

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

TODD JANSON, GERALD T. ARDREY, CHAD M.
FERRELL, and C & J REMODELING LLC, on behalf of
themselves and on behalf of all others similarly situated,

Plaintiffs,

v.

LEGALZOOM.COM, INC.,

Defendant.

Case No. 2:10-cv-04018-NKL

**SUGGESTIONS IN SUPPORT OF DEFENDANT LEGALZOOM'S
MOTION TO RECONSIDER OR, IN THE ALTERNATIVE, TO TRANSFER VENUE**

Robert M. Thompson MO #38156
James T. Wicks MO #60409
BRYAN CAVE LLP
One Kansas City Place
1200 Main Street, Suite 3500
Kansas City, MO 64105
Tel.: (816) 374-3200
Fax: (816) 374-3300

John Michael Clear MO #25834
Michael G. Biggers MO #24694
James R. Wyrsh MO #53197
BRYAN CAVE LLP
One Metropolitan Square – Suite 3600
211 North Broadway
St. Louis, MO 63102
Tel.: (314) 259-2000
Fax: (314) 259-2020

Attorneys for LegalZoom.com, Inc.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. THE COURT SHOULD RECONSIDER ITS ORDER DENYING LEGALZOOM’S MOTION TO DISMISS	1
II. IN THE ALTERNATIVE, THE COURT SHOULD TRANSFER VENUE TO THE CENTRAL DISTRICT OF CALIFORNIA.....	5
A. Convenience of the Parties.....	7
B. Convenience of Witnesses	9
C. Interests of Justice.....	10
CONCLUSION.....	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>ASAI, Inc. v. Guest Reddick, Inc.</i> , 2009 WL 1657436 (W.D. Mo. June 10, 2009)	12
<i>Beatie & Osborn LLP v. Patriot Scientific Corp.</i> , 431 F. Supp. 2d 367 (S.D.N.Y. 2006).....	8
<i>BTC-USA Corp. v. Novacare</i> , 2008 WL 2465814 (D. Minn. June 16, 2008).....	2
<i>CFMOTO Powersports, Inc. v. NNR Global Logistics USA, Inc.</i> , 2009 WL 4730330 (D. Minn. Dec. 4, 2009).....	2
<i>Dick Proctor Imports, Inc. v. Sumitomo Corp. of America</i> , 486 F. Supp. 815 (E.D. Mo. 1980).....	8
<i>Dominium Austin Partners, L.L.C. v. Emerson</i> , 248 F.3d 720 (8th Cir. 2001).....	8, 12
<i>Falconwood Financial Corp. v. Griffin</i> , 838 F. Supp. 836 (S.D.N.Y. 1993).....	8
<i>GMAC Commercial Credit, LLC v. Dillard Department Stores, Inc.</i> , 198 F.R.D. 402 (S.D.N.Y. 2001).....	3, 5, 7
<i>Goad v. Gray</i> , 2010 WL 1979436 (M.D. Pa. May 17, 2010).....	1
<i>Hertz Corp. v. Friend</i> , ___ U.S. ___, 130 S. Ct. 1181 (2010).....	6
<i>Huntingdon Engineering & Environmental Inc. v. Platinum Software Corp.</i> , 882 F. Supp. 54 (W.D.N.Y. 1995)	6
<i>In re Apple, Inc.</i> , 602 F.3d 909 (8th Cir. 2010).....	7
<i>Jumara v. State Farm Insurance Co.</i> , 55 F.3d 873 (3d Cir. 1995).....	8
<i>M/S Bremen v. Zapata Off-Shore Co.</i> , 407 U.S. 1 (1972).....	2

