EXHIBIT 1

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FERRIS & SALTER, P.C.,

CASE NO. 5:11-CV-12448-JAC-MJH

Plaintiff,

v.

HON. JULIAN ABELE COOK, JR.

THOMSON REUTERS CORPORATION,
d/b/a FINDLAW,

Defendant.

____/

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DEFENDANT'S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, TO TRANSFER TO THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Defendant Thomson Reuters Corporation d/b/a FindLaw ("Thomson") moves this Court to enforce a valid venue-selection clause in the agreements that are the subject of this suit, by either dismissing Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) or,

in the alternative, transferring this case to the United States District Court for the District of Minnesota.

This Motion is supported by the attached Brief.

Defendant's counsel certifies, pursuant to E.D. Mich. L. Civ. R. 7.1(a) that he has sought concurrence from counsel for Plaintiff concerning this Motion, and that concurrence in the relief requested has not been forthcoming.

WHEREFORE, Defendant requests that this Court enforce the venue-selection clause of the agreements and either dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) or, in the alternative, transfer this matter to the United States District Court for the District of Minnesota pursuant to 28 U.S.C. § 1404(a).

Respectfully submitted,

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Dated: June 13, 2011

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BRIEF IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE,
TO TRANSFER TO THE DISTRICT OF MINNESOTA

ISSUES PRESENTED

1. Whether the forum selection clause in the agreements that are the subject of this suit should be enforced by dismissal of the Complaint because the agreements require that "any claim arising from or relating to" the agreements be resolved in a Minnesota venue.

   Defendant answers: Yes.

   Plaintiff answers: No.

2. If this case is not dismissed, whether the forum selection clause in the agreements should be enforced by transferring this case to the United States District Court for the District of Minnesota and whether such transfer should otherwise be granted for the convenience of the parties and witnesses and in the interest of justice.

   Defendant answers: Yes.

   Plaintiff answers: No.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases:

Carnival Cruise Lines v. Shute, 499 U.S. 585, 595 (1991)........ 7,9-11

Cincinnati Ins. Co. v. O'Leary Paint Co., 676 F. Supp. 2d 623, 635 (W.D. Mich. 2009)........16

Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc., 320 N.W.2d 886, 889 (Minn. 1982).....11

Interamerican Trade Corp. v. Companhia Fabricadora de Pecas, 973 F.2d 487, 489 (6th Cir. 1992) 8

Kerobo v. S.W. Clean Fuels, Corp., 285 F.3d 531, 538-39 (6th Cir. 2002)........13

Langley v. Prudential Mortgage Capital Co., 546 F.3d 365, 369 (6th Cir. 2008) 6,13

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) 6,11-12

Moses v. Bus. Card Express, 929 F.2d 1131, 1138 (6th Cir. 1991)........8,14

Radisson Hotels Int'l, Inc. v. Westin Hotel Co., 931 F. Supp. 638, 642 (D. Minn. 1996)........18

Stewart Org. Inc. v. Ricoh Crop., 487 U.S. 22, 33 (1988)........ 7,13, 18-19

Turcheck v. Amerifund Fin., Inc., 272 Mich. App. 341, 725 N.W.2d 684, 688 (2006)........11-13

Viron Int'l Corp. v. David Boland, Inc., 237 F. Supp. 2d 812, 815 (W.D. Mich. 2002)........13-18

Wong v. PartyGaming Ltd., 589 F.3d 821, 828 (6th Cir. 2009) 7-11

Statutes:

Fed. R. Civ. P. 12(b)(6)........3

28 U.S.C. § 1404(a) 3, 5

M.C.L. § 600.745(3)........12

Defendant Thomson Reuters Corporation, d/b/a FindLaw ("Thomson" or "Defendant"), by and through its counsel, respectfully submits this Memorandum in Support of its Motion to Dismiss for failure to state a claim for which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for Transfer of Venue pursuant to 28 U.S.C. §1404(a).

