EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FERRIS & SALTER, P.C.

Plaintiffs,

v.

Honorable Julian Abele Cook
File No. 5:11-12448-JAC-MJH

THOMSON REUTERS CORPORATION, d/b/a FINDLAW.

Defendants.

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

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Because this is strictly a tort/professional negligence action not based on the contract referenced by Defendant, and because under Minnesota law, it is clear that a professional has a duty, independent of any contract, to exercise such care, skill, and diligence as a person in that profession ordinarily exercises under the circumstances, does the forum selection provision apply to this tort/professional negligence action?

Plaintiff answers, "No."

Defendant answers, Yes."

2. Even if the forum selection provision is applicable to this tort action, is dismissal under F.R.Civ.P. 12(b)(6) improper under *Kerobo v Southwestern Clean Fuels, Corp* because the clause does not deprive this Court of proper venue where Defendant does business in this state and federal district?

Plaintiff answers, "Yes."

Defendant answers, "No."

3. Applying the factors under 28 U.S.C. 1404(a), should this Court refuse to transfer this case to Minnesota where the only issue for trial in this case is damages?

Plaintiff answers, "Yes."

Defendant answers, "No."

INTRODUCTION AND FACTS

Plaintiff Ferris & Salter, P.C. is a long-standing plaintiff's personal injury Ann Arbor law firm specializing in medical negligence, wrongful death, and serious personal injury claims. Ferris and Salter, P.C., brings this professional negligence action against Thomson because its professional computer engineers and technicians in November 2008 destroyed the connection/link between Plaintiff's web-site inquiry section and Plaintiff's e-mails, which was in existence for years before Plaintiff hired Defendant. As a result, Plaintiff lost hundred of thousands of dollar in attorneys fees over a 15 month period.

For many years prior to 2008, Plaintiff had a website, Ferris-Salter.com, with an inquiry section for clients to send e-mail/inquiries to Don Ferris and Heidi Salter-Ferris concerning plaintiff's personal injury claims. From its website, Plaintiff received hundreds of inquiries each year, resulting in numerous meritorious cases being filed, and successfully litigated, with hundreds of thousands of dollars in attorneys fees being generated for Plaintiff and its principals..
During this same period prior to 2008, Plaintiff paid thousands of dollars to web-based services which specialized in directing cases to its subscribing law firms. Among these services were medicalmalpractice.com, lawyers.com, druglitigationlawyers.com, ExpertHub.com, Lawfirms.com, and LeadManager@SWIDigital.com. These services directed hundreds of e-mail inquiries to Plaintiff's website each year, resulting in numerous meritorious cases being filed, and successfully litigated, with hundreds of thousands of dollars in attorneys fees being generated for Plaintiff and its principals.

Contrary to the claims of Defendant, Defendant did not develop Plaintiff's website. Part of Defendant's business is to provide professional services calling for specialized skill and

knowledge in designing, re-designing, and hosting websites for law firms. Defendant regularly does business in Washtenaw County, having an office in Washtenaw County since 1979. Its current office is located at 777. E. Eisenhower Parkway, Ann Arbor 48108 and has approximately 1800 employees at its Washtenaw County Office.

In November, 2008, Plaintiff hired Defendant to provide professional services to optimize Plaintiff's website, and to host its website. In performing these services, in November, 2008, Defendant's professional and technical employees and agents negligently destroyed the previous connection/link between Plaintiff's web-site inquiry section and Plaintiff's e-mails, which was in existence before Plaintiff hired Defendant.

Defendants did not repair the connection/link until February, 2010. During this 15 month period, Plaintiff paid the previously listed services thousands of dollars for the case inquiries/leads which Plaintiff never received because of Defendant's agents' negligence. As a direct and proximate result of Defendant's employees' and agents' negligence in destroying the connection/link for over 15 months, Plaintiff lost numerous clients with meritorious cases, and lost hundreds of thousands of dollars in attorney's fees.

