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

Attorneys for Defendant
YELP! INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

Plaintiffs,

v.

YELP! INC.,

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

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

Plaintiffs,

v.

YELP! INC.,

Defendant.

Case No. CV 10-01578 VBF (SSx)

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INTRODUCTION

Among other deficiencies of Plaintiffs' opposition to Yelp's motion to transfer, Plaintiffs obfuscate several critical facts, rely on improper law, and proffer evidence that is irrelevant under the governing legal standards. After Plaintiffs' flawed arguments fall, the following facts remain: (1) all named Plaintiffs and likely most of the putative class have agreed to venue in the Northern District; (2) nearly all named Plaintiffs *affirmatively* agreed to the forum selection clause; (3) the forum selection clause is valid and enforceable; (4) 7 of the 11 named Plaintiffs do not reside in the Central District and Plaintiffs seek to represent a nationwide class, meaning their choice of forum is entitled to minimal weight; (5) a greater portion of the putative classes reside in the Northern District; (6) nearly all of the alleged conduct took place in or from the Northern District; and (7) transfer would allow for consolidation with a related action, and the first-to-file rule does not apply because the convenience factors favor the Northern District.

ARGUMENT

I. The Forum Selection Clause Tips the Balance Heavily in Favor of Transfer to the Northern District.

Despite Plaintiffs' attempts to discount the forum selection clause at issue—by misrepresenting the nature of the agreements containing the forum selection clause and attacking the clause as unconscionable despite U.S. Supreme Court case law to the contrary—the forum selection clause remains a "significant factor" entitled to "substantial consideration" in the § 1404(a) analysis.

A. Plaintiffs Ignore their Affirmative Assent to the Forum Selection Clause.

The forum selection clause is included in both Yelp's Terms of Service ("TOS") and the terms of the advertising agreements businesses agree to when they purchase advertising from Yelp ("Advertising Agreements"). There are three distinct ways that businesses and individuals agree to the forum selection clause:

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

Disregarding the distinction entirely, Plaintiffs conflate these three methods of agreement—suggesting that all business owners are notified of the TOS solely via a link at the bottom of Yelp's business home page. (Pls.' Opp. 14.) They thus obfuscate the fact that every business that registers at biz.yelp.com *affirmatively assents* to the TOS[1]—which eight of the eleven Plaintiffs have done.[2] (*See* Yelp Br. 10.) Further, Plaintiffs attach a screenshot of a biz.yelp.com login page, not the registration page described here and in the Byrne Declaration. (*Compare* Lee Beck Decl. Ex. B *and* Byrne Decl. ¶ 6.) Yelp attaches the correct screenshot of the first page of the online registration process. (*See* Decl. of Matthew Tai ("Tai Decl.") Ex. A.)

Plaintiffs also barely mention the fact that all three "Sponsor Plaintiffs" have *affirmatively agreed* to an Advertising Agreement with Yelp.[3] (*See* Byrne Decl.

[1] The first page of the online registration process states: "By clicking the button below, you agree to the Yelp Terms of Service." The "Yelp Terms of Service " text is in blue font and is hyperlinked to the TOS; the "button below" refers to a red button directly 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.

[2] Like the three Sponsor Plaintiffs' declarations discussed *infra*, Wag My Tail's owner's declaration, that to her knowledge she has never agreed to a forum selection clause, is irrelevant. She assented to the TOS by registering for Yelp's business services on 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.

[3] Business owners generally enter into the Advertising Agreements by: (1) accepting a click-through agreement online; (2) by signing an agreement in paper form; and (3) by agreeing via email by stating "I agree" or a similar statement. Sofa Outlet signed an 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

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

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

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

[4] Jason Aaron Blecher, manager of Bleeding Heart Bakery, submitted a declaration in support of Plaintiffs' Opposition. (*See* Blecher Decl. ¶ 1.) However, as stated in Exhibit C to the Byrne Declaration, it was **Michelle Garcia**, owner and operator of Bleeding 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.