INTRODUCTION

Plaintiff Ferris & Salter, P.C. ("F&S" or "Plaintiff") purports to assert a professional negligence claim against Thomson. Dismissal of Plaintiff's Complaint is warranted because the express terms of the contracts at issue required Plaintiff to file its complaint in a court located in Minnesota. Plaintiff filed its complaint for the sole purpose of availing itself of the Michigan forum in violation of the parties' contracts. On the basis of the clear forum selection provision, which is contained in each of the agreements that were executed by the parties, Thomson respectfully requests that this Court either dismiss the present action or transfer this action to the United States District Court for the District of Minnesota. As demonstrated below, Plaintiff will be unable to show that enforcement of the forum selection clause would be unreasonable or that other considerations are sufficient to overcome the parties' express agreement that any proceedings or claims arising out of the contractual relationship should take place in Minnesota.

28 U.S.C. §1406(a) authorizes a court to dismiss a civil action that is filed in the wrong venue. Rule 12(b)(6) provides a mechanism for obtaining such a dismissal. As an alternative to dismissal, Section 1406(a) also gives a court the option of transferring a wrongly-venued civil action to an appropriate district or division. Similarly, 28 U.S.C. §1404(a) provides that a court may transfer a civil action "to any other district or division where it might have been brought" – without regard to the propriety of the initial forum – where the transfer is "[f]or the convenience of the parties and witnesses and/or "in the interest of justice."

The present motion is based upon an unambiguous forum selection provision contained in each of the parties' written agreements. Thomson asks the Court to enforce that provision, either through a dismissal without prejudice under Rule 12(b)(6) or through a transfer of venue under Section 1404(a) and/or Section 1406(a).[1]

FACTS

FindLaw is the brand name for a website development and internet advertising product offered by West Publishing Corporation (hereinafter "West"). Declaration of Michael Mokosaik ("Mokosaik Decl."), ¶ 5. West is a Minnesota corporation that transacts business as West, a Thomson Reuters business. Mokosaik Decl., ¶ 3. West is indirectly owned by Thomson Reuters Corporation, which is a Canadian corporation with its principal place of business in New York. Mokosaik Decl., ¶ ¶ 3-4. Although Plaintiff initiated this litigation against Thomson, the proper contractual party and provider of the disputed services is West. Mokosaik Decl., ¶ ¶ 6-8. Plaintiff entered into a contract with West on or about September 29, 2006, for FindLaw website development and internet advertising services. *See* Exhibit 1 to the Declaration of Michael Mokosaik. Plaintiff entered into an addendum to the September 29, 2006 contract with West on or about June 15, 2009, also for FindLaw website development and internet advertising services. *See* Exhibit 2 to Mokosaik Decl. Each of these contracts had a forum selection clause in which

[1] There has been much confusion in federal case law as to whether a motion to dismiss premised on an agreed-upon forum selection clause should be brought under Fed. R. Civ. P. 12(b)(2), (3), and/or (6), and whether an alternative motion to transfer should be brought under 28 U.S.C. § 1404(a) and/or § 1406(a). *See, e.g.,* Wright & Miller, Fed. Prac. & Proc. § 3803. The current view in the Sixth Circuit, however, seems to be that motions to enforce an agreed-upon forum selection clause should be considered under Rule 12(b)(6) and § 1404(a). *Langley v. Prudential Mort. Cap. Co.*, LLC, 546 F.3d 365 (6th Cir. 2008) (concurring opinion J. Moore); *Kerobo v. S.W. Clean Fuels Corp.*, 285 F.3d 531 (6th Cir. 2002). Consequently, West brings this Motion under Rule 12(b)(6) (for dismissal), and alternatively under § 1404(a) (for transfer), but would additionally or alternatively invoke Rules 12(b)(2) or (3), and § 1406(a), in the event that this Court chooses to evaluate the request for dismissal (or, in the alternative, for transfer) under those rules.

Plaintiff consented to exclusive jurisdiction in Minnesota. *See* Exhibits 1 and 2 to Mokosaik Decl.