Plaintiff discovered Defendant's negligence in February, 2010, when Communications Concepts, Inc. attempted to send a splash page to the connection /link which Defendant's destroyed. It never arrived at the web-site. Plaintiff's then contacted Defendant's, **which in a series of e-mails attached as Exhibit 1, admitted that they had negligently destroyed our connection/link.** Defendant found the 730 e-mails (along with hundreds of others not at issue in this lawsuit), and forwarded them to Plaintiff. However, by this time, clients with meritorious cases had hired other attorneys.

Prior to filing this negligence action, Plaintiff demanded consequential damages from Defendant for its admitted negligence. When Defendant refused, Plaintiff filed this professional negligence case in Washtenaw County Circuit Court. Defendant's timely removed the case to this Court as a diversity action in which the damages are more than $75,000. 28 U.S.C. 1441(a).

Contrary to Defendant's contention, Plaintiff has not disregarded the boilerplate language in its form contract used by it in all of internet development contracts. Plaintiff instead contends that because this is a professional negligence action, which under Minnesota law is independent of the contract, this is therefore not a contract action, and the forum selection clause does not apply. Simply put, this is strictly a tort/professional negligence action not based on the contract referenced by Defendant. Under Minnesota law, it is clear that a professional has a duty, independent of any contract, to exercise such care, skill, and diligence as a person in that profession ordinarily exercises under the circumstances, and that a tort action independent of the contract may be maintained to recover for economic loss. *See City of Eveleth v Ruble*, 302 Minn. 249, 253; 225 N.W.2d 521, 524 (Minn. 1974); and *Arden Hills North Homes Association v. Pemtom, Inc.*, 475 N.W.2d 495 (Minn. App. 1991) Defendant's computer engineers and technicians who destroyed Plaintiff's connection/link are professionals. Minnesota courts have stated that "[a] 'professional service,' is one calling for specialized skill and knowledge in an occupation . . . [t]he skill required to perform a professional service is predominantly intellectual or mental rather than physical.'" *Piper Jaffray Cos., Inc., v Nat'l Union Fire Ins. Co. of Pittsburg*, 967 F.Supp 1148, 1156 (D. Minn.1997) (quoting *Ministers Life v. St. Paul Fire & Marine Ins. Co.*, 483 N.W.2d 88, 91 (Minn. App. 1992). As such, the forum selection provision does not apply to this tort/professional negligence action

As will be discussed below, even if this Court were to rule that the forum selection provision is applicable to this tort lawsuit – because this case is a diversity action, and because venue is proper in this Court because the contract was signed in this District, and Defendant does business in this District (having 1800 employees in Ann Arbor), Rule 12(b)(6) does not apply -- dismissal is improper. The Sixth Circuit clearly so held in *Kerobo v Southwestern Clean Fuels Corp*, 285 F.3d 531, 535 (6th Cir. 2002). Despite the fact that Defendant cites *Kerobo* as supportive of its arguments, Defendant either misreads or ignores the clear holding that dismissal is improper in venue transfer cases in diversity cases. The Court in *Kerobo* held that dismissal is improper in diversity cases involving a forum selection clause question, and that Rule 12(b)(6) and 28 U.S.C. 1406(a) do not apply. This is because venue is proper in this Court. In fact, because this case was properly filed in Washtenaw County Circuit Court, the only district that this case could be removed to is the Eastern District of Michigan. As the Court in *Kerobo*, *supra* stated, there is only one federal venue into which a state court diversity action may be removed, and that is in the statutorily dictated "district court . . . for the district and division embracing the place where [the state court] action [was] pending." 28 U.S.C. 1441(a); *see also PT United Can Co. Ltd. v Crown Cork & Seal Co., Inc.*, 138 F.3d, 65, 72 (2nd Cir., 1998) In sum, the only issue in diversity cases involving a forum selection clause is whether the case should be transferred to a different forum under 28 U.S.C. 1404(a).

