 Plaintiffs’ choice of venue.

10 **2. The First-To-File Rule Weighs Heavily Against Transfer**

11 Yelp argues that the pendency of a copycat action in the Northern District,
12 which was filed after both *Cats and Dogs* and *LaPausky*, supports transfer. *See*
13 *Yelp Mot.* at 11-13. The reverse is actually true. The first-to-file rule is a factor
14 weighing strongly *against* transfer.

15 The Ninth Circuit instructs that the first-to-file rule promotes efficiency and
16 “should not be disregarded lightly.” *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946
17 F.2d 622, 625 (9th Cir. 1991) (quoting *Church of Scientology v. U.S. Dep’t of the*
18 *Army*, 611 F.2d 738, 750 (9th Cir. 1979)). “Where two actions involving
19 overlapping issues and parties are pending in two federal courts, ***there is a strong***
20 ***presumption across the federal circuits that favors the forum of the first-filed***
21 ***suit under the first-filed rule.***” *Applied Elastomerics, Inc. v. Z-Man Fishing*
22 *Prods., Inc.*, 2006 WL 2868971, *6 (N.D. Cal. Oct. 6, 2006) (quoting *Manuel v.*
23 *Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005) (emphasis added)).

24 Here, application of the first-to-file rule is straightforward and balances
25 against transfer to the district where a third-filed copycat case is pending. Yelp’s
26 argument that the potential for consolidation with the Northern District supports
27 transfer is wholly unavailing: that action can just as readily be consolidated with
28 *Cats and Dogs* and *LaPausky*. *See Applied Elastomerics*, 2006 WL 2868971, at *6

1 (“in its moving papers, [the defendant] fails to note that the South Carolina case
2 could also be consolidated with this case”; finding that first-to-file rule weighed
3 against the defendant’s motion to transfer).²

4 **3. The Central District Of California Has A Strong Interest In**
5 **Deciding This Controversy**

6 Also strongly favoring the Central District over the Northern District is a
7 vital factor that receives no mention in Yelp’s motion: this district’s substantial
8 interest in protecting its business community through adjudication of this
9 controversy.

10 “The interests of justice are promoted when a localized controversy is
11 resolved in the region that it impacts.” *Forest Guardians*, 2007 WL 2572287, at
12 *4. Protecting businesses situated within the Central District of California—which
13 likely make up the largest percentage of class members—from extortionate
14 practices is a compelling interest in this respect. *See Van Slyke v. Capital One*
15 *Bank*, 503 F. Supp. 2d 1353, 1365 (N.D. Cal. 2007) (estimate that 20% of potential
16 class members resided in California, which has an interest in “preventing
17 fraudulent practices which may have an effect both in California and throughout
18 the country,” supported California’s local interest in controversy; court denied
19 transfer to Eastern District of Virginia). Accordingly, the Central District of
20 California’s local interest weighs strongly against transfer.³

21
22
23 ² Alternatively, the later-filed action may be dismissed or stayed under the first-to-
24 file rule. *See Benson v. JPMorgan Chase Bank, N.A.*, 2010 WL 1445532, *2 (N.D.
25 Cal. Apr. 7, 2010).

26 ³ “Concurrent with the local-interest factor is the issue of burdening citizens of an
27 unrelated forum with jury duty.” *Van Slyke*, 503 F. Supp. 2d at 1365. Because the
28 Central District of California has a greater interest in adjudicating this dispute than
the Northern District of California, this factor also strongly disfavors transfer. *See*
id.

1 **4. Yelp Has Failed To Show That Ease Of Access To Proof Or**
2 **Difference In Cost Of Litigation Favors Transfer**

3 Yelp argues that transfer to the Northern District of California is favored by
4 the factors of ease of access to proof and difference in cost of litigation. It claims
5 that the Northern District is a more convenient forum for the “vast majority” of
6 relevant witnesses, and “most documents” are located there. *See* Yelp Mot. at 15-
7 16. But Yelp has failed to make the strong showing required to prevail on these
8 factors.

9 “To demonstrate an inconvenience to witnesses, the moving party must
10 identify relevant witnesses, state their location and describe their testimony and its
11 relevance.” *Reid-Ashman Mfg., Inc. v. Swanson Semiconductor Serv., L.L.C.*, 2006
12 WL 3290416, *7 (N.D. Cal. Nov. 13, 2006); *see also S.E.C. v. Rose Fund, LLC*,
13 2004 WL 2445242, *3 (N.D. Cal. Jan. 9, 2004).