Pursuant to those contracts, West provided a website to Plaintiff. Mokosaik Decl., ¶ 9. The Plaintiff's Complaint asserts allegations associated with the performance of service, or alternatively lack of performance of service, in relation to the FindLaw website product. *See* Complaint, ¶¶ 11-15. The FindLaw services at issue would have been performed by West at its Minnesota location. Mokosaik Decl., ¶ 9. The potential witnesses include, but are not limited to website developers, designers, account managers, content writers, search engine optimization consultants, and project managers. Mokosaik Decl., ¶ 10. There are at least twenty individuals with personal knowledge of the Plaintiff's account and/or website. Mokosaik Decl., ¶ 11. Those individuals are located in Minnesota. Mokosaik Decl., ¶ 11. Further, there may be a number of former employees of West with personal knowledge of the Plaintiff's account and/or website. Mokosaik Decl., ¶ 12. Upon information and belief, the last known locations of these individuals was in Minnesota. Mokosaik Decl., ¶ 13.

On May 4, 2011, F&S filed its Summons and Complaint against Thomson in Washtenaw County, Michigan, and served Thomson via certified mail on or about May 10, 2011. In commencing the action in Michigan, Plaintiff entirely disregarded the "Governing Law and Venue" and "General Provisions" contained in each of the agreements that the parties had executed.

The September 29, 2006 agreements state, on the same page as Plaintiff's representative's signature, as follows:

> **General Provisions**
>
> This Order Form is subject to approval by West in St. Paul, Minnesota and is governed by Minnesota law. The state and

> federal courts sitting in Minnesota will have exclusive jurisdiction over any claim arising from or related to this agreement. (remaining paragraph intentionally omitted)

Mokosaik Decl., Ex. 1.

Further, the FindLaw Client Development Services Agreement, which was specifically incorporated by reference into the September 29, 2006 order form, provides as follows:

> **23. General Provisions**
>
> This Agreement will be governed by and construed under the laws of the State of Minnesota, without regard to conflicts of law provisions. The parties agree that the state and federal courts sitting in Minnesota will have exclusive jurisdiction over any claim arising from this Agreement, and each party consents to the exclusive jurisdiction of such courts. (remaining paragraph intentionally omitted)

See Findlaw Client Development Services Agreement, ¶ 23, attached to Ex. 1 of Mokosaik Decl.

Nearly identical language was also incorporated in the June 15, 2009 FindLaw Order Form Addendum as provided for in the FindLaw Master Services Agreement expressly incorporated into the addendum as follows:

> **14.4 Governing Law and Venue**
>
> This Agreement is governed by and shall be construed under the laws of the State of Minnesota, without regard to conflict of law provisions. The parties agree that the state and federal courts sitting in Minnesota will have exclusive jurisdiction over any claim arising out of this Agreement, and each party consents to the exclusive jurisdiction of such courts. Each party further waives all defenses or objections to such jurisdiction and venue.

See FindLaw Master Services Agreement, ¶ 14.4, attached to Ex. 2 of Mokosaik Decl.

Based in part on each of the above-quoted contractual provisions, Thomson now moves to dismiss or transfer this action.

ARGUMENT

A. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P. 12(b)(6) BECAUSE THE AGREEMENTS AT ISSUE CONTAIN AN ENFORCEABLE FORUM SELECTION CLAUSE THAT REQUIRES DISPUTES WITH RESPECT TO THE AGREEMENTS TO BE FILED IN MINNESOTA.

This Court should dismiss this lawsuit under Fed. R. Civ. P. 12(b)(6) because the agreements between the parties contain an unambiguous and exclusive forum section clause that requires the parties to litigate their disputes in Minnesota. As the Supreme Court has expressly recognized, forum selection clauses contained in contracts are "prima facie valid" and "should be enforced unless enforcement is show by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *see also Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 374 (6th Cir. 1999) (explaining that "forum-selection clauses generally are enforced by modern courts unless enforcement is shown to be unfair or unreasonable"), *cert, denied*, 528 U.S. 1181 (2000).

In the Sixth Circuit, a valid forum selection clause in a contract provides sufficient grounds to dismiss a complaint under Rule 12(b)(6). *Langley v. Prudential Mortgage Capital Co.*, 546 F.3d 365, 369 (6th Cir. 2008) (concurring opinion) ("When a party seeks to enforce a forum-selection clause through a properly brought motion to dismiss, the district court may enforce the forum-selection clause through dismissal.").[2] *See also Sec. Watch*, 176 F.3d at 374-76 (affirming dismissal under Rule 12 based upon forum selection clause).