<i>Paramont Properties, LLC v. La Salle Bank N.A.</i> , 2008 WL 948284 (E.D. Mo. Apr. 4, 2008).....	12
<i>Public School Retirement System of Missouri v. State Street Bank & Trust Co.</i> , 2010 WL 318538 (W.D. Mo. Jan 21, 2010)	2
<i>Rainforest Cafe, Inc. v. EklecCo, L.L.C.</i> , 340 F.3d 544 (8th Cir. 2003).....	2
<i>Robles v. USA Truck, Inc.</i> , 2009 WL 677835 (S.D. Tex. Mar. 12, 2009).....	1
<i>Servewell Plumbing, LLC v. Federal Insurance Co.</i> , 439 F.3d 786 (8th Cir. 2006).....	2
<i>Slater v. Energy Services Group International, Inc.</i> , 2009 WL 1010951 (M.D. Fla. Apr. 15, 2009)	4
<i>Stewart Org., Inc. v. Ricoh Corp.</i> , 487 U.S. 22 (1988).....	1, 2, 6
<i>Terra International, Inc. v. Mississippi Chemical Corp.</i> , 119 F.3d 688 (8th Cir. 1997).....	6, 8, 10
<i>Terra International, Inc. v. Mississippi Chemical Corp.</i> , 922 F. Supp. 1334 (N.D. Iowa 1996).....	passim
<i>Tockstein v. Spoeneman</i> , 2007 WL 3352362 (E.D. Mo. Nov. 7, 2007)	2
<i>Weiss v. Columbia Pictures Television, Inc.</i> , 801 F. Supp. 1276 (S.D.N.Y. 1992).....	6

Statutes

28 U.S.C. § 1391(a)	5, 6
28 U.S.C. § 1404(a)	passim
28 U.S.C. § 1406(a)	2

Other Authorities

14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE
AND PROCEDURE § 3803.1 (3d ed. 2010) 1, 2

Rules

Fed. R. Civ. P. 12(b)(3)..... 1, 2
Fed. R. Civ. P. 12(b)(6)..... 2

I. THE COURT SHOULD RECONSIDER ITS ORDER DENYING LEGALZOOM'S MOTION TO DISMISS

On February 26, 2010, LegalZoom moved to dismiss Plaintiffs' Petition under Rule 12(b)(3) of the Federal Rules of Civil Procedure. LegalZoom moved on the grounds that, under the forum selection clause to which Plaintiffs assented in purchasing documents on the LegalZoom website, exclusive venue lies in courts situated in the city of Los Angeles, California.

In an Order issued June 1, 2010, the Court denied LegalZoom's motion on the grounds that "a motion to dismiss pursuant to 28 U.S.C. § 1406, or Fed. R. Civ. P. 12(b)(3), is not the proper procedure for enforcing a forum selection clause." Court's June 1, 2010 Order (citing 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3803.1 (3d ed. 2010)). The Order also authorized LegalZoom to file a motion to transfer venue to the Central District of California no later than June 16, 2010.

LegalZoom moved to dismiss under Rule 12(b)(3) rather than to transfer under 28 U.S.C. § 1404(a) because transfer to a state court is unavailable under section 1404(a). "Section 1404(a) only provides for the transfer of a case to another federal district court, not to a state court." *Robles v. USA Truck, Inc.*, No. L-08-122, 2009 WL 677835, at *4 (S.D. Tex. Mar. 12, 2009); *see also Goad v. Gray*, No. 4:10-cv-711, 2010 WL 1979436, at *4 (M.D. Pa. May 17, 2010) ("Pursuant to 28 U.S.C. § 1404(a), we can only transfer a case to another federal district court where the case may have been originally brought."). Thus, only dismissal will preserve Plaintiffs' right to bring their claims in a state court sitting in the city of Los Angeles.

