IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LIMITNONE LLC,	)	Hon. Blanche Manning
	)	
Plaintiff,	)	Case No. 08-cv-4178
	)	
vs.	)	Magistrate Judge Cox
	)	
GOOGLE INC,	)	
	)	
Defendant.	)	

DEFENDANT GOOGLE INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS FOR IMPROPER VENUE UNDER F.R.C.P. 12(b)(3) OR, IN THE ALTERNATIVE, MOTION TO TRANSFER UNDER 28 U.S.C. § 1404(a)

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INTRODUCTION

This case concerns a dispute between LimitNone, LLC and Google Inc., in which LimitNone alleges that Google misappropriated and copied LimitNone's software program during the parties' business relationship in 2007. That business relationship was governed by written contracts in which LimitNone agreed—not once, but twice—to bring any suit regarding any and all disputes arising from that relationship in the California courts. Because LimitNone's present suit was filed in Illinois, in violation of the two mandatory forum selection clauses to which LimitNone agreed, this action should be dismissed for improper venue pursuant to Fed. R. Civ. P. 12(b)(3). Alternatively, should the Court decline to dismiss this action for improper venue, the interests of justice warrant transferring this action to the District Court for the Northern District of California (San Jose Division) pursuant to 28 U.S.C. § 1404.

STATEMENT OF FACTS

The Agreements Governing the Business Relationship Between LimitNone and Google

In early 2007, representatives of LimitNone contacted Google to explore possible involvement in the Google Enterprise Professional Program. Complaint ¶ 18. As part of this process, LimitNone and Google executed two written agreements.[1]

The first contract, entitled "Mutual Non-Disclosure Agreement" (the "NDA"), was executed by LimitNone on or about February 27, 2007. Among other things, the NDA described its purpose as follows:

> a) to evaluate whether to enter into a contemplated business transaction, and b) if the Parties enter into an agreement related to such business transaction, to fulfill

[1] The Complaint fails to mention or attach either of the two contracts containing the forum selection clauses that govern this dispute. Google submits them now as Exhibits A (the Mutual Non-Disclosure Agreement) and B (the Google Enterprise Professional Agreement) to this Motion. This Court may consider such evidence in ruling on a motion to dismiss for improper venue under Fed. R. Civ. P 12(b)(3). *See, e.g., Morton Grove Pharmaceuticals, Inc. v. National Pediculosis Ass'n, Inc.*, 525 F. Supp. 2d 1039, 1043 (N.D. Ill. 2007) (a court considering a motion to dismiss for improper venue "may examine facts outside the complaint"); *Rotec Industries, Inc. v. Aecon Group, Inc.*, 436 F. Supp. 2d 931, 933 (N.D. Ill. 2006) (same).

> each Party's confidentiality obligations to the extent the terms set forth below are incorporated therein (the "Purpose").

See Ex. A (Preamble). The NDA contains various terms governing the parties' contemplated exchange of confidential information, which information is described as including:

> (a) **trade secrets**; (b) financial information, including pricing; (c) **technical information,** including research, development, procedures, algorithms, data, **designs**, and know-how; (d) business information, including operations, planning, marketing, interests **and products**; (e) the terms of any agreement entered into between the Parties and the discussions, negotiations and proposals related thereto; and (f) information acquired during any facilities tours.

See Ex. A, ¶ 2 (emphasis added). The NDA also includes a mandatory forum selection clause that states as follows:

> **The exclusive venue for any dispute relating to this Agreement shall be in the state or federal courts within Santa Clara County, California**.

See Ex. A ¶ 16 (emphasis added). Finally, the NDA includes a choice of law clause providing that it "shall be governed by the laws of the State of California, without reference to conflict of laws principles." *See id.*

LimitNone and Google executed a second contract, entitled "Google Enterprise Professional Agreement" (the "GEP Agreement"), on or around March 9, 2007. *See* Ex. B.[2] The stated purpose of the GEP Agreement is as follows:

> Subject to the terms of this Agreement, Company [LimitNone] shall participate in the Google Enterprise Professional Program (the "Program") pursuant to which it will license certain Google Enterprise Products which may include hardware, software and documentation (collectively "Products") or subscribe to certain Google-hosted services ("Hosted Services") and obtain technical services and training in order to assist Company in developing its own products and services which work in conjunction with the Products and Hosted Services.