14 “A party seeking a transfer of venue must do more than make general
15 allegations that key witnesses are unavailable or are inconveniently located
16 Rather, the moving party must identify specific witnesses and outline the substance
17 of their testimony.” *ADS Sec. L.P. v. Advanced Detection Sec. Servs., Inc.*, 2010
18 WL 1170976, *3 (W.D. Tex. Mar. 23, 2010). Yelp has not done so—instead, it
19 merely sets forth broad “category[ies] of witnesses,” all of which happen to be
20 Yelp employees, and then states that these categories of witnesses (not specific
21 individuals) are located in the Northern District. *See* Yelp Mot. at 15-16.
22 Furthermore, any inconvenience to Yelp’s employees must be given little weight,
23 because Yelp will be able to compel its employees’ testimony at trial. *See*
24 *Jonathan Brown, Inc. v. Venetian Casino Resort, LLC*, 2007 WL 4532214, *6
25 (N.D. Cal. Dec. 19, 2007); *see also STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551,
26 1556 (N.D. Cal. 1988) (noting that a court should “discount inconvenience to [a]
27 party’s witnesses when they are employees who can be compelled to testify”);
28 *Allstar Mktg. Group, LLC v. Your Store Online, LLC*, 666 F. Supp. 2d 1109, 1132

1 (C.D. Cal. 2009) (same).⁴

2 The location of Yelp’s documents is similarly of little importance. “[E]ase
3 of access to documents does not weigh heavily in the transfer analysis, given that
4 advances in technology have made it easy for documents to be transferred to
5 different locations.” *Metz v. U.S. Life Ins. Co.*, 674 F. Supp. 2d 1141 (C.D. Cal.
6 2009); *Szegedy v. Keystone Food Prods., Inc.*, 2009 WL 2767683, *6 (C.D. Cal.
7 Aug. 26, 2009) (same); *Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 778
8 (E.D. Tex. 2000) (accessibility and location of sources of proof have been given
9 “decreasing emphasis” in courts’ transfer analyses “due to advances in copying
10 technology and information storage”). Given that nearly all documents relevant to
11 Plaintiffs’ claims will be electronic, the physical location of the documents is
12 especially irrelevant. And to be sure, many relevant documents are situated
13 outside of the Northern District and within the Central District, given the number
14 of class members located in the latter, including four of the named Plaintiffs.

15 Furthermore, any “convenience” factors, such as the location of witnesses
16 and documents, are made substantially less important by the geographic proximity
17 of the Central District to the Northern District, dropping them out of the analysis
18 entirely. *See Barr*, 2009 WL 3497776, at *4 (“in cases where the requested forum
19 is geographically close to the current forum, the district court should not consider
20 convenience factors” (quotation marks and citation omitted)). Here, regardless of
21 where the key witnesses and documents are located, there is no appreciable
22 difference in convenience given that the Central District is directly adjacent to the

23 _____
24 ⁴ Yelp suggests that the Northern District “is more likely to be convenient for any
25 non-party witnesses,” while admitting that it has failed to actually identify any
26 such individuals. Yelp Mot. at 16 n.4. Accordingly, Yelp has also failed to make
27 any showing that the location of non-party witnesses favors transfer. Indeed, given
28 Yelp’s overwhelming impact on businesses in the Central District of California—
and the sheer number of potential class members located here—the location of
non-party witnesses is more likely to favor the Central District.

1 Northern District. *See also Gen. Retirement Sys. of City of Detroit v. Wells Fargo*
2 *Mortgage Backed Secs. 2006-AR18 Trust*, 2009 WL 2137094, *6 (N.D. Cal. July
3 16, 2009) (significance of convenience to witnesses factor “is substantially reduced
4 by the ease of communication and interstate air travel in today’s business
5 community”; forum not necessarily inconvenient “if it is readily accessible in a
6 few hours of air travel”).

7 **5. The Permissive Forum Selection Clauses In Yelp’s TOS And**
8 **Advertising Agreements Cannot Overcome Plaintiffs’ Choice Of**
9 **Forum**

10 Yelp argues that Plaintiffs’ choice of the Central District should be rejected
11 owing to forum selection clauses appearing in the Terms of Service (“TOS”) on
12 Yelp’s website, as well as Yelp’s Advertising Agreements, which reference venue
13 in federal courts in “San Francisco County, California.” *See Yelp Mot.* at 7-11.
14 But as discussed below, the Court should disregard these venue provisions as both
15 procedurally and substantively unconscionable.