[2] After noting that it "would find the forum selection clause enforceable," the court in *Langley*, remanded the case to the district court because the defendant "ha[d] not yet moved for enforcement of the clause through either a motion to transfer venue under 28 U.S.C. § 1404(a) or a motion to dismiss under FED.R.CIV.P. 12(b)(6) for failure to state a claim." 546 F.3d at 369.

1. Plaintiff Cannot Establish that the Forum Selection Clause is Unenforceable.

In the Sixth Circuit, the enforceability of a forum selection clause in a diversity case is governed by federal law. *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 828 (6th Cir. 2009). Under federal law, the party seeking to avoid the effect of a forum selection clause bears "a heavy burden of proof." *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991). That party must clearly demonstrate that proceeding in the agreed forum would be so gravely difficult and inconvenient that the clause, for all practical purposes, will deprive the party of its fair day in court. *M/S Bremen*, 407 U.S. at 18; *Carnival*, 499 at 594-95. In that regard, Justice Kennedy has recognized that a valid forum selection clause should be "given controlling weight in all but the most exceptional circumstances." *Stewart Org. Inc. v. Ricoh Crop.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

The Sixth Circuit has echoed the foregoing statements of federal law, noting that "[a] forum selection clause should be upheld absent a strong showing that it should be set aside," and further noting that "[t]he party opposing a forum selection clause bears the burden of showing that the clause should not be enforced," and *Wong*, 589 F.3d at 828 (citing *Carnival*). The court in *Wong* then went on to explain the factors that the Sixth Circuit looks at to determine whether a particular forum selection clause is unenforceable:

> "When evaluating the enforceability of a forum selection clause, this court looks to the following factors: (1) whether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust."

Id. (citing *Sec. Watch*, 176 F.3d at 375).

Under the first factor utilized by the Sixth Circuit, "the party opposing the clause must show fraud in the inclusion of the clause itself." *Wong*, 589 F.3d at 828 (citing *Preferred*

Capital, Inc. v. Assocs. of Urology, 453 F.3d 718, 722 (6th Cir.2006)). "[U]nless there is a showing that the alleged fraud or misrepresentation induced the party opposing a forum selection clause to *agree to inclusion of that clause* in a contract, a general claim of fraud or misrepresentation as to the entire contract does not affect the validity of the forum selection clause." *Moses v. Bus. Card Express,* 929 F.2d 1131, 1138 (6th Cir. 1991) (citing *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 519 n. 14, (1974)) (emphasis in original). Plaintiff will not be able to make such a showing in the present case.

The forum selection clauses contained in the parties' agreements are written in language that is easily readable, in a legible typeface, under a heading that clearly identifies the clause, and in one instance – on the same page as the signature of Plaintiff's representative. There was no fraud or overreaching with regard to the forum selection provision, and Plaintiff was free not to enter into the agreements. *See Interamerican Trade Corp. v. Companhia Fabricadora de Pecas*, 973 F.2d 487, 489 (6th Cir. 1992) (noting that plaintiff could have "walked away from the contract, being under no compulsion to deal" in defendant's products)

Further, the agreements were entered into between two sophisticated entities. In the wake of the *Carnival* decision, it is clear that the standard for establishing that a forum selection provision is so overreaching as to be unenforceable is extremely high. In that case, the Supreme Court upheld a clause on the back of a cruise ticket that required any action against Carnival to be brought in Florida. 499 U.S. at 595. In terms of demonstrating an inequality in bargaining power or lack of actual negotiation, the facts in *Carnival* would appear to present a fairly strong case for negating a forum selection provision, since the claimant was an unsophisticated resident of the state of Washington. Even in those circumstances, however, the Supreme Court chose to enforce the forum selection provision.

In stark contrast to the facts in *Carnival*, the facts of the present case do not even arguably portray a compelling picture of fraud or overreaching. As noted above, the forum selection provision at issue in this case is clearly set forth in the written contract documents. Plaintiff cannot realistically claim that it lacked the sophistication to understand the forum selection clause. By its own admission, Plaintiff is a law firm and lists among its specialties the litigation of legal malpractice and negligence claims. *See* Complaint, ¶¶ 1-3. Arguably, Plaintiff would be considered to be in the best position to understand and evaluate the forum selection clause in the parties' agreements. Had Plaintiff wished to amend the forum selection clause, it could have demanded such when it entered into the agreements with West. It did not, and must be held to the terms of the contracts.