In the section of Wright & Miller cited in the Court's June 1, 2010 Order, the authors note that the Supreme Court held in *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28 (1988), that "a federal court sitting in diversity jurisdiction should treat a request to enforce a forum

selection clause that permits venue in another federal district as a motion to transfer venue under the federal venue statute” WRIGHT & MILLER § 3803.1; *see Stewart*, 487 U.S. at 29 n.8 (“The parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business in the Northern District of Alabama.”).¹

¹ Despite *Stewart*’s holding, the Eighth Circuit has noted that it remains an open question in the circuit whether a motion to dismiss for improper venue based on a forum selection clause should be brought under Rule 12(b)(3) or 12(b)(6). *Rainforest Cafe, Inc. v. EklecCo, L.L.C.*, 340 F.3d 544, 546 n.5 (8th Cir. 2003) (“[W]e recognize that there is some controversy as to whether Rule 12(b)(3) or 12(b)(6) is the proper vehicle for bringing a motion to dismiss based on improper venue when the issue turns on a forum selection clause in the parties’ underlying contract. . . . The question appears to be open in this circuit”); *see also CFMOTO Powersports, Inc. v. NNR Global Logistics USA, Inc.*, No. 09-2202, 2009 WL 4730330, at *2 n.2 (D. Minn. Dec. 4, 2009) (“The Eighth Circuit has not definitively decided the question of whether a motion to dismiss pursuant to a forum-selection clause is properly brought under Federal Rule of Civil Procedure 12(b)(3) or 12(b)(6).”); *BTC-USA Corp. v. Novacare*, No. 07-3998, 2008 WL 2465814, at *2 (D. Minn. June 16, 2008) (“There is disagreement among the circuits regarding whether Rule 12(b)(3) or Rule 12(b)(6) is the proper vehicle for bringing a motion to enforce a forum selection clause and the Eighth Circuit has not ruled definitively on this issue.”).

Since the decision in *Rainforest Cafe*, the Eighth Circuit has not only implicitly approved motions to dismiss for improper venue based on forum selection clauses, it has also engaged in the reasonableness analysis of *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which is undertaken in 12(b)(3) cases. *Servewell Plumbing, LLC v. Federal Ins. Co.*, 439 F.3d 786, 789-90 (8th Cir. 2006). District courts in the Eighth Circuit have followed suit. *CFMOTO*, 2009 WL 4730330, at *2 n.2 (“District courts in this circuit, however, have determined that a 12(b)(3) motion is a proper vehicle by which to challenge venue under a forum-selection clause.”); *Tockstein v. Spoeneman*, No. 4:07CV00020, 2007 WL 3352362, at *3 (E.D. Mo. Nov. 7, 2007) (“Because most circuits have decided that Fed. R. Civ. P. 12(b)(3) is the proper vehicle for seeking enforcement of a forum selection clause, . . . the Court will treat Defendants’ motion to dismiss for lack of jurisdiction based on the forum selection clause as a motion under Fed. R. Civ. P. 12(b)(3).”) (citation omitted); *compare Pub. Sch. Ret. Sys. of Missouri v. State Street Bank & Trust Co.*, No. 09-4214-CV-C-NKL, 2010 WL 318538, at *2 (W.D. Mo. Jan. 21, 2010) (in context of motion to remand, quoting language from *Servewell*, in turn quoting *Bremen*, to the effect that “[f]orum selection clauses are prima facie valid and are enforced unless they are unjust or unreasonable or invalid. Where . . . the forum selection clause is the fruit of an arm’s length negotiation, the party challenging the clause bears an especially heavy burden of proof to avoid its bargain.”).

When, however, a forum selection clause permits venue either in another federal district or in state court, transfer will defeat the plaintiff's agreed right to bring the claim in state court.

This right is preserved only by dismissal:

If, for example, the forum selection clause only authorized suit in the United States District Court for the Eastern District of Arkansas, without reference to the Arkansas state courts, then a transfer of venue to another federal district court would be adequate to enforce the contracting parties' agreement. However, the forum selection clause in this case permits suit to be brought in both the federal district court and in state courts. Therefore, to transfer venue in this case, this court would be depriving plaintiff of its right under the forum selection clause of this contract to bring suit in *either* state or federal court.

GMAC Commercial Credit, LLC v. Dillard Dep't Stores, Inc., 198 F.R.D. 402, 409 (S.D.N.Y. 2001) (emphasis in original).