16 Moreover, and as a threshold matter, even if the venue provisions are valid,
17 they carry little weight in the transfer analysis. This is because, as Yelp
18 acknowledges, the venue provisions are permissive rather than mandatory. Federal
19 courts have repeatedly declined to grant more than a modicum of weight to the
20 existence of permissive forum selection clauses in addressing motions to transfer
21 venue.

22 ***a. Because They Are Permissive Rather Than Mandatory, The Forum***
23 ***Selection Clauses Carry Little Weight In The Transfer Analysis***

24 There is no dispute that the forum selection clauses in Yelp’s TOS and
25 Advertising Agreements are permissive: they authorize but do not require litigation
26 in the federal courts of San Francisco County. *See Yelp Mot.* at 4.

27 When confronted with permissive forum selection clauses on a motion to
28 transfer venue, numerous federal courts have declined to grant them significant

1 weight in the analysis. *See, e.g., Watson v. John K. Burch Co.*, 2003 WL
2 21145744, *4 (N.D. Tex. May 14, 2003) (“Given the permissive nature of the
3 forum selection clause, the court refuses to give significant weight to the
4 contractual provision, and as such does not shift the burden of persuasion to [the
5 plaintiff] as it would if a mandatory forum selection clause were involved.”); *Atlas*
6 *Oil Co. v. Micro-Design, Inc.*, 2009 WL 411763, *3 (E.D. Mich. Feb. 17, 2009)
7 (“courts consider a permissive forum selection clause to be a relatively minor
8 factor in the transfer analysis” (citing cases)); *Flight Solutions, Inc. v. Club Air,*
9 *Inc.*, 2010 WL 276094, *3 (M.D. Tenn. Jan. 14, 2010) (citing cases where
10 permissive forum selection clauses were assigned “little weight in deciding
11 whether to transfer venue”); *JFE Steel Corp. v. ICI Americas, Inc.*, 2008 WL
12 4449080, *3 (N.D. Ohio Sept. 30, 2008) (“a *permissive* forum, as opposed to a
13 mandatory forum, is given little weight in balancing the decision to the permissive
14 forum”(emphasis in original)); *BRC Group, LLC v. Quepasa Corp.*, 2009 WL
15 2424669, *4 (N.D. Cal. Aug. 07, 2009) (presence of permissive forum selection
16 clause did not alleviate defendant’s burden of overcoming plaintiff’s venue on a
17 motion to transfer venue, which court denied).

18 Yelp relies on a single non-binding decision from the Northern District of
19 California in asserting that a permissive forum selection clause should be given
20 “substantial consideration” under § 1404(a). Yelp Mot. at 7 (citing *Unisys Corp. v.*
21 *Access Co.*, 2005 WL 3157457, *5 (N.D. Cal. Nov. 23, 2005)). In addition to
22 contravening the vast case law affording little weight to permissive forum selection
23 clauses, the Northern District of California recently criticized the *Unisys* opinion
24 and its reasoning. *See BrowserCam Inc. v. Gomez, Inc.*, 2008 WL 4408053, *5
25 (N.D. Cal. Sept. 26, 2008) (noting that *Unisys* is non-binding and “relies on out-of-
26 circuit cases”; rejecting the argument that a permissive forum selection clause is
27 entitled to “substantial consideration,” and denying the defendant’s motion to
28

1 transfer venue).⁵

2 This Court should also follow the long line of federal decisional authority
3 granting little weight to permissive forum selection clauses within the analysis
4 under §1404(a).

5 ***b. The Forum Selection Clauses Should Be Disregarded As***
6 ***Unconscionable***

7 Their permissive nature notwithstanding, the forum selection clauses should
8 be disregarded as unconscionable.

9 When Yelp enters a new market, it creates new listings for businesses there.
10 Yelp categorically refuses ever to allow businesses to “opt-out” of being listed.⁶
11 After creating new business listings, Yelp contacts businesses directly, by
12 telephone and email, pressuring them to “claim” their listing and sign up for a free
13 business owner account, which allows the business to post accurate basic
14 information (such as address and hours of operation) and track the hits on the
15