In short, Plaintiff is a sophisticated party that agreed with Thomson (West) in writing on separate occasions, including a signature on the same page as the forum selection provision on the original order form in 2006, that Minnesota was the exclusive forum for any litigation. *See* Mokosaik Decl., Exs. 1 and 2. Furthermore, the forum selection clause in the parties' agreements is clear and unequivocal. *Id.* Thus, Plaintiff will not be able to show that "it did not knowingly and willingly consent to the inclusion of the clause in the agreement." *See Wong*, 589 F.3d at 828 (citing *Assocs. of Urology*, 453 F.3d at 722).

Under the second factor employed by the Sixth Circuit, Plaintiff would need to show that a Minnesota court "would ineffectively or unfairly handle the suit." *Wong*, 589 F.3d at 829 (citing *Sec. Watch*, 176 F.3d at 375). "Different or less favorable foreign law or procedure alone does not satisfy this prong." *Id.* (citing *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1230 (6th Cir. 1995)). Rather, as noted above, "the foreign law must be such that a risk exists that the litigants will be denied any remedy or will be treated unfairly." *Id.* Plaintiff can offer no evidence that

litigation of its claims in Minnesota would effectively deprive it of its day in court or that it would be treated unfairly by a court in Minnesota. Indeed, there is no reason to believe that Plaintiff will not receive essentially the same treatment in Minnesota as it would have received in Michigan. It is not as if Plaintiff will be deprived of the right to a jury trial if the venue of this matter is changed to Minnesota. Moreover, even if the state and federal courts in Minnesota did not allow jury trials and placed other procedural limitations on plaintiffs, that would not be a sufficient reason to deny enforcement of the forum selection clause under the second prong of the Sixth Circuit's three-pronged analysis. *See Wong*, 589 F.3d at 829 (holding that foreign jurisdiction that does not permit jury trials in civil actions and does not allow class action claims is not an ineffective or unfair forum).

Under the third factor employed by the Sixth Circuit, the party contesting the forum selection clause must establish that "enforcement of the clause would be so inconvenient such that its enforcement would be unjust or unreasonable." *Wong*, 589 F.3d at 829 (citing *Assocs. of Urology*, 453 F.3d at 722-23). To satisfy this factor, there must be a showing of "more than mere inconvenience of the party seeking to avoid the clause." *Id.* In fact, as the decisions in *Carnival* and *Wong* demonstrate, the level of inconvenience required to negate a forum selection clause is very high. In *Carnival*, the Supreme Court held that the expense to Washington resident of litigating a claim in Florida was not a sufficient reason to invalidate the forum selection provision in a consumer contract. 499 U.S. at 594-95. Likewise, in *Wong*, the Sixth Circuit held that the obvious inconvenience associated with having to sue the defendant in a distant foreign forum was not sufficient to excuse two unsophisticated Ohio residents from complying with a forum selection clause that required them to bring suit in Gibraltar. *Wong*, 589 F.3d at 829-30. Any inconvenience that Plaintiff may attempt to show in the present case pales

in comparison to the inconvenience that the courts in *Carnival* and *Wong* determined to be insufficient to hold a forum selection clause unenforceable.

Because none of the three factors that the Sixth Circuit uses to evaluate the enforceability of a forum selection clause would support a determination that the forum selection clause at issue in the present case is unenforceable, this Court should enforce the forum selection clause by granting Defendant's motion to dismiss.

2. Public Policy in Michigan and Minnesota Favors Enforcement of Forum Selection Clauses.

Though forum selection clauses in contracts were once held in disfavor, the modern rule is that such clauses are enforceable if they are not unreasonable. *See M/S Bremen*, 407 U.S. at 10. The courts of both Michigan and Minnesota have adopted that modern rule from a public policy standpoint. *See, e.g., Turcheck v. Amerifund Fin., Inc.*, 272 Mich. App. 341, 725 N.W.2d 684, 688 (2006); *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 889 (Minn. 1982).