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

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

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

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

[5] The Yelp Website homepage (*i.e.*, the initial webpage displayed at www.yelp.com) and every webpage on the Yelp Website states: "Use of this site is subject to express **Terms of 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.*)

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

C. Permissive Forum Selection Clauses Are Entitled to Substantial Consideration.

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

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

[6] Plaintiffs contend that *BrowserCam Inc. v. Gomez, Inc.* criticized the *Unisys* opinion and its reasoning. Not so. The *BrowserCam* court criticized the defendant's use of *Unisys* to support its position, but did not criticize *Unisys* itself or its reasoning. The defendant in *BrowserCam* failed to make a showing, beyond the presence of a permissive forum 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.

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

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

[7] The sole case Plaintiffs cite from within the Ninth Circuit, *BRC Group, LLC v. Quepasa Corp.* is readily distinguishable. In *BRC Group*, defendant relied solely on the permissive forum selection clause at issue in support of transfer under §1404(a): "[Defendant] elected not to develop the balancing factors in its argument and instead relied on the tit-for-tat argument that plaintiff's choice of forum should simply be ignored because plaintiff chose not to bring suit in Arizona." No. C 09-01506 WHA, 2009 WL 2424669, at *4 (N.D. Cal. 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.)

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

D. The Forum Selection Clause Is Valid and Enforceable.

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

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

> [J]ust as the permissive forum clause does not strongly weigh in favor of transfer, it also does not weigh strongly (or provide any weight at all) against transfer. If anything, the permissive forum [selection] indicates the 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.

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

[9] Plaintiffs' reliance on California law or federal cases applying California law regarding unconscionability is wholly inapplicable here. As the Supreme Court held in *Stewart*, federal law 28 U.S.C. § 1404(a) controls the issue before the court and precludes 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).

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

Plaintiffs do not even come close to meeting this standard. Labeling the TOS and the Advertising Agreements[10] as "contracts of adhesion" is unavailing because it is well established that neither a differential in the parties' bargaining power nor the non-negotiability of a contract is sufficient to invalidate a forum selection clause. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) ("it would be entirely unreasonable for us to assume that [cruise ship passengers] would negotiate with [cruise line] the terms of a forum-selection clause . . . Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual . . . will not have bargaining parity with the cruise line"); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1141 (9th Cir. 2004) ("Under *Carnival Cruise*, a differential in power or education on a non-negotiated contract will not vitiate a forum selection clause.").

[10] Plaintiffs argue that "[t]he terms of Service date only to 2007 or 2008 . . . even though this action is brought for claims arising out of Yelp's conduct beginning in 2004." (Pls.' Opp. 16.) This argument ignores the fact that the named Plaintiffs which registered at 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).

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

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

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

[11] Plaintiffs' allegations in the complaint regarding coercion are all stated in general language, completely untied to any particular plaintiff and most likely constitute argument 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.

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

II. Plaintiffs Miscalculate Yelp's Relevant Contacts with the Central District.

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

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[12] *See Ellis v. Costco Wholesale Corp.*, 372 F. Supp. 2d 530, 543 (N.D. Cal. 2005) (plaintiffs identified specific number of potential class members in two districts such that court could determine the transferor district was "home to a proportionately large segment of the putative class"); *Brody v. Am. Med. Ass'n*, 337 F. Supp. 611, 613 (S.D.N.Y. 1971) (45 percent of the 1000 total class members came from or near New York); *Berenson v. 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 Assocs., Inc.*, 565 F. Supp. 711, 720 n. 12 (D. Md. 1983) (comparison of total sales in transferee and transferor districts' forum states).

[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.)

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

III. Plaintiffs' Remaining Arguments Regarding Geography and Related Litigation in the Northern District Are Unavailing.

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

[14] Plaintiffs cite to *Bibo*, arguing plaintiffs' choice of forum remains significant in a class action where it is "preferable" to other forums in administering the action and protecting the class. (Pls.' Opp. 5.) In *Bibo*, the court found plaintiffs' choice of forum was "preferable" because (1) all of the named plaintiffs and (2) many important witnesses, including defendant's employees, lived in the chosen forum. No. C07-2505 TEH, 2007 WL 2972948, at *2 (N.D. Cal. Oct. 10, 2007). Here, only four of eleven Plaintiffs reside 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*

Circuit for this "geographical" argument.

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

CONCLUSION

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

Dated: April 26, 2010

COOLEY LLP

/s/ Matthew D. Brown
Matthew D. Brown (196972)
Attorneys for Defendant YELP! INC.

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