EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FERRIS & SALTER, P.C.,

Plaintiff,

v.

THOMSON REUTERS CORPORATION, d/b/a FINDLAW,

Defendant.

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

HON. JULIAN ABELE COOK, JR.

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

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A. DEFENDANT DISPUTES VARIOUS PURPORTED "FACTS" ASSERTED BY PLAINTIFF.

Many of the purported "facts" that Plaintiff asserts – without affidavit or other support – in opposing this motion are simply incorrect, and will be vigorously contested, including:

1. Contrary to Plaintiff's assertions, Defendant has in no way admitted liability. Defendant intends to contest liability in this matter, so the testimony of the current and former FindLaw[1] employees that worked on Plaintiff's website will be highly important. Those individuals reside in Minnesota. Mokosaik Decl. ¶¶ 9-13. Furthermore, to the extent that Plaintiff plans to argue that the communications attached to its response brief represent admissions of liability, the employees who actively participated in those communications with Plaintiff (Kelly Patnoe, Francine Clausen, Paul Samuels and Jon Olson) will be key witnesses. Each of those individuals resides in Minnesota. Declaration of Darci Kaul, ¶ 3.

2. Plaintiff inaccurately characterizes both the nature and the timing of the services that it received from Defendant's FindLaw group. FindLaw actually began providing website design, website support, website hosting and email services to Plaintiff long before November 2008, as evidenced by the contract that the parties signed in June of 2006. Mokosaik Decl. Ex. A. Plaintiff wrongly implies, without any evidentiary support, that FindLaw first provided services to Plaintiff in November of 2008 and that those services caused an interruption in pre-existing email services. The email services that allegedly were interrupted instead were part of the package of services that Plaintiff contracted for FindLaw to provide, and this case thus arises directly out of the contract between the parties.

3. None of the employees that Thomson Reuters employs in Washtenaw County has any role in providing the FindLaw services that are the subject of this lawsuit. Kaul Decl. ¶ 6.

[1] FindLaw is the trade name under which West Publishing Corporation, a company that Defendant indirectly owns, sells internet-related products and services. Mokosaik Decl. ¶¶ 3-5.

Nearly all of those employees work for Thomson Reuters Healthcare Inc., Thomson Reuters Tax & Accounting Inc. or Thomson Reuters Tax & Accounting Services, none of which has anything to do with FindLaw. *Id.* ¶ 5. FindLaw operations are primarily based in Minnesota. Mokosaik Decl. ¶¶ 3-5 and 9.

4. FindLaw did not provide "professional services" to Plaintiff. As noted above, FindLaw provided various website-related services to Plaintiff, including website and email hosting. Plaintiff provides no factual support for its repeated characterization of such services as "professional services." Moreover, as discussed *infra* at 3, courts that have considered the issue do not consider computer-related services to be "professional services."

5. In asserting that there are numerous Michigan witnesses who will have to testify concerning Plaintiff's claimed damages, Plaintiff overlooks the express "LIMITATION OF LIABILITY" clauses that are contained in the relevant contracts. *See* Mokosaik Decl. Ex. A (¶ 16) and Ex. B (¶ 12). Because those provisions unambiguously exclude claims for "ANY LOST PROFITS OR ANY CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, INDIRECT OR SPECIAL DAMAGES ARISING FROM OR IN ANY WAY RELATED TO THE AGREEMENT[S]," Plaintiff's highly-speculative lost profits claim will be barred. Accordingly, none of the Michigan-based potential clients will be witnesses in this case.

B. THIS CASE ARISES OUT OF THE WEBSITE AND EMAIL SERVICES CONTRACTS.

Plaintiff attempts to obscure the fact that the present dispute arises out of the contracts under which FindLaw provided website and email services to Plaintiff. Specifically, Plaintiff purports to assert a "professional negligence" claim, in a transparent effort to avoid the terms of the service contracts (including the forum selection and limitation of liability clauses). The

Court should not be misled. Rather, the Court should recognize that this case is governed by the written agreements, regardless of how Plaintiff characterizes its claim.