Therefore, even if the forum selection clause is somehow applicable to this tort action, then the question facing this Court is whether this Court should grant Defendant's motion to transfer this case under 28 U.S.C. 1404(a). Defendant argues that the forum selection clause somehow trumps all of the other case specific considerations recognized by the federal courts in

deciding transfer motions. Defendant is once again misreading *Kerobo.* The Court in *Kerobo,* following *Ricoh,* stated that the factors which must be weighed are the convenience of parties and witnesses, "public-interest factors of systemic integrity," and private concerns falling under the heading "the interest of justice." *Stewart Org., Inc. v Ricoh Corp.*, 487 U.S. 22, 30 (1988). *Kerobo (*and *Ricoh)* makes short shrift of Defendant's argument that its venue selection clause is all-important, or that it is even weighted more than any other factor. Here is what the Supreme Court in *Ricoh* had to say on the subject: A forum-selection clause in a contract is one of the factor to consider in this calculus. Such a clause "should receive neither dispostive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in 1404(a). *Ricoh,* at 30-31.

Defendant argues that trial should be held in Minnesota because it has all of these 20 or 30 witnesses who will testify in this matter. Such is not the case. As can be seen from the e-mails and letters in Exhibit 1, Defendant has admitted the negligence Plaintiff claims in this case – their professionals destroyed the connection/link that Plaintiff had in its website for years. This link was essential for Plaintiff to get client-inquiries which led to new meritorious cases. It is especially ironic that Plaintiff hired Defendant's professionals in order to optimize its website, and instead lost hundreds of thousands of dollars in new cases and fees because Defendant destroyed the essential link/connection to e-mails.

Thus, the only issue in the case will be damages, and that question is entirely centered in Michigan – in the e-mails, and in the clients who tried to contact Ferris & Salter, P.C. for representation, but were prevented from doing so by Defendant's negligence. Not one witness from Defendant is necessary to testify on the issue of damages.

ARGUMENT

I. THE FORUM SELECTION CLAUSE DOES NOT APPLY TO THIS INDEPENDENT TORT/PROFESSIONAL NEGLIGENCE ACTION.

This Court has only to look at Plaintiff Complaint (Exhibit 2) to see that it is not based on contract. The Complaint has only one count – professional negligence – based on Defendant's professional computer engineers and technicians destroying the connection/link to the website from client inquiries. Minnesota law is clear that a person who suffers damages as a result of professional negligence is not limited to contractual damages. There is a tort cause of action independent of the contract, for damages caused by violation of the standards applicable to professionals. Under Minnesota law, it is clear that a professional has a duty, independent of any contract, to exercise such care, skill, and diligence as a person in that profession ordinarily exercises under the circumstances, and that a tort action independent of the contract may be maintained to recover for economic loss. *See City of Eveleth v Ruble*, 225 N.W.2d at 524; and *Arden Hills North Homes Association v. Pemtom, Inc., supra.* Defendant's computer engineers and technicians who destroyed Plaintiff's connection/link are professionals. Minnesota courts have stated that "[a] 'professional service,' is one calling for specialized skill and knowledge in an occupation . . . [t]he skill required to perform a professional service is predominantly intellectual or mental rather than physical.'" *Piper Jaffray Cos., Inc., v Nat'l Union Fire Ins. Co. of Pittsburg, supra* at 1156. As such, the forum selection provision does not apply to this tort/professional negligence action.