[2] Paragraph 6 of the GEP Agreement states that "the terms of this Agreement" shall be considered "Confidential Information." *See* Ex. B, ¶ 6. Accordingly, in Exhibit B to this Motion, Google has redacted the confidential portions of the GEP Agreement that are irrelevant to the Court's resolution of the Motion. Concurrently, Google has filed a Motion for Restrictive Order and for Leave to File Under Seal an Unredacted Version of Exhibit B. Google was unable to obtain leave of court to file Exhibit B under seal prior to the filing of Google's Motion to Dismiss, because pursuant to Fed. R. Civ. P. 81, Google's deadline for filing its responsive pleading was just five days after the date this action was removed to this Court. Google is hand-serving LimitNone with a complete and unredacted copy of the GEP Agreement.

See Ex. B ¶ 1. The GEP Agreement specifies that the confidential information that may be shared between the parties under the Agreement includes "pricing, the terms of this Agreement and the discussions, negotiations and proposals related thereto and other information clearly and conspicuously identified as "confidential". *See* Ex. B ¶ 6.

Like the NDA, the GEP Agreement contains a mandatory forum selection clause requiring either party to bring suit regarding any disputes in the courts of Santa Clara County, California:

> **Company [LimitNone] and Google agree to submit to the personal and <u>exclusive</u> jurisdiction of the courts located in Santa Clara County, California.**

See Ex. B ¶ 9 (emphasis added). Also like the NDA, the GEP Agreement has a California choice of law clause that provides:

> This Agreement and any claim or dispute of whatever nature arising out of or relating to this Agreement shall be governed by and construed in accordance with the laws of the State of California and the federal U.S. laws applicable therein, without giving effect to any choice of law principles that would required the application of the laws of a different state.

See Ex. B ¶ 9.

<u>The LimitNone Complaint</u>

On June 23, 2008, LimitNone filed a complaint against Google in the Circuit Court of Cook County, Illinois. LimitNone alleges that in early 2007, it contacted Google concerning LimitNone's interest in Google's Enterprise Professional program, and that subsequently LimitNone was invited to join the Google Enterprise Professional Group. Complaint ¶¶ 18-20. Pursuant to that relationship, LimitNone alleges that it traveled to Mountain View (Santa Clara County), California, where it met with Google and shared with Google a prototype software program known as gMove. Complaint ¶¶ 21-23. LimitNone additionally alleges that it shared with Google other versions of the gMove program, as well as confidential marketing plans and sales information. Complaint ¶¶ 29, 47-49. Ultimately, LimitNone contends that Google misappropriated and/or copied LimitNone's software program and related materials, and launched a competing program, to LimitNone's detriment. Complaint ¶¶ 70-71. Based upon

these alleged acts, LimitNone pleads two causes of action, under (1) the Illinois Trade Secrets Act (Complaint ¶¶ 59-64), and (2) the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"). Complaint ¶¶ 66-77.

On July 23, 2008, Google properly removed the Complaint to this Court, on the basis of federal question jurisdiction, because LimitNone's unfair competition claim brought under the ICFA is preempted by the federal Copyright Act, 17 U.S.C. § 301.

ARGUMENT

This action should be dismissed under Federal Rule of Civil Procedure 12(b)(3), because the parties' agreements require this dispute to be brought in Santa Clara County, California, rendering Illinois an improper venue. In the alternative, the interests of justice warrant transferring this action to the District Court for the Northern District of California (San Jose Division) under 28 U.S.C. § 1404(a).

I. LIMITNONE BROUGHT ITS CLAIMS IN AN IMPROPER FORUM, REQUIRING DISMISSAL OF THIS ACTION PURSUANT TO RULE 12(B)(3).

Because LimitNone contractually agreed—not once, but twice—to bring suit regarding any disputes relating to its business relationship with Google in the federal or state courts sitting in Santa Clara County, California, this action should be dismissed for improper venue.