"It is undisputed that Michigan's public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions." *Turcheck,* 725 N.W.2d at 688. Indeed, the Michigan Legislature has enacted a statute — M.C.L. § 600.745(3) — that mandates enforcement of an express forum-selection clause as written, provided that the party opposing enforcement does not establish that one of the statutory exceptions applies. *Id.*[3]

[3] M.C.L. § 600.745(3) provides as follows:

> If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:
>
> (a) The court is required by statute to entertain the action.
>
> (b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.

Meanwhile, the Minnesota Supreme Court has explained that "persuasive public policy reasons exist for enforcing a forum selection clause in a contract freely entered into by parties who have negotiated at arm's length." *Hauenstein*, 320 N.W.2d at 889. Among those public policy reasons are the fact that enforcing forum selection clauses "'accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons' of American business" and the fact that "forum selection clauses provide a degree of certainty to business contracts by obviating jurisdictional struggles." *Id.* (quoting *M/S Bremen*, 407 U.S. at 11).

In summary, the United States Supreme Court has held that forum selection clauses are "prima facie valid," and the courts of both Michigan and Minnesota adhere to that determination as both a matter of law and a matter of public policy. *M/S Bremen*, 407 U.S. at 10; *Turcheck,* 725 N.W.2d at 688; *Hauenstein*, 320 N.W.2d at 889. Plaintiff cannot demonstrate that the public policy of Michigan or Minnesota will be violated or undermined by the enforcement of the forum selection clause to which the parties agreed. Therefore, this Court should not find any circumstances or interests that favor disregarding the forum selection clause.

B. ALTERNATIVELY, THIS LAWSUIT SHOULD BE TRANSFERRED TO MINNESOTA.

If this Court decides not to dismiss this lawsuit pursuant to Fed. R. Civ. P. 12(b)(6), the Court should exercise its power under 28 U.S.C. §1404(a) to transfer the lawsuit to the U.S. District Court for the District of Minnesota, which is one of the forums to which the parties agreed.

(c) The other state would be a substantially less convenient place for the trial of the action than this state.

(d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.

(e) It would for some other reason be unfair or unreasonable to enforce the agreement.

If a forum selection clause is not enforced by dismissal pursuant to Fed. R. Civ. P. 12(b)(6), the clause alternatively may be enforced by an order transferring the case pursuant to 28 U.S.C. § 1404(a). *Langley*, 546 F.3d at 369. Under Section 1404(a), a district court may transfer venue "[f]or the convenience of parties and witnesses, in the interest of justice ... to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

A district court weighing a possible venue transfer under Section 1404(a) must consider the existence of a presumptively valid forum selection clause in the overall balance. *Kerobo v. S.W. Clean Fuels, Corp.*, 285 F.3d 531, 538-39 (6th Cir. 2002). Indeed, the existence of such a clause is a "significant factor" that "figures centrally in the district court's calculus" under Section 1404(a). *Stewart,* 487 U.S. at 28. The parties' agreement to a forum is entitled to great weight, because "[a] forum selection clause represents the parties' agreement to the *most proper forum*." *Viron Int'l Corp. v. David Boland, Inc.*, 237 F. Supp. 2d 812, 815 (W.D. Mich. 2002) (emphasis added).[4]

A motion to transfer venue under 28 U.S.C. § 1404(a) requires a two-part analysis. First, the Court must determine whether the moving party has selected "any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Second, the Court must consider "the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of 'interests of justice.'" *Moses,* 929 F.2d at 1137.