The forum selection clause to which Plaintiffs here assented states that "I agree that California law shall govern any disputes arising from my use of this website, and that the courts of the city of Los Angeles, state of California, shall have exclusive jurisdiction over any disputes." See Declaration of Edward R. Hartman in Support of Motion to Dismiss Without Prejudice for Improper Venue ("Hartman Declaration in Support of Motion to Dismiss"), attached as Exhibit A to Declaration of Edward R. Hartman in Support of Motion to Reconsider or, In the Alternative, to Transfer Venue ("Hartman Declaration in Support of Motion to Reconsider or Transfer"), at ¶¶ 6-8 and Exhibits B and C attached thereto. The Hartman Declaration in Support of Motion to Dismiss and its attached exhibits are hereby incorporated by reference.

As LegalZoom set out in its Reply Suggestions in Support of its Motion to Dismiss, a forum selection clause agreeing to venue in a city places venue in either state or federal courts within that city:

It is clear that the forum selection clause here is mandatory, as it states that all claims “shall” be brought in the City of Richmond, Virginia. The fact that the clause does not designate whether claims must be brought in federal or state court within the City of Richmond does not eliminate its mandatory effect. The cases cited by [plaintiff] . . . support [defendant]’s position. In those cases, the Eleventh Circuit analyzed forum selection clauses that mandated litigation in a particular geographic area, similar to the one at issue here, and ruled that the provisions were mandatory in nature and permitted litigation in a federal or state court within that geographical area. The same holds true here. The forum selection clause mandates that [plaintiff] may bring her suit against [defendant] in a federal or state court within the City of Richmond, Virginia.

Slater v. Energy Servs. Group Int’l, Inc., No. 8:09-CV-208-T-24, 2009 WL 1010951, at *2 (M.D. Fla. Apr. 15, 2009) (citations omitted).

In its opening and reply briefing on its Motion to Dismiss for Improper Venue, LegalZoom demonstrated that the forum selection clause contained in the Terms of Service on the LegalZoom.com website was binding on Plaintiffs. LegalZoom also showed that the clause is enforceable because it is reasonable and does not contravene a public policy of the State of Missouri; because Plaintiffs’ assent to the clause was not obtained by fraud, undue influence, or unequal bargaining power; and because any inconvenience to Plaintiffs in litigating in Los Angeles was foreseeable at the time they entered into their contracts with LegalZoom. *See* LegalZoom’s Suggestions In Support of Motion to Dismiss Without Prejudice for Improper Venue filed February 26, 2010, as Document 17 on the docket (“LegalZoom’s Suggestions”), and Reply Suggestions in Support of Motion to Dismiss Without Prejudice for Improper Venue filed April 12, 2010, as Document 16 on the docket (“LegalZoom’s Reply Suggestions”), both of which are hereby incorporated by reference.

In order to preserve Plaintiffs’ agreed-to right to bring their claims in the California state courts sitting in the city of Los Angeles, the Court should therefore dismiss this action without prejudice to refile the action in a state or federal court sitting in the city of Los Angeles,

California. *GMAC*, 198 F.R.D. at 409 (“Because dismissal preserves plaintiff’s decision to file in the state or federal courts of Arkansas, this court dismisses this action without prejudice to refiling the action in the state courts of Pulaski County, Arkansas or the United States District Court for the Eastern District of Arkansas.”).²

II. IN THE ALTERNATIVE, THE COURT SHOULD TRANSFER VENUE TO THE CENTRAL DISTRICT OF CALIFORNIA

As an alternative to dismissal, and in accordance with the Court’s June 1, 2010 Order, LegalZoom also moves the Court, pursuant to 28 U.S.C. § 1404(a), to transfer venue in this case to the United States District Court for the Central District of California. In assenting to the forum selection clause on the LegalZoom website, Plaintiffs agreed to bring any claims in the state or federal courts situated in the city of Los Angeles. Transfer to the Central District of California will be more convenient for the parties and witnesses and is in the interests of justice.