16 ⁵ Yelp’s brief also misleadingly quotes and cites *Jones v. GNC Franchising, Inc.*,
17 211 F.3d 495 (9th Cir. 2000) and *Pfeiffer v. Himax Technologies, Inc.*, 530 F.
18 Supp. 2d 1121, 1125 n.4 (C.D. Cal. 2008). See Yelp Mot. at 7-8. *Jones* involved a
19 mandatory forum selection clause. See *Jones*, 211 F.3d 495, 496 (clause provided
20 that action “shall be brought **only** within the Commonwealth of Pennsylvania”
21 (emphasis added)). As discussed in the case law cited above, whether a forum
22 clause is mandatory or permissive is dispositive of the question of its significance
23 in the venue transfer analysis. Meanwhile, in *Pfeiffer*, the court determined that
24 the clause at issue was not even a forum selection clause at all, but merely a
25 provision designating an agent for service of process that had no bearing on venue.
26 See *Pfeiffer*, 530 F. Supp. 2d at 1125. As such, its citation of *Unisys* is only *dicta*.

24 ⁶ See http://www.yelp.com/business/common_questions (**Q.** I’m a business owner
25 and don’t want my business to be listed on Yelp – can I have it removed from
26 Yelp? **A.** *Actually, no. Consumers have the right to talk about what they like (and
27 don’t like) about a meal they ate, a plumber that they hired, or a car wash that they
28 visited. The law is clear on this point—even if you’ve registered your business
name as a trademark—so your best bet is to engage with your fans and critics alike
and hear what they have to say.*)

1 business’s Yelp listing. It is this solicitous process on which Yelp relies to bind
2 captive business owners to Yelp’s Terms of Service.

3 But the process is even more disingenuous because business owners are only
4 notified of those Terms of Service through a hidden sentence, in miniscule, light
5 grey font, *see* Lee Beck Decl. Ex. B, at the bottom of Yelp’s business home page
6 (biz.yelp.com), similar to the Yelp home page (yelp.com), *see* Lee Beck Decl. Ex.
7 A. If they see the notice, owners must then click a link to access the Terms of
8 Service. Crucially, *business owners are never asked to click an “I Agree” button to*
9 *be bound*. Instead, Yelp claims they are bound simply for “continuing beyond” the
10 home page. Thus, just clicking the link to see the Terms of Service purportedly
11 binds business owners before they can even review those Terms. But this type of
12 “browse wrap” agreement has been rarely upheld, and should not be upheld now.⁷

13 Yelp’s Terms of Service, and the permissive forum selection clause it seeks
14 to enforce, are procedurally and substantively unconscionable, part of an
15 adhesionary contract that lacks mutuality. For these reasons, the Court should,
16 respectfully, set aside the disputed provision.

17 ***c. Legal Standard For Unconscionability***

18 If a court finds that a contract or any clause was unconscionable at the time
19 it was made, it may refuse to enforce the contract or clause, or limit its
20 applicability to avoid any unconscionable result. Cal. Civ. Code § 1670.5(a).
21 Unconscionability “has both a ‘procedural’ and a ‘substantive’ element.”
22 *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000).
23 The elements are considered on a “sliding scale[,] . . . such that the more
24

25 ⁷ The process may be more tenuous still: the Terms of Service themselves purport
26 to bind any person who accesses, browses, crawls, scrapes, or in any way uses
27 Yelp.com (not just a person who navigates past the homepage). *See* Byrne Decl.
28 Exs. E, F. By this language, even individuals who perform a Google search for a
business are bound when the business’s Yelp listing shows as a search result.

1 substantively oppressive the contract term, the less evidence of procedural
2 unconscionability is required . . . and vice versa.” *Nagrampa v. MailCoups, Inc.*,
3 469 F.3d 1257, 1280 (9th Cir. 2006) (internal quotation omitted).

4 ***Procedural*** unconscionability focuses on oppression or surprise arising from
5 an inequality of bargaining power of the parties and the absence of real negotiation
6 or a meaningful choice on the part of the weaker party; involves the extent to
7 which supposedly agreed-upon terms are hidden in the prolix printed form drafted
8 by the party seeking to enforce the disputed term; and generally takes the form of a
9 contract of adhesion. *See Nagrampa*, 469 F.3d at 1280; *see also Kinney v. United*
10 *HealthCare Servs., Inc.*, 83 Cal. Rptr. 2d 348, 353 (Cal. Ct. App. 1999); *Little v.*
11 *Auto Stiegler, Inc.*, 63 P.3d 979, 983 (Cal. 2003)).