Contrary to Plaintiff's repeated contentions, this is not a "professional negligence" claim, because the services that FindLaw contracted to provide are not "professional services." Plaintiff fails to provide any legitimate factual or legal support for its allegations that the FindLaw personnel are "professionals" and that this matter involves "professional services." Instead, Plaintiff twice misquotes a Minnesota case, by leaving out the highlighted language:

> A "professional service," ***within the meaning of an insurance exclusion***, "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 v. Nat. Union Fire Ins. Co., 967 F. Supp. 1148, 1156 (D. Minn. 1997) (emphasis added) (quoting *Ministers Life v. St. Paul Fire & Marine Ins. Co.*, 483 N.W.2d 88, 91 (Minn. Ct. App. 1992)). In other words, Plaintiff twice misquotes the *Piper Jaffray* case in a way that obscures the fact that the court's statement was intended to apply only to the interpretation of a professional services exclusion in an insurance policy (which is not the situation here).

It should also be noted that courts that have considered the issue have held that computer consultants are not professionals and have refused to permit professional negligence claims arising out of computer-related services. *See, e.g., Racine County v. Oracular Milwaukee, Inc.*, 767 N.W.2d 280, 289 (Wis. Ct. App. 2009), *aff'd on other grounds,* 781 N.W.2d 88 (Wis. 2010); *Hosp. Computer Sys., Inc. v. Staten Island Hosp.*, 788 F. Supp. 1351, 1361 (D. N.J. 1992).

Furthermore, the email issue that forms the basis for Plaintiff's claim plainly "arises out of" the service contracts in any event.[2] Indeed, as noted in the previous section of this Reply,

[2] "The phrase 'arising out of' is broadly construed," and "generally means 'originating from,' 'growing out of, or 'flowing from.'" *Dougherty v. State Farm Mut. Ins. Co.,* 699 N.W.2d 741,

email services were a part of the contract. Thus, even if those services were somehow considered to be "professional" in nature, Plaintiff could not avoid the forum selection clauses in the contracts, which state that any dispute "arising out of" the contracts are to be tried in Minnesota. In short, the forum selection clause is not limited to breach of contract claims.[3]

C. DEFENDANT'S INITIAL BRIEF ACCURATELY STATES THE LAW.

Due to inconsistencies in the case law as to whether a forum selection clause should be enforced via a motion to dismiss or a motion to transfer (and under which provisions), Defendant brought this motion seeking either of those results, and accurately stated the law. *See Langley v. Prudential Mortgage Capital Co.*, 546 F.3d 365, 369 (6th Cir. 2008) (remanding case where 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)")[4].

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744 (Minn. 2005) (citing *Associated Indep. Dealers, Inc. v. Mut. Servs. Ins. Cos.*, 229 N.W.2d 516, 518-19 (Minn. 1975)).

[3] Defendant does not concede that Minnesota law permits Plaintiff to make a tort claim under these circumstances. In fact, Minnesota does not recognize claims for "negligent breach of contract." *See Am. Home Assur. Co. v. Major Tool & Mach., Inc.*, 767 F.2d 446, 448 (8th Cir. 1985) (citing *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983)). This Court need not reach that issue to decide the present motion, however, since Plaintiff's email claim plainly "arises out of" the contracts, regardless of whether it is characterized as a tort claim or a contract claim. That is, Defendant would not have had any involvement with Plaintiff's email but for the contract to provide website and email services, and would not have any duty to Plaintiff in the absence of the contracts for services. It makes no difference that Plaintiff has characterized its claim as a tort claim. *See, e.g., Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) (requiring cruise passenger to bring her tort claim in Florida pursuant to forum selection clause that required all claims "arising under, in connection with or incident to" the contract to be brought in Florida); *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1070 (11th Cir. 1987) (en banc) (holding that forum selection clause directed at claims "arising under or in connection with" a contract covered "all causes of action arising directly or indirectly from the business relationship evidenced by the contract," including fraud and antitrust claims), *aff'd and remanded on other grounds*, 487 U.S. 22 (1988).