Here, their first part of the Section 1404(a) analysis is easily resolved. The District of Minnesota is clearly a proper (as well as the logical and agreed-upon) venue in which to litigate

[4] It should be noted that, for purposes of a motion to transfer venue under 28 U.S.C. § 1404(a), a forum selection clause is entitled to substantial weight but is not necessarily dispositive. *Stewart*, 487 U.S. at 29-31. Other case-specific factors must be considered as well. *Id.*

this dispute. Under the federal venue statute, a civil action based on diversity jurisdiction may be brought in "(1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim or occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought." 28 U.S.C. § 1391(a). The District for Minnesota (and only the District of Minnesota) satisfies all of these tests, and is therefore a proper venue in this case. West, the actual party to the underlying agreements, is incorporated in Minnesota and maintains its principal place of business in Minnesota. Mokosaik Decl. ¶ 3. The FindLaw website at issue in this litigation was created and maintained by West personnel in Minnesota. *Id.* ¶ 9. The FindLaw services at issue would have been performed by West at its Minnesota location. *Id.* ¶ 9. The potential witnesses include, but are not limited to website developers, designers, account managers, content writers, search engine optimization consultants, and project managers. *Id.* ¶ 10. There are at least twenty individuals with personal knowledge of the Plaintiff's account and/or website. *Id.* ¶ 11. Those individuals are located in Minnesota. *Id.* ¶ 11. Further, there may be a number of former employees of West with personal knowledge of the Plaintiff's account and/or website. *Id.* ¶ 12. Upon information and belief, the last known locations of these individuals was in Minnesota. *Id.* ¶ 13.

The second part of the Section 1404(a) analysis also supports a transfer to the District of Minnesota, because the balance of the factors that a court looks at to determine the interest of justice and the convenience of the parties and witnesses tilts in favor of a transfer to the District of Minnesota.

As one of the other judges of this district has noted:

> In ruling on a motion to transfer venue pursuant to 28 U.S.C. § 1404(a), the Court must examine a number of factors, including (1) convenience of the parties and the witnesses, (2) accessibility of sources of proof, (3) the costs of securing testimony from witnesses, (4) practical problems associated with trying the case in the least expensive and most expeditious fashion, and (5) the interests of justice.... Other factors include (1) the relative congestion in the courts of the two forums, (2) the public's interest in having local controversies adjudicated locally, (3) the relative familiarity of the two courts with the applicable law, (4) the plaintiff's original choice of forum, and (5) whether the parties have agreed to a forum selection clause.

Bennett v. Am. Online, Inc., 471 F. Supp. 2d 814, 820 (E.D. Mich. 2007) (citing *Viron*, 237 F. Supp. 2d at 816).

The "convenience of the parties and the witnesses" factor favors a transfer to Minnesota. Although a Michigan forum is undoubtedly more convenient for Plaintiff and a Minnesota forum is undoubtedly more convenient for Defendant, "the parties' convenience is already reflected in the mandatory forum selection clause." *Viron*, 237 F. Supp. 2d at 816. That is, having consented to a clause that provides for a Minnesota forum, Plaintiff should not be heard to claim that Minnesota is an inconvenient forum. As for the convenience of the witnesses, all of the current and former West employees who are likely to be called as witnesses reside in Minnesota. Mokosaik Decl. ¶¶ 10-13. A Minnesota forum would be far more convenient for those witnesses.

The "accessibility of sources of proof" factor is not a significant factor under Section 1404(a), because modern technologies (like photocopying, scanning, and electronic document production) have rendered that factor largely irrelevant. *Cincinnati Ins. Co. v. O'Leary Paint Co.*, 676 F. Supp. 2d 623, 635 (W.D. Mich. 2009). To the extent that that factor retains any significance, however, it too favors a transfer to Minnesota, because any documentary evidence

relevant to this professional negligence action is located in Minnesota. That is, all of the work that West did with regard to the Findlaw website that is the subject of this lawsuit was done in Minnesota and all of the records pertaining to that work are maintained in Minnesota. Mokosaik Decl. ¶ 9.

"The costs of securing testimony from witnesses" factor also favors a Minnesota forum, due to the large number of potential witnesses located in Minnesota (including several non-party witnesses). Unlike a federal court in Minnesota, a federal court in Michigan will not be able to compel the attendance of any of those Minnesota witnesses to appear in Michigan, meaning extra monetary costs in terms of video depositions for witnesses who are unwilling to come to Michigan. In addition to the monetary costs, there is the non-monetary cost associated with the fact that a trier of fact in Michigan may be deprived of live testimony, making the job of evaluating such testimony more difficult. Furthermore, as to those witnesses who do come to Michigan, there will be extensive travel costs that would not be incurred if the case is transferred to Minnesota.