A challenge to venue based upon a mandatory forum selection clause is appropriately brought through a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(3). *Muzumdar v. Wellness Intern. Network, Ltd.*, 438 F.3d 759, 760 (7th Cir. 2006). Accordingly, a complaint is subject to dismissal under Rule 12(b)(3) if it was originally brought in a venue other than the venue in which the complainant had contractually agreed to bring suit. *Glazer v. Quebecor World, Inc.*, 2006 WL 335791, at *5 (N.D. Ill. Feb. 13, 2006) ("Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(3) where a claim is covered by a valid forum selection clause that selects a venue elsewhere."); *Photogen, Inc. v. Wolf*, 2001 WL

477226, at *2-3 (N.D. Ill. May 7, 2001) (enforcing a forum selection clause in a nondisclosure agreement).

Here, LimitNone filed suit in Cook County, Illinois, in violation of the mandatory forum selection clauses contained in the two contracts LimitNone executed in connection with its business relationship with Google—both of which designate Santa Clara County, California as the exclusive forum for disputes between the parties. Accordingly, the Complaint should be dismissed pursuant to Rule 12(b)(3).

A. The Contracts Between LimitNone and Google Govern the Instant Dispute.

The NDA and GEP Agreement state in clear terms that they govern disputes such as the one that LimitNone has pleaded here. Indeed, by its own allegations, LimitNone's suit arose from LimitNone's role as a Google Enterprise Professional—the very business relationship created and memorialized in these agreements. *See* Complaint, ¶¶ 18-22, 27-29, 37-38, 47-49, 70-71. Specifically, according to LimitNone's allegations, in early 2007, LimitNone contacted Google concerning LimitNone's interest in Google's Enterprise Professional program, and that subsequently LimitNone was invited to join the Google Enterprise Professional Group. Complaint ¶¶ 18-22. LimitNone further alleges that during the course of that relationship, LimitNone shared with Google certain proprietary and trade secret information relating to the gMove software program, including "the gMove program," "sales forecasts," "conceptual design" of gMove," "technical process[es]" and "marketing materials." Complaint, ¶¶ 22, 29, 48 55, 56, 70. Finally, LimitNone claims that Google copied and misappropriated the software and other materials, to LimitNone's detriment. Complaint ¶¶ 55-56, 62-64, 74.

This alleged conduct falls squarely within the scope and terms of the NDA and the GEP Agreement. The NDA states in relevant part that it covers the exchange of confidential information between the parties—including "trade secrets," "technical information," "designs," and "products"—as the parties explored a potential business relationship. *See* Ex. A, Preamble & ¶ 2. That is exactly what LimitNone has alleged—that it shared such information and products with Google. *See* Complaint, ¶¶ 18-22, 29, 48 55, 56. Similarly, the GEP Agreement

broadly covers the entire scope of LimitNone's participation the Google Enterprise Professional Program. *See* Ex. B ¶¶ 1, 6. It was pursuant to its participation in this Program that LimitNone claims it disclosed to Google its software and confidential information. *See* Complaint, ¶¶ 18-22, 29, 48 55, 56.

As such, the mandatory forum selection clauses in both the NDA and the GEP Agreement encompass this dispute. The NDA's forum selection clause provides that "the exclusive venue for any dispute relating to this Agreement shall be in the state or federal courts within Santa Clara County, California." *See* Ex. A, ¶ 16 (emphasis added). The GEP Agreement likewise states that the parties "agree to submit to the personal and exclusive jurisdiction of the courts located in Santa Clara County, California." *See* Ex. B ¶ 9 (emphasis added).