II. EVEN IF THE VENUE SELECTION CLAUSE IS ENFORCEABLE, RULE 12(b)(6) AND 28 U.S.C. 1406(a) DO NOT APPLY TO THIS DIVERSITY ACTION, AND DISMISSAL IS IMPROPER

Even if this Court finds that the venue selection clause applies to this tort action, the Sixth Circuit made clear in *Kerobo, supra*, that F.R.Civ.P. 12(b)(6) and 28 U.S.C. 1406(a) do not apply to diversity cases as long as state court action was properly filed. The Court in *Kerobo* held that dismissal is improper in diversity cases involving a forum selection clause question, and that Rule 12(b)(6) and 28 U.S.C. 1406(a) do not apply. This is because venue is proper in this Court. In fact, because this case was properly filed in Washtenaw County Circuit Court, the only district that this case could be removed to is the Eastern District of Michigan. Venue is proper in this Court because the contract was signed in this District, and Defendant does business in this District (having 1800 employees in Ann Arbor) As the Court in *Kerobo, supra* stated, there is only one federal venue into which a state court diversity action may be removed, and that is in the statutorily dictated "district court . . . for the district and division embracing the place where [the state court] action [was] pending." 28 U.S.C. 1441(a); *see also PT United Can Co. Ltd. v Crown Cork & Seal Co., Inc., supra* at 72 (2nd Cir., 1998) In sum, the only issue in diversity cases involving a forum selection clause is whether the case should be transferred to a different forum under 28 U.S.C. 1404(a).

III. THIS CASE SHOULD NOT BE TRANSFERRED UNDER THE CONSIDERATIONS APPLICABLE TO 28 U.S.C. 1404(a)

28 U.S.C. 1404(a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Even if the forum selection clause is somehow applicable to this tort action, then the question facing this Court is whether this Court should grant Defendant's motion to transfer this case under 28 U.S.C. 1404(a). Defendant argues that the forum selection clause somehow trumps all of the other case specific considerations recognized by the federal courts in deciding transfer motions. Defendant is once again misreading *Kerobo.* The Court in *Kerobo,* following *Ricoh,* stated that the factors which must be weighed are the convenience of parties and witnesses, "public-interest factors of systemic integrity," and private concerns falling under the heading "the interest of justice." *Ricoh Corp.*, at 30 (1988). *Kerobo (*and *Ricoh)* makes short shrift of Defendant's argument that its venue selection clause is all-important, or that it is even weighted more than any other factor. Here is what the Supreme Court in *Ricoh* had to say on the subject: A forum-selection clause in a contract is one of the factor to consider in this calculus. Such a clause "should receive neither dispostive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in 1404(a). *Ricoh,* at 30-31.

One of the other judges of this district noted 10 factors which this Court should consider in deciding a motion to transfer under 28 U.S.C. 1404(a). They include:

1. The convenience of the parties and 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.

5. The interests of justice.

Bennett v Am. Online, Inc., 471 F. Supp. 2d 814-820 (E.D.Mich 2007).

Plaintiff contends that all of these support keeping this case in this District. Defendant argues that trial should be held in Minnesota because it has all of these 20 or 30 witnesses who will testify in this matter. Such is not the case. As can be seen from the e-mails and letters in Exhibit 1, Defendant has admitted the negligence Plaintiff claims in this case – their professionals destroyed the connection/link that Plaintiff had in its website for years. This link was essential for Plaintiff to get client-inquiries which led to new meritorious cases. It is especially ironic that Plaintiff hired Defendant's professionals in order to optimize its website, and instead lost hundreds of thousands of dollars in new cases and fees because Defendant destroyed the essential link/connection to e-mails.

Thus, the only issue in the case will be damages, and that question is entirely centered in Michigan – in the e-mails, and in the clients who tried to contact Ferris & Salter, P.C. for representation, but were prevented from doing so by Defendant's negligence. Not one witness from Defendant is necessary to testify on the issue of damages. The only witnesses necessary to testify concerning damages are in Michigan. Plaintiff and its principles are in Michigan. Defendant has an office in Ann Arbor with 1800 employees. The attorneys are in Michigan.

CONCLUSION

Because this is a tort action for professional negligence brought independent of the contract, the forum selection clause does not apply to this case. And regardless, the factors that courts apply in deciding motion under 28 U.S.C. 1404(a) favor keeping this case in this District. For these reasons, this Court should deny Defendant's Motion in its entirety.

Dated: July 5, 2011

/s/ Don Ferris
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