[4] Plaintiff overreads *Kerobo v. Southwestern Clean Fuels Corp.*,285 F.3d 531 (6th Cir. 2002). While *Kerobo* found that Fed. R. Civ. P. 12(b)((3) was not the appropriate vehicle for seeking dismissal pursuant to a forum selection clause, Fed. R. Civ. P. 12(b)(6) remains an appropriate vehicle. *Langley, supra; Wong v. Partygaming Ltd.*, 589 F.3d 821 (6th Cir. 2009).

Defendant will be content with either a dismissal or a transfer, and notes that either of those results is consistent with the public policies of Minnesota and Michigan that favor enforcing forum selection clauses. *See* Def. Initial Brief. at 11-13.

D. PLAINTIFF'S SUPERFICIAL DISCUSSION OF THE TRANSFER FACTORS IS UNPERSUASIVE.

Plaintiff acknowledges that the court in *Bennett v. Am. Online, Inc.*, 471 F. Supp. 2d 814, 820 (E.D. Mich. 2007), sets forth ten factors to be considered in connection with a motion to transfer, but Plaintiff only mentions five of those factors and then focuses exclusively on a subpart of one of them, namely, the convenience of the witnesses. Not surprisingly, the majority of the five factors that Plaintiff neglects to even mention favor a transfer of venue in this case. *See* Def. Initial Brief. at 17-19. Likewise, the majority of the factors that Plaintiff mentions but fails to discuss favor a transfer of venue. *Id.* at 16-17. Moreover, as noted above, Plaintiff is grossly mistaken in its assertion that liability witnesses from Minnesota *will not* be needed and that damages witnesses from Michigan *will* be needed. Liability has not been admitted. *See supra* at 1. On the other hand, the Limitation of Liability clauses in the contracts foreclose any lost profits claim and negate the need for any speculative testimony from Michigan-based potential clients who may have tried to email Plaintiff. *See supra* at 2.

CONCLUSION

For the reasons set forth above and in Defendant's initial Brief, the Court should either dismiss this case or transfer it to the U.S. District Court for the District of Minnesota.

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

Dated: July 19, 2011

By: s/Mark T. Boonstra
Mark T. Boonstra (P36046)

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 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 U.S. Postal Service the paper to the following non-ECF participants: **NONE**

s/Mark T. Boonstra
Mark T. Boonstra

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Attorneys for Defendant

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

Pursuant to 28 U.S.C., § 1746, Darci Kaul declares that the statements set forth in this Declaration are true and correct, except as to matters therein stated to be on information and

belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

Declaration - Darci Kaul

1. I am a Senior Director of Human Resources at West Publishing Corporation ("West"). I have personal knowledge of the facts and matters contained in this Affidavit.

2. Kelly Patnoe, Francine Clausen, Paul Samuels and Jon Olson are employees of West and are located at its Minnesota headquarters.

3. Kelly Patnoe, Francine Clausen, Paul Samuels and Jon Olson reside in Minnesota.

4. Thomson Reuters employs approximately 731 people at its Washtenaw County, Michigan facility located at 777 E. Eisenhower Parkway, Ann Arbor 48108.

5. Nearly all of those 731 employees work for Thomson Reuters Healthcare Inc., Thomson Reuters Tax & Accounting Inc. or Thomson Reuters Tax & Accounting Services, which are all companies that do not have anything to do with West's FindLaw product.

6. None of the 731 employees at the Washtenaw County facility located at 777 E. Eisenhower Parkway, Ann Arbor 48108 provided any of the website design, website support, website hosting and email services that West contracted to provide to Plaintiff.

FURTHER AFFIANT SAYETH NOT.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Darci Kaul

Darci Kaul

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