Section 1404(a) provides that “[f]or 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.” 28 U.S.C. § 1404(a). Venue in civil actions is governed by 28 U.S.C. § 1391(a), which provides that, in actions in which the court’s jurisdiction is based solely on diversity, cases 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 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.

² That LegalZoom might later seek to remove any action brought by Plaintiffs in state court in Los Angeles should not affect this Court’s decision to dismiss. *GMAC*, 198 F.R.D. at 409 (“Although defendant would be able to remove to federal court an action filed by plaintiff in Arkansas state court, this court cannot and should not rule in anticipation of what defendant may or may not do.”).

28 U.S.C. § 1391(a). The only defendant, LegalZoom resides in the Central District of California, where its officers direct, control, and coordinate its activities. Hartman Declaration in Support of Motion to Reconsider or Transfer at ¶ 4. See *Hertz Corp. v. Friend*, ___ U.S. ___, 130 S. Ct. 1181 (2010). Because LegalZoom resides in the Central District of California, venue is proper in that district under section 1404(a)(1). And because the case “might have been brought” in the Central District of California, the case may therefore be transferred there if the other requirements of section 1404(a) are satisfied.

The Eighth Circuit requires district courts to analyze motions to transfer under three broad factors that track the language of section 1404(a): “The statutory language reveals three general categories of factors that courts must consider when deciding a motion to transfer: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice.” *Terra Int’l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 691 (8th Cir. 1997).

Looming over these factors, however, is the forum selection clause to which Plaintiffs have assented. As the Supreme Court held in *Stewart*, “[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” under section 1404(a). 487 U.S. at 29. Indeed, the presence of a forum selection clause alters the topography of the transfer decision, shifting the burden and requiring the plaintiff to demonstrate why the clause should not be enforced:

The moving party on a motion to transfer generally bears the burden of showing that the forum should be changed. . . . The presence of a forum selection clause, however, means that “the burden shifts to the plaintiff to demonstrate exceptional facts explaining why he should be relieved from his contractual duty.”

Huntingdon Eng’g & Envtl. Inc. v. Platinum Software Corp., 882 F. Supp. 54, 57-58 (W.D.N.Y. 1995), citing *Weiss v. Columbia Pictures Television, Inc.*, 801 F. Supp. 1276, 1278 (S.D.N.Y. 1992). See also *Terra Int’l, Inc. v. Mississippi Chem. Corp.*, 922 F. Supp. 1334, 1367 (N.D.

Iowa 1996) (citing *Huntingdon*). The existence of a valid forum selection clause will therefore bear strongly upon the Court's analysis of all three prongs of section 1404(a).

A. Convenience of the Parties

The presence of a valid forum selection clause colors the analysis of the convenience of transfer to the parties. Plaintiffs can be expected to argue that transfer of this action to the Central District of California will be more inconvenient to them than litigating their claims in Missouri. Conversely, defending against Plaintiffs' claims in Missouri will be more inconvenient to LegalZoom than litigating in the Central District of California, where LegalZoom is headquartered, where its witnesses are located, and where its documents are stored.³ Hartman Declaration in Support of Motion to Reconsider or Transfer ¶ 4. That is why it is reasonable for LegalZoom to ask its customers to agree to venue in Los Angeles. *See GMAC*, 198 F.R.D. at 408 (“Defendant had a good faith basis for selecting Arkansas as its forum for disputes with vendors since Arkansas is defendant’s princip[al] place of business and the place where its employees and relevant documents are located.”).