12 The relevant inquiry in determining ***substantive*** conscionability is whether
13 the provision is “overly harsh or generates one-sided results.” *Nagrampa*, 469 F.3d
14 at 1280 (citation omitted). The primary consideration is mutuality. *Id.* at 1281.
15 “Substantively unconscionable terms . . . may generally be described as unfairly
16 one-sided.” *Gentry v. Superior Court*, 165 P.3d 556, 572 (Cal. 2007). In contracts
17 of adhesion, substantive unconscionability “need not be present in the same
18 degree” as procedural unconscionability. *Id.*

19 In sum, “the procedural component [of unconscionability] is satisfied by the
20 existence of unequal bargaining positions and hidden terms common in the context
21 of adhesion contracts [and] the substantive component is satisfied by overly harsh
22 or one-sided results” *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D.
23 Cal. 2002). Forum selection clauses may be set aside if unconscionable under the
24 “sliding scale” analysis. *See, e.g., Nagrampa*, 469 F.3d 1257 (forum selection
25 clause unenforceable as both procedurally and substantively unconscionable).

26 The “Terms of Service” Yelp relies on for its claim that Plaintiffs agreed to a
27 permissive forum selection clause should be deemed unconscionable and otherwise
28 disregarded because:

1 (1) Yelp users have no opportunity to negotiate the Terms of Service
2 and—because they are not required to agree to them to use the service—no
3 opportunity to reject the contract;

4 (2) Any notification of the Terms of Service—whether on Yelp’s
5 homepage and purportedly applicable to each of its 31 million individual users, or
6 on the biz.yelp.com website and purportedly applicable to any business claiming
7 its Yelp.com listing—is miniscule and hidden;

8 (3) The Terms of Service purportedly apply to “[a]ll persons who proceed
9 past the homepage of the Yelp Website,” Byrne Dec. ¶ 9, even though deeper
10 pages are directly accessible (for example through a Google search), so that a user
11 may have no notification;

12 (4) The Terms of Service *cannot* apply, in any event, to Class members
13 who never claimed their Yelp.com business listing, but who were solicited for
14 advertising as part of Yelp’s extortionate scheme;

15 (5) Unrepresented business owners and individual Yelp users are unlikely
16 to know what the legal terms “personal jurisdiction” and “venue” in the forum
17 selection clause mean;

18 (6) The forum selection clause is hidden in a “Miscellaneous” section
19 covering at least 11 different topics and therefore unlikely to draw attention;

20 (7) The forum selection clause effectively shields Yelp from liability by
21 making the bringing of claims for most plaintiffs cost-prohibitive;

22 (8) The forum selection clause lacks mutuality because it provides “you
23 do not have any authority of any kind to bind Yelp in any respect whatsoever.”
24 Byrne Decl. Ex. F at ¶ 16.; and

25 (9) The Terms of Service date only to 2007 or 2008, Byrne Dec. ¶¶ 10-
26 11, even though this action is brought for claims arising out of Yelp’s conduct
27 beginning in 2004.

28

1 **i. The TOS Forum Selection Clause Is Procedurally Unconscionable**

2 California courts begin examining a contract for evidence of
3 unconscionability by “inquir[ing] . . . whether the contract is one of adhesion.”
4 *Armendariz v. Found. Health Psychcare Servs.*, 24 Cal. 4th at 113. An adhesi-
5 onary contract is “a standardized contract, which, imposed and drafted by the party of
6 superior bargaining strength, relegates to the subscribing party only the opportunity
7 to adhere to the contract or reject it.” *Id.*

8 The California Court of Appeal has held that “[a] finding of a contract of
9 adhesion is essentially a finding of procedural unconscionability.” *Flores v.*
10 *Transamerica HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376, 382 (Cal. Ct. App. 2001)
11 (emphasis added); *see also Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893
12 (9th Cir. 2002) (“The DRA is procedurally unconscionable because it is a contract
13 of adhesion: a standard-form contract”); *Aral v. Earthlink, Inc.*, 36 Cal. Rptr.
14 3d 229, 238 (Cal. Ct. App. 2005) (finding “quintessential procedural
15 unconscionability” where “the terms of the agreement were presented on a ‘take it
16 or leave it’ basis through installation of the software or through materials included
17 in the package mailed with the software with no opportunity to opt out”).