Aside from the witness-related issues already mentioned, the "practical problems associated with trying the case in the least expensive and most expeditious fashion" factor does not strongly favor either forum. The average time period from filing to trial in civil cases is not materially different from one district to the other. *See* http://www.uscourts.gov/cgi-bin/cmsd2010Dec.pl. The average time from filing to disposition in civil cases in the District of Minnesota is roughly half what it is in the Eastern District of Michigan, however. *Id.* Thus, this factor marginally favors a transfer to the District of Minnesota.

The interests of justice factor supports a transfer to Minnesota for the simple reason that the federal courts and the courts of both Michigan and Minnesota all recognize and uphold valid

forum selection clauses like the one to which the parties agreed in this case. As explained in the preceding section of this memorandum, the public policy of both Michigan and Minnesota favors enforcement of such provisions.

"The relative congestion in the courts of the two forums" factor has already been addressed in connection with the "practical problems associated with trying the case in the least expensive and most expeditious fashion" factor. Again, what little difference there is in the statistical performance of the two districts marginally favors a transfer to Minnesota.

"The public's interest in having local controversies adjudicated locally" factor has no meaningful application to this private dispute between private parties located in different states. That is, this factor is of no consequence to the present motion because this case does not involve a matter of interest to the public in either Michigan or Minnesota. *See Viron,* 237 F. Supp. 2d at 819.

Like several of the other factors already discussed, the "familiarity with applicable law" factor favors a transfer to Minnesota. The parties' agreements provide that Minnesota law governs any disputes arising with respect to the agreements. A federal court in Minnesota is likely to be marginally more versed in and familiar with the applicable Minnesota law than this Court is. *See Radisson Hotels Int'l, Inc. v. Westin Hotel Co.*, 931 F. Supp. 638, 642 (D. Minn. 1996) (noting that federal court in another state is "fully capable of applying Minnesota law," but that federal court in Minnesota is "more likely to be familiar with the applicable Minnesota law").

Like the court in *Viron*, this Court should not give any weight to Plaintiff's selection of a Michigan forum "when plaintiff already has agreed, through the forum selection clause, to litigate disputes arising out of the contract in a federal court in [Minnesota]." *See Viron,* 237 F.

Supp. 2d at 819. As the court in *Viron* explained, "[a]ccording any weight to plaintiff's decision to file suit in Michigan, 'would only encourage parties to violate their contractual obligations, the integrity of which are vital to our judicial system.'" *Id.* (citing *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989)).

Finally, and most importantly, the "whether the parties have agreed to a forum selection clause" factor strongly favors a transfer to Minnesota, as the parties did agree to such a clause in this case. As explained above, the existence of such a clause is a "significant factor" that "figures centrally in the district court's calculus" under Section 1404(a). *Stewart*, 487 U.S. at 28. As the court in *Viron* explained, a party opposing a transfer motion that is based upon such a clause might overcome the forum selection clause and defeat the motion to transfer by showing that all of the third-party material witnesses in the case were located in the current forum, that the operative facts underlying the dispute all occurred in the current forum, and that it would be more economical to hold trial in current forum. 237 F. Supp. 2d at 819. Absent such an overwhelming showing with regard to the other factors, however, a court should enforce a valid forum selection clause by granting the motion to transfer. *Id.*

In summary, the agreement of the parties and the substantial majority of the other factors that courts look to in deciding motions under 28 U.S.C. § 1404(a) both favor transferring this case to the District of Minnesota.

CONCLUSION

The claims of Plaintiff fail, because the parties agreed that Minnesota was the proper forum for any action arising out of the parties' agreements. Thus, pursuant to Fed. R. Civ. P. 12(b)(6) this Court should dismiss this lawsuit. Alternatively, the Court should exercise its

power under 28 U.S.C. §1404(a) to transfer this case to the United State District Court for the District of Minnesota.

Respectfully submitted,

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Dated: June 13, 2011

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2011, I electronically filed the foregoing paper with the Clerk of the court using the ECF system which will send notification of such filing to the following:

Don Ferris, dferrissalt@aol.com

And I hereby certify that I have mailed by US Postal Service the paper to the following non-ECF participants:

None

/sMark T. Boonstra
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