Where one party or another will be inconvenienced in either forum, the parties' contractual agreement must be given effect. *GMAC*, 198 F.R.D. at 408 (“In considering defendant’s motion to transfer venue under § 1404(a), there is no reason for this court to decline to give weight to the expression of the contracting parties’ preference that venue lie in Arkansas”)

³ While the location of documents might appear to be less significant now than in the past, the Eighth Circuit quite recently held that this factor still favors transfer to the venue in which documents are stored. “The district court found that the location of documents did not favor transfer in ‘this age of electronic document transmissions.’ . . . While electronic filing may lessen the inconvenience of document handling, if the need arises to refer to original documents or evidence in the litigation, Northern California would prove more convenient.” *In re Apple, Inc.*, 602 F.3d 909, 914 (8th Cir. 2010). Thus, this factor also favors transfer to Los Angeles.

where “[t]here is no showing that Arkansas is any less convenient to plaintiff than New York is to defendant . . .”).

A plaintiff’s later assessment of convenience is entitled to no deference in the presence of a forum selection clause. “[I]n a case where the parties have already agreed to a particular forum, the “convenience of the parties” weighs heavily in favor of hearing the case in the designated court.” *Beatie & Osborn LLP v. Patriot Scientific Corp.*, 431 F. Supp. 2d 367, 396 (S.D.N.Y. 2006) (quoting *Falconwood Fin. Corp. v. Griffin*, 838 F. Supp. 836, 840 (S.D.N.Y. 1993)). In the district court opinion in *Terra*, which earned the Eighth Circuit’s broad approval, the court held that a valid and enforceable forum selection clause trumps the plaintiff’s choice of forum. “[T]he plaintiff’s choice of forum, ordinarily the subject of considerable deference, as *Terra* asserts, is not properly given deference ‘where the plaintiff has already freely contractually chosen an appropriate forum.’” *Terra*, 922 F. Supp. at 1367 (quoting *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995)). This is because “it may be assumed that parties consider the inconvenience of the forum at the time they enter a contract” *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 727 (8th Cir. 2001); *see also Dick Proctor Imports, Inc. v. Sumitomo Corp. of Am.*, 486 F. Supp. 815, 818 (E.D. Mo. 1980) (“Any inconvenience to plaintiff should have been foreseen when the agreement was signed.”).

As LegalZoom established in the briefing on its motion to dismiss, the forum selection clause on its website was part of a valid, binding contract. LegalZoom showed that Plaintiffs entered into the contract freely and not as the product of any undue influence or unequal bargaining power. Plaintiffs have not alleged that the contract was due to fraud or bad faith. The clause is therefore binding upon them. *See* LegalZoom’s Suggestions and LegalZoom’s Reply Suggestions, both of which are incorporated by reference in this Motion to Transfer Venue.

Because Plaintiffs have “freely contractually chosen” the courts in Los Angeles as the “appropriate forum,” *Terra*, 922 F. Supp. at 1367, the element of convenience of the parties favors transfer to the Central District of California.

B. Convenience of Witnesses

The factor of convenience to witnesses lies indisputably in LegalZoom’s favor. In both LegalZoom’s Rule 26(a)(1)(A) Initial Disclosures and in the Hartman Declaration in Support of Motion to Reconsider or Transfer, LegalZoom identifies a number of its employees, all resident in California, whose testimony will be relevant to this action:

- Brian Liu, Co-Founder and Chairman, who can testify as to historical information regarding LegalZoom;
- Scott MacDonnell, Vice President, Consumer Marketing for LegalZoom, who can testify as to LegalZoom’s marketing of its online document preparation services for consumers;
- Tim Bint, Vice President of Finance and Controller, who can testify as to LegalZoom’s customer accounts, including fees paid by LegalZoom customers in Missouri for online document preparation services;
- Frank Monestere, President and Chief Operating Officer, who can testify as to LegalZoom’s operations of its online document preparation services for consumers;
- Eddie Hartman, Chief Strategy Officer, who can testify as to LegalZoom’s technology related to automatic document creation, operations, customer accounts, and marketing;
- Adam Thomas, Vice President and General Manager of Intellectual Property, who can testify as to LegalZoom’s intellectual property online document preparation services;
- Jake Varghese, Vice President and General Manager of Business Services, who can testify as to LegalZoom’s business services online document preparation services;
- Nelly Jacobo, Vice President and General Manager of Personal Services, who can testify as to LegalZoom’s personal services online document preparation services; as well as

- Present and former officers, employees, and agents of LegalZoom, who can testify as to LegalZoom's operations, customer accounts with Missouri residents, and marketing.