18 Because the Yelp Terms of Service are embodied in a form “agreement” that
19 purportedly applies to anyone who uses the Yelp website, plaintiffs and class
20 members had no opportunity to negotiate it. Arguably, they lacked even the power
21 to *reject* the Terms of Service, since Yelp claims they either apply to anyone who
22 has ever negotiated past Yelp’s homepage or business homepage (biz.yelp.com),
23 even though the notification of the agreement and its application is miniscule and
24 hidden,⁸ or to anyone who accesses Yelp in any manner, even though search

25
26 _____
27 ⁸ Yelp has also not said how it notified people and businesses of the Terms of
28 Service and their application—if at all—from October 2004 to the present; the only
evidence available of notice is what is on Yelp’s website today.

1 engines.⁹ This is true despite that Yelp users may directly penetrate beyond the
2 Yelp homepage or business homepage through outside links, such as through a
3 Google search, and thus purportedly be bound by Terms of Service without ever
4 receiving notification—not even miniscule, hidden notification.

5 The contract is especially adhesive with respect to Plaintiffs and class
6 member businesses because Yelp unilaterally creates business listings then engages
7 in direct, high-pressure tactics urging businesses to “claim” their listings, and
8 categorically refuses to delist businesses from the Yelp site. This is very different
9 than the circumstances in cases like *Universal Grading Serv. v. eBay, Inc.*, 2009
10 U.S. Dist. LEXIS 49841, at *64 (E.D.N.Y. June 10, 2009), where the court held a
11 User Agreement was not procedurally unconscionable because plaintiffs could
12 have chosen not to register for eBay. To the contrary, the “option” businesses have
13 to register for a free business owner account is illusory because the owner must
14 either allow his business to be listed with cursory and often inaccurate
15 information—and never view what people are saying about the business (since
16 even browsing past Yelp’s home page purportedly binds the user to the Terms of
17 Service)—or “claim” the listing and by doing so be bound to a contract the owner
18 has no ability to negotiate and likely never saw.

19 Worse, just by browsing Yelp to *explore* the *possibility* of claiming a
20 business’s listing, the business becomes bound by the Terms of Service, including
21 merely by reviewing those terms since, by doing so, the owner is proceeding
22 beyond the “point of no return” represented by the biz.yelp.com homepage.
23 Moreover, there are a substantial number of class members for whom Yelp created

24
25 ⁹ The Terms of Service purport to bind any person who accesses, browses, crawls,
26 scrapes, or in any way uses Yelp.com (not just a person who navigates past the
27 homepage) (*see* Byrne Decl. Exs. E, F). By this language, even individuals who
28 perform a Google search for a business are bound when the business’s Yelp listing
shows as a search result.

1 business listings and solicited to become Sponsors, but who never actually logged
2 onto Yelp or “claimed” their business’s listing—these businesses *could not have*
3 *been* bound by the Terms of Service.

4 Yelp’s users are not required to click an “I Agree” button or take any other
5 affirmative action to indicate agreement to the Terms of Service. Instead, the terms
6 purport to apply to anyone who merely browses the site. This type of “browse
7 wrap” agreement¹⁰ has rarely been enforced or upheld by a court. *See, e.g.,*
8 *Douglas v. U.S. Dist. Court*, 495 F.3d 1062 (9th Cir. 2007) (issuing writ of
9 mandamus to vacate order compelling arbitration based on changes to terms of
10 service in browse wrap license); *Specht v. Netscape Communs. Corp.*, 306 F.3d 17
11 (2d Cir. 2002) (where consumers are urged to download free software at the
12 immediate click of a button, reference to existence of license terms on a submerged
13 screen were insufficient to place consumers on notice of terms); *Sw. Airlines Co. v.*
14 *BoardFirst L.L.C.*, 2007 U.S. Dist. LEXIS 96230, at *15 (N.D. Tex. Sept. 12,
15 2007) (as browse wrap agreements have become more prevalent, general principle
16 that has emerged in case law is that an agreement’s validity depends on whether
17 the user has actual or constructive knowledge of the site’s terms and conditions
18 *prior to using the site*).

19 The *Specht* case is especially useful in analyzing the browse wrap Terms of
20 Service at issue here. The defendant sought to compel arbitration based on a clause
21 in a license agreement provided when consumers downloaded free software. The
22 license was on a “submerged” screen, which required users to click through, then
23 scroll to review the terms. The Second Circuit held that, when products are free
24 and users are invited to download them, in the absence of a “reasonably
25

26 ¹⁰ “[A] browse wrap license is part of the website, e.g., license terms are posted on
27 a site’s home page or are accessible by a prominently displayed hyperlink, and the
28 user assents to the contract when the user visits the web site.” *Register.com, Inc. v.*
Verio, Inc., 356 F.3d 393, 429 (2d Cir. 2004) (citation omitted).