Seventh Circuit law supports this plain reading of the agreements. Specifically, in cases involving a contract with a forum selection clause, "the forum selection clause does not apply just to the litigation of ***claims*** that arise out of, concern, etc., the contract; it applies to the litigation of ***disputes*** that arise out of, concern, etc., the contract." *Abbott Laboratories v. Takeda Pharmaceutical Co. Ltd.*, 476 F.3d 421, 424 (7th Cir. 2007) (emphasis added). Stated another way, causes of action arising from conduct ancillary to a contract are governed by forum selection clauses within the contract. *See Kochert v. Adagen Medical Intern., Inc.*, 491 F.3d 674, 679 (7th Cir. 2007) ("Kochert's fraudulent inducement claim stems from her contractual relationship with Adagen" and therefore "[t]he contract's forum-selection clause is not limited to claims for breach," but rather governs the fraudulent inducement claim).

As a result, LimitNone cannot escape the forum selection clause by pursuing a trade secrets claim instead of a contractual one. As the Seventh Circuit has explained:

> [T]he existence of multiple remedies for wrongs arising out of a contractual relationship does not obliterate the contractual setting, does not make the dispute any less one arising under or out of or concerning the contract, and does not point to a better forum for adjudicating the parties' dispute than the one they had selected to resolve their contractual disputes.

American Patriot Ins. Agency, Inc. v. Mutual Risk Management, Ltd., 364 F.3d 884, 889 (7th Cir. 2004) (enforcing a forum selection clause in insurance action for fraud); *see also Xantrex Technology, Inc. v. Advanced Energy Indus., Inc.*, 2008 WL 2185882, at *7 (D. Colo. May 23, 2008) (forum selection clause covered claims under the Colorado Trade Secrets Act because they arose under the same facts as would a claim for breach of the nondisclosure agreement containing the clause; "Non-contract claims that involve the same operative facts as a parallel breach of contract claim fall within the scope of a forum selection clause."); *MBI Group, Inc. v. Credit Foncier du Cameroun*, ___ F. Supp. 2d ___, 2008 WL 2345347, at *13 (D.D.C. June 10, 2008) (dismissing claims for misappropriation of trade secrets where "at least two of the agreements contain a forum selection clause identifying the High Court of Yaounde, Cameroon as the proper tribunal to adjudicate any disputes."); *Cuno, Inc. v. Hayward Indust. Products, Inc.*, 2005 WL 1123877, at *4 (S.D.N.Y. May 10, 2005) (enforcing forum selection clause in a nondisclosure agreement executed by the parties with respect to a suit for patent infringement, holding that "[a] forum selection clause should not be defeated by artful pleading of claims not based on the contract containing the clause if those claims grow out of the contractual relationship, or if 'the gist' of those claims is a breach of that relationship.") (internal citations omitted).

Thus, under both the clear terms of the agreements themselves and the weight of authority, LimitNone's claims are governed by the two mandatory forum selection clauses in the underlying agreements between the parties. LimitNone may not avoid enforcement of these forum selection clauses though artful pleading where, as here, its claims grew out of the very contractual relationship containing those clauses. *See American Patriot Ins. Agency, Inc.*, 364 F.3d at 889.

B. LimitNone's Complaint Should Be Dismissed Because the Governing Forum Selection Clauses Require LimitNone to Bring Its Claims in California, Not Illinois.

This action should be dismissed because two binding, mandatory forum selection clauses govern LimitNone's present dispute with Google. Under both Seventh Circuit and California law,[3] forum selection clauses such as the ones agreed to by LimitNone here are presumptively valid and enforceable. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991); *Muzumdar*, 438 F.3d at 762 ("a forum selection clause will be enforced unless it can be clearly shown 'that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching'") (internal citations omitted); *Lu v. Dryclean-U.S.A. of California, Inc.*, 11 Cal.App.4th 1490, 1493 (Cal. App. 1 Dist. 1992) ("Given the importance of forum selection clauses, both the United States Supreme Court and the California Supreme Court have placed a heavy burden on a plaintiff seeking to defeat such a clause, requiring it to demonstrate that enforcement of the clause would be unreasonable under the circumstances of the case.").

As the Supreme Court has recognized, a "forum-selection clause is given controlling weight in all but the most exceptional cases." *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) (Kennedy, J., concurring). Specifically, forum selection clauses are held invalid only in three narrowly defined circumstances:

> "(1) if their incorporation into the contract was the result of fraud, undue influence or overweening bargaining power, . . . (2) if the selected forum is so "gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court . . . or (3) if enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision..."