See Defendant's Rule 26(a)(1)(A) Initial Disclosures, attached as Exhibit A to Declaration of Robert M. Thompson in Support of Motion to Reconsider or, In the Alternative, to Transfer Venue ("Thompson Declaration"), submitted with this Motion; Hartman Declaration in Support of Motion to Reconsider or Transfer ¶ 5.

Plaintiffs' Initial Disclosures, on the other hand, identify as witnesses the named plaintiffs and one witness who assisted a named plaintiff in using the LegalZoom website. These four witnesses all reside in Missouri. Plaintiffs' Initial Disclosures Under Rule 26(a)(1), attached as Exhibit B to Thompson Declaration. Plaintiffs' Disclosure also acknowledges, however, that "representatives of Defendant are also likely to have information related to the allegations in the amended class action petition." *Id.* This further tips the balance of convenience toward transfer to Los Angeles.

Thus, the "convenience of witnesses" factor also favors transfer to the Central District of California, where the greater portion of witnesses will be available.

C. Interests of Justice

In an opinion reviewing a decision on a section 1404(a) motion to transfer, the Eighth Circuit spoke approvingly of the district court's analysis of the "interests of justice" under a number of discrete factors:

Under the category titled "Interest of Justice" the court also considered (1) judicial economy, (2) the plaintiff's choice of forum, (3) the comparative costs to the parties of litigating in each forum, (4) each party's ability to enforce a judgment, (5) obstacles to a fair trial, (6) conflict of law issues, and (7) the advantages of having a local court determine questions of local law.

Terra, 119 F.3d at 696 (citing *Terra*, 922 F. Supp. at 1361-63).

The district court in *Terra* regarded judicial economy as a matter of taking advantage of the opportunity to consolidate multiple pending actions. *See Terra*, 922 F. Supp. at 1362-63. Because that feature is absent in this case, this factor bears no weight in either direction.

As previously discussed in the context of the convenience of the parties, the district court in *Terra* held that the plaintiff's choice of forum is not entitled to deference where the plaintiff has chosen a forum by means of a forum selection clause. *Terra*, 922 F. Supp. at 1367. The court thus enforced the forum selection clause at issue in the case. *Id.* at 1382. Here, likewise, the interests of justice favor enforcing Plaintiffs' agreement to litigate their claims in Los Angeles.

In dealing with the next listed factor, the *Terra* court noted that the element of "comparative costs to the parties of litigating in each forum" was subsumed by the analysis of convenience to the parties and witnesses. *Id.* at 1364. As laid out above, those elements favor transfer to the Central District of California in this case. Thus, the balance of comparative costs to the parties favors transfer in this case as well.

As to the next two factors under the heading of "Interest of Justice," the district court in *Terra* held that "[t]he court sees no difficulty in either party enforcing a favorable judgment on its claims in either federal forum, . . . and thus does not find this factor decisive. Nor does the court find any relative advantages or obstacles to a fair trial for either party in either forum." *Id.* (citation omitted). These factors are likewise neutral here.