1 conspicuous notice that they are about to bind themselves to contract terms, the
2 transactional circumstances . . . support our conclusion that plaintiffs did not
3 manifest assent to [the] license terms.” 306 F.3d at 39.

4 Like the defendant offering free download services, Yelp offers users and
5 businesses free directory services. When a business “claims” its Yelp listing, Yelp
6 even calls that a “free business owner account.” Since Yelp solicited plaintiffs to
7 claim their sites, then provided the account for free—and since the hidden notice in
8 miniscule, light grey font at the bottom of the page is not “reasonably
9 conspicuous”—the Court should similarly find that the circumstances do not show
10 plaintiffs’ assent to Yelp’s Terms of Service.

11 Even if plaintiffs had considered the Terms of Service before “clicking
12 through” to purportedly bind them, though, it is unlikely that unrepresented
13 business owners, now Plaintiffs and members of the proposed classes, would have
14 understood the terms “personal jurisdiction” and “venue” used in the clause. The
15 fact that Plaintiffs are business owners does not defeat their procedural
16 unconscionability claim. *See Nagrampa*, 469 F.3d at 1283 (citing *A&M Produce*
17 *Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 124 (Cal. Ct. App. 1982) (“experienced but
18 legally unsophisticated businessmen may be unfairly surprised by unconscionable
19 terms, and [] even large business entities may have *relatively* little bargaining
20 power, depending on the identity of the other contracting party and the commercial
21 circumstances surrounding the agreement.” (citation omitted))).

22 Moreover, the forum selection clause at issue here is comprised of a single
23 sentence in a large (11 sentences, 325 words), catchall “Miscellaneous” section
24 covering at least 11 different subjects and buried at the end of the Terms of
25 Service. *See* Byrne Decl. Ex. F at ¶ 20. Thus the element of surprise here is strong.
26 *See, e.g., Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775, 785 (Cal. Ct. App. 1976)
27 (“Where the contract is one of adhesion, conspicuousness and clarity of language
28 alone may not be enough to satisfy the requirement of awareness. Where a

1 contractual provision would defeat the ‘strong’ expectation of the weaker party, it
2 may also be necessary to call his attention to the language . . .”).

3 Finally, where a party has not received actual notice of a forum selection
4 clause in an adhesionary contract, the clause is unenforceable. *See Nagrampa*, 469
5 F.3d at 1291-92 (citations omitted). Plaintiffs had no idea they had ever agreed to
6 the forum selection clause and did not expect, if a dispute arose between Yelp and
7 their businesses, to be limited to litigating only in the Northern District of
8 California. *See* Declarations of Gregory Perrault, John Lewis, Yvonne Tannous,
9 Mary Seaton, Kevin DiCerbo, & Jacob Aaron Blecher.

10 **ii. The TOS Forum Selection Clause Is Substantively Unconscionable**

11 If the “place and manner” restrictions of a forum selection provision are
12 “unduly oppressive,” or “have the effect of shielding the strong party from
13 liability” then it lacks mutuality and is substantively unconscionable. *See*
14 *Nagrampa*, 469 F.3d at 1287 (citation omitted). For example, in *Bolter v. Superior*
15 *Court*, 104 Cal. Rptr. 2d 888, 894 (Cal. Ct. App. 2001), the court found a forum
16 clause requiring “mom and pop” franchisees to travel to an international
17 franchisor’s jurisdiction unduly oppressive. California courts should scrutinize the
18 effects of contracts styled as “mutual” when “it is difficult to envision the
19 circumstances under which [they] might negatively impact” the sophisticated
20 corporate party. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005)
21 (finding a mutually-worded condition on paper to be an illegal exculpatory clause
22 in practice).