[3] The Seventh Circuit has suggested that the enforceability of a forum selection clause should be evaluated under the same law as governs the rest of the agreement in which it is found, which in this case is California law. *See Abbott Laboratories*, 476 F.3d at 423; Complaint, Ex. A, ¶ 16 (California choice of law provision) and (Ex. B ¶ 9 (California choice of law provision). Under either body of law, however, the result is the same—the forum selection clauses in question are valid and should be enforced.

Bonny v. Society of Lloyd's, 3 F.3d 156, 160 (7th Cir. 1993) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 16-17 (1972)). None of these narrow exceptions applies here.

First, the inclusion of the forum selection clauses in the NDA and GEP Agreement involved no fraud, undue influence or overweening bargaining power, nor has LimitNone so alleged. *See, e.g., CQL Original Products, Inc. v. National Hockey League Players' Assn.*, 39 Cal.App.4th 1347, 1355 (Cal. App. 4 Dist. 1995) (forum selection clause was valid even if objecting party could not negotiate so long as the objecting party would have been able to "walk away from negotiations" without signing).

Second, LimitNone cannot show that proceeding in the Northern District of California—where LimitNone voluntarily initiated its relationship with Google—would be so "gravely difficult and inconvenient" that LimitNone "will for all practical purposes be deprived of its day in court." *AGA Shareholders, LLC v. CSK Auto, Inc.*, 467 F. Supp. 2d 834 (N.D. Ill. 2006) (internal citations omitted). This bar is a high one, and a routine claim of inconvenience will not meet it. *See, e.g., Paper Exp., Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 758 (7th Cir. 1992) (enforcing forum selection clause requiring litigation to take place in Germany).

Third, enforcement of the forum selection clauses here would not contravene any strong Illinois public policy or statute. Indeed, both agreements include a choice of law provision requiring the application of California law. *See, e.g.*, Ex. B ¶ 9 ("This Agreement and any claim or dispute of whatever nature arising out of or relating to this Agreement shall be governed by and construed in accordance with the laws of the state of California . . . ."). There is no public policy against having the laws of one jurisdiction applied by a court sitting in that same jurisdiction. *See M & K Chemical Engineering Consultants, Inc. v. Mallinckrodt, Inc.*, 2008 WL 2477691, at *3 (S.D. Ill. June 18, 2008) ("Allowing Missouri courts to apply Missouri professional engineering licensing law to the contract does not conflict with Illinois public policy"); *cf. CQL Original Products, Inc.*, 39 Cal. App. 4th at 1357 (no public policy bar to enforcement of a forum selection clause existed in the absence of a statute prohibiting election of

the target forum).[4] To the contrary, enforcing the forum selection clause is in keeping with public policy, for, as the Supreme Court recognized in *Carnival Cruise Lines*, forum selection clauses "dispel[] any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions." 499 U.S. at 593. Application of the forum selection clauses to which LimitNone agreed provides precisely these benefits.

The forum selection clauses agreed to by LimitNone are valid and enforceable, and LimitNone's Complaint should be dismissed pursuant to Rule 12(b)(3). *See Glazer*, 2006 WL 335791, at *5 (dismissing for improper forum causes of action based on an agreement containing a valid forum selection clause requiring that claims be brought in Quebec); *M & K Chemical Engineering*, 2008 WL 2477691, at *3 (enforcing a forum selection clause and dismissing case "for improper venue").[5]

II. ALTERNATIVELY, THIS ACTION SHOULD BE TRANSFERRED TO THE NORTHERN DISTRICT OF CALIFORNIA PURSUANT TO 28 U.S.C. § 1404(A).