As to conflicts of law and familiarity with applicable law, LegalZoom notes that the Terms of Service to which Plaintiffs assented designate California law as the applicable law: "I agree that California law shall govern any disputes arising from my use of this website" *See Hartman Declaration in Support of Motion to Dismiss* at ¶¶ 6-8 and Exhibits B and C attached

thereto. Even if Missouri law is ultimately held to apply to Plaintiffs' claims, however, as the district court in *Terra* observed, "the court is not convinced that the Mississippi federal court would less competently address claims founded on Iowa law than this court would address claims or counterclaims founded on Mississippi law." 922 F. Supp. at 1364. Substitute "California" for "Mississippi" and "Missouri" for "Iowa" and the same general principle approved by the Eighth Circuit in *Terra* applies here. Compare *ASAI, Inc. v. Guest Reddick, Inc.*, No. 09-0041-CV-W-FJG, 2009 WL 1657436, at *3 (W.D. Mo. June 10, 2009) (ordering transfer and noting, under both "convenience" and "interest of justice" factors, that "Defendant argues that the District of Arkansas is more familiar with Arkansas law than is the District of Missouri. However, federal courts routinely apply the law of foreign jurisdictions, so the Court finds that this factor is neutral.").

The final word on the interests of justice comes from the Eighth Circuit in the related context of personal jurisdiction. In *Dominium Austin*, 248 F.3d at 726, the court held that "[d]ue process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause." In enforcing a forum selection clause agreeing to jurisdiction in Chicago, the United States District Court for the Eastern District of Missouri quoted this language with approval. *Paramont Props., LLC v. La Salle Bank N.A.*, No. 4:08CV00193MLM, 2008 WL 948284, at *4 (E.D. Mo. Apr. 4, 2008).

Transfer to the Central District of California will be more convenient for the parties and witnesses and is in the interests of justice. Accordingly, therefore, in the alternative to dismissal without prejudice to refile in a state or federal court sitting in Los Angeles, this Court should transfer venue to the Central District of California pursuant to section 1404(a).

CONCLUSION

For the foregoing reasons, LegalZoom requests that the Court reconsider its Order denying LegalZoom's motion to dismiss and grant LegalZoom's motion, dismissing Plaintiffs' action without prejudice to refiling the action in a state or federal court sitting in the city of Los Angeles, California. In the alternative, LegalZoom requests the Court to transfer this action to the Central District of California pursuant to 28 U.S.C. § 1404(a).

Dated: June 16, 2010

Respectfully submitted,

BRYAN CAVE LLP

By: s/ James T. Wicks

Robert M. Thompson MO #38156

James T. Wicks MO #60409

One Kansas City Place

1200 Main Street, Suite 3500

Kansas City, MO 64105

Tel.: (816) 374-3200

Fax: (816) 374-3300

John Michael Clear MO #25834

Michael G. Biggers MO #24694

James R. Wyrsh MO #53197

One Metropolitan Square – Suite 3600

211 North Broadway

St. Louis, MO 63102

Tel.: (314) 259-2000

Fax: (314) 259-2020

Attorneys for LegalZoom.com, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2010, the foregoing was electronically filed with the Clerk of Court and served by operation of the Court's electronic filing system upon all counsel of record.

Timothy Van Ronzelen
Matthew A. Clement
Kari A. Schulte
COOK, VETTER, DOERHOFF &
LANDWEHR, PC
231 Madison
Jefferson City, MO 65101
tvanronzelen@cddl.net
mclement@cddl.net
kschulte@cddl.net

David T. Butsch
James J. Simeri
Mathew R. Fields
BUTSCH SIMERI FIELDS LLC
231 South Bemiston Ave., Suite 260
Clayton, MO 63105
butsch@bsflawfirm.com
simeri@bsflawfirm.com
fields@bsflawfirm.com

Edward D. Robertson, Jr.
Mary Doerhoff Winter
BARTIMUS, FRICKLETON, ROBERTSON
& GORNY
715 Swifts Highway
Jefferson City, MO 65109
chiprob@earthlink.net
marywinter@earthlink.net

Randall O. Barnes
RANDALL O. BARNES & ASSOCIATES
219 East Dunklin Street, Suite A.
Jefferson City, MO 65101
rbarnesjclaw@aol.com

Steven E. Dyer
10805 Sunset Office Drive, Suite 300
St. Louis, MO 63127
jdcpamba@gmail.com

s/ James T. Wicks _____