23 Likewise, in *Comb*, the court struck down a forum selection clause used by
24 PayPal very similar to the one Yelp seeks to enforce here. That clause required
25 arbitration in Santa Clara County, PayPal’s backyard. Because PayPal serves
26 millions of customers throughout the United States, and because the average claim
27 was likely to be low, the Court held that the restriction of venue to PayPal’s home
28 county was effectively a “means by which the arbitration clause serves to shield

1 PayPal from liability” *Comb*, 218 F. Supp. 2d at 1177. It therefore set aside
2 the provision.

3 The circumstances are similar here. Requiring every one of Yelp’s 31
4 million users, or every business listed on Yelp—which currently lists businesses in
5 thousands of cities, in every U.S. state, and more in Canada, Ireland, and the
6 U.K.—to file suit in San Francisco, the location of Yelp’s headquarters, is highly
7 favorable to Yelp and highly prejudicial to users and businesses. *See Nagrampa*,
8 469 F.3d at 1289 (finding forum selection clause “oppressive” where it placed
9 venue a few miles away from the large corporate defendant’s headquarters, but
10 3,000 miles away from the small business plaintiff, who would have to hire a
11 lawyer familiar with Massachusetts law). Because of the nature of the services
12 Yelp provides, it is likely that any claim asserted against Yelp would be small. In
13 this manner, Yelp’s forum selection clause would effectively bar nearly all
14 potential plaintiffs from pursuing claims against the company. This is the *sine qua*
15 *non* of unconscionability. *Cf. Nagrampa*, 469 F.3d at 1290 (“The forum selection
16 provision has no justification other than as a means of maximizing an advantage
17 over franchisees.” (citation omitted)).

18 In addition, the forum selection clause purports to bind Yelp’s potential
19 opponents to venue in the Northern District, but maintains that Yelp’s counterparty
20 “do[es] not have any authority of any kind to bind Yelp in any respect
21 whatsoever.” *See Byrne Decl. Ex. F* at ¶ 16. The California Supreme Court has
22 held just such a provision substantively unconscionable. *See Armendariz*, 24 Cal.
23 4th at 119 (agreement requiring arbitration only for claims of weaker party but
24 choice of forums for stronger party lacked mutuality and was substantively
25 unconscionable).

26 **iii. The Advertising Agreements Are Unconscionable**

27 The Advertising Agreements for Plaintiffs Sofa Outlet, Celebré, and
28 Bleeding Heart Bakery are susceptible to many of the same criticisms as Yelp’s

1 Terms of Service, for example: (1) the contracts are adhesionary; (2) the forum
2 selection clause in each is inconspicuous, buried in a large, catchall
3 “Miscellaneous” section and using legal terms lay people are unlikely to
4 understand; and (3) the forum selection clause effectively shields Yelp from
5 liability to any potential small business plaintiff located outside the Northern
6 District of California.

7 In addition, the Sponsor Plaintiffs state claims in the First Amended
8 Complaint for civil extortion whereby they were compelled to enter into
9 Advertising Agreements with Yelp under the threat of financial ruin if they
10 refused. As Yelp noted in its Motion to Dismiss, extortion is a form of duress. And
11 a contract formed as a result of duress is unenforceable.

12 “The validity of a forum selection clause is determined under the usual rules
13 governing the enforcement of contracts in general” including whether there was
14 any duress or other misconduct in connection with the agreement. *P&S Bus.*
15 *Machs., Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) (citation
16 omitted).

17 Recently, a Ninth Circuit district court refused to enforce a forum selection
18 clause contained in an agreement arising out of an allegedly fraudulent transaction.
19 The court held that “Plaintiffs had no true choice in signing” the agreement,
20 especially where “there exist[ed] a significant disparity between Plaintiffs and
21 Defendants” and where the Defendant “came into [Plaintiffs’] forum to solicit
22 Plaintiffs’ investment.” *Brown v. Scripps Invs. & Loan, Inc.*, 2009 U.S. Dist.
23 LEXIS 49247, at *10-11 (W.D. Was. June 11, 2009).

24 Like the *Brown* plaintiffs, Yelp Sponsors who joined as a result of Yelp’s
25 extortionate threats were sought out by Yelp, were in a disparate bargaining
26 position since Yelp wielded the power to substantially affect their businesses, and
27 had no “true choice” in assenting to the Advertising Agreement (“assenting”
28 because they were never asked negotiate, but rather only to type “I agree” in

1 response to an email from a Yelp sales employee containing the agreement). These
2 emailed agreements came immediately after Yelp’s high-pressure sales calls.
3 Further, under the circumstances, it is clear the agreements were being offered on a
4 “take-it-or-leave-it” basis, giving the Sponsors no opportunity to negotiate.

5 For all of these reasons, the Court should decline to give effect to the forum
6 selection clauses in Yelp’s TOS and Advertising Agreements.

7 **IV. CONCLUSION**

8 Plaintiffs respectfully request that the Court deny Yelp’s Motion to Transfer
9 Venue.

10
11 DATED: April 19, 2010

Respectfully Submitted,

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