Should this Court conclude that transfer of this action would be preferable to dismissal in light of the parties' agreed-to mandatory forum selection clauses, it may do so pursuant to 28 U.S.C. § 1404(a).[6] Under Section 1404(a), a court has discretion to transfer a case where venue was proper in the transferor district, venue and jurisdiction would be proper in the transferor district, venue and jurisdiction would be proper in the transferee district, and the transfer would

[4] Nor do the statutes under which LimitNone initially brought this action include language suggesting that the application of California law would be against Illinois public policy. *See* Illinois Trade Secrets Act, 765 ILCS 1065/1-9 *et seq.*; Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*

[5] That the NDA bears LimitNone's signature but not Google's has no bearing on its enforceability against LimitNone. *See Dye v. Wargo*, 253 F.3d 296 (7th Cir. 2001) ("the statute of frauds requires the signature only of the party sought to be bound."); *Hubble v. O'Connor*, 291 Ill.App.3d 974, 984, 684 N.E.2d 816, 833 (Ill. App. 1 Dist. 1997) (a signee to an agreement is bound even if not all other parties signed).

[6] *See, e.g., Oldlaw Corp. v. Allen*, 2007 WL 2772697, at *6 (C.D. Ill. Sept. 27, 2007).

serve the convenience of the parties and the witnesses as well as the interests of justice. *See Sanders v. Franklin*, 25 F. Supp. 2d 855, 857 (N.D. Ill. 1998). Here, in the alternative to dismissal, this action should be transferred to the Division of the District Court for the Northern District of California that sits in Santa Clara County, California, where the parties agreed to resolve all disputes.

A. The Forum Selection Clauses Weigh Heavily in Favor of Transfer.

The mandatory forum selection clauses governing this dispute warrant transfer of this action to the Northern District of California. Under Section 1404(a), transfer of an action is permitted to any district in which it could have been brought initially, if the transfer would serve the interests of justice. This action could—and should—have been brought in Santa Clara County in the first instance, since that is Google's principal place of business and where the parties' business relationship arose. *See* Complaint, ¶¶ 2, 18-22. Given that the parties contractually agreed to bring all disputes in Santa Clara County and nowhere else, the interests of justice support a transfer here. As the Supreme Court has noted when discussing the balancing analysis required by Section 1404(a), "[t]he presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus." *Stewart Organization, Inc.*, 487 U.S. at 29.

Nor may LimitNone argue to the contrary, because where a party has agreed to a forum selection clause, as LimitNone has twice done here, that party may not argue the injustice of the selected forum in opposing a motion to transfer. *Northwestern Nat. Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990); *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1293 (7th Cir. 1989) ("By virtue of the forum-selection clause, Midwhey has waived the right to assert its own inconvenience as a reason to transfer the case."). Accordingly, the parties' agreed-upon mandatory forum selection clauses militate in favor of transferring this action. *See, e.g, Missouri Franchise Development Systems, LLC v. McCord*, 2007 WL 3085961, at *3 (S.D. Ill. Oct. 22, 2007) (granting motion to transfer because of forum selection clause). LimitNone's election to agree to California as the exclusive forum for any disputes with Google weighs

heavily in favor of transferring this action, and LimitNone is precluded from arguing to the contrary.

B. All Remaining Section 1404(a) Factors Also Weigh in Favor of Transfer.

The remaining factors considered in a Section 1404(a) transfer analysis also militate in favor of transferring this action to Santa Clara County, California. These factors include the plaintiff's choice of forum, the situs of material events, the relative ease of access to sources of proof, the convenience of the witnesses, and the convenience to the parties of litigating in the respective forums. *Hanley v. Omarc, Inc.*, 6 F. Supp. 2d 770, 774 (N.D. Ill. 1998); *See also Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964).

First, LimitNone's choice of filing in an Illinois forum counts little in the overall analysis, both because (1) LimitNone agreed on two separate occasions to litigate its disputes with Google in California, and (2) the vast majority of the alleged conduct referenced in the Complaint occurred outside the forum selected by the plaintiff. *See Chicago, R. I. & P. R. Co. v. Igoe*, 220 F.2d 299, 304 (7th Cir. 1955) (granting writ of mandamus to compel transfer where "there is no controverted question which depends on any event occurring in the Northern District of Illinois").

Indeed, according to the allegations in LimitNone's Complaint, most if not all relevant events underlying this action occurred in California. *See, e.g., Hanley*, 6. F. Supp. 2d at 775 (transfer to New Jersey was appropriate where negotiations, agreements, employees, and alleged breach were all located or occurred in New Jersey). Specifically, LimitNone allegedly first reached out to Google in California, came to California to enter into its business relationship with Google, and demonstrated its prototype software program to Google in California (Complaint at ¶¶ 18-22). Further, the Complaint alleges that meetings between Google personnel and LimitNone concerning LimitNone's software program occurred in California (*id.* at ¶¶ 25-27), and discussions concerning development assistance occurred in California (*id.* at ¶ 27). Moreover, the Google Enterprise Professional Program in which LimitNone participated was run out of Google's California offices, and the Google personnel with whom LimitNone met

and interacted were located in California. *See* Complaint ¶¶ 18, 20-22, 25-28. LimitNone's choice of forum must be afforded little weight in these circumstances.

The sources of proof for the claims and defenses in this action likewise will be predominantly in California, weighing in favor of transfer. *See International Star Registry of Illinois v. Omnipoint Marketing, LLC*, 2006 WL 2598056, at *5-6 (N.D. Ill. Sept. 6, 2006) (factor favors transfer where "most evidence for this litigation" and the "situs of material events" is in the target forum). LimitNone alleges that Google committed the alleged copying and misappropriation at Google's headquarters in California, and thus, the sources of proof for the claims and defenses in this action will focus on California.

The convenience of the witnesses and parties likewise weighs in favor of transfer. *See New Hampshire Ins. Co. v. Green Dragon Trading Co.*, 2008 WL 2477484, at *7 (N.D. Ill. June 18, 2007) (convenience of parties and witnesses favored transfer where "the vast majority of the witnesses relevant to the instant action are located in" the target forum). As indicated above, the key Google personnel with knowledge of the events central to this action are located in California. *See* Complaint ¶¶ 20, 21, 25-29, 37, 50-53, 57. This further militates in favor of transfer to the Northern District of California.

Finally, both agreements require that disputes be governed by California law. *See* Ex. A ¶ 16; Ex. B ¶ 9. This too favors transfer. *Oldlaw Corp.*, 2007 WL 2772697, at *7 (facts that "the Agreement specifies Arizona law as controlling" and that "a federal court in Arizona is more familiar with Arizona law" militated in favor of transfer).

Because the Section 1404(a) factors support a transfer here, the interests of justice dictate that this action should be transferred to the Northern District of California (San Jose Division), sitting in Santa Clara County, California.[7]

[7] Though Section 1404(a) provides sufficient authority to transfer this case, 28 U.S.C. § 1406 provides an alternate basis. Under 28 U.S.C. § 1406, a court has the discretion to transfer a case "in the interests of justice" from a district where venue is improper to one where venue is proper. *Organ v. Byron*, 434 F. Supp. 2d 539, 543 (N.D. Ill. 2005) (finding improper venue and transferring case under § 1406 due to forum selection clause); *Lashcon, Inc. v. Butler*, 340 F. Supp. 2d 932, 936 (C.D. Ill. 2004) (transferring action under both § 1404(a) and § 1406(a));

CONCLUSION

Google respectfully requests that the Court dismiss LimitNone's Complaint due to improper venue pursuant to Rule 12(b)(3), or, in the alternative, transfer this action to the District Court for the Northern District of California, San Jose Division, pursuant to 28 U.S.C. § 1404(a).

DATED: July 30, 2008

Respectfully submitted,

GOOGLE INC.

By: /s/ Rachel M. Herrick
One of Its Attorneys

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Oldlaw Corp., 2007 WL 2772697, at *7 ("[s]ection 1406(a) is one way to effect the transfer" of case removed to federal court).

CERTIFICATE OF SERVICE

I, Rachel M. Herrick, an attorney, certify under penalty of perjury that I caused a copy of the forgoing document to be served on all counsel of record via the Court's CM/ECF online filing system this 30th day of July, 2008.

/s/ Rachel M. Herrick