

Robert E. Mansfield (#6272)
Todd Shaughnessy (#6651)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Beneficial Tower
Salt Lake City, UT 84101-1004
(801) 257-1900 Telephone
(801) 257-1800 Facsimile

Jeffery M. Lillywhite
953 East 12400 South, Suite A
Draper, UT 84020
(801)416-0746

*Attorneys for Third-Party Defendant Pacific
Webworks, Inc.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

GOOGLE, INC., a Delaware corporation,
Plaintiff,

vs.

BLOOSKY INTERACTIVE, LLC
Defendant, Third-Party Plaintiff

vs.

PACIFIC WEBWORKS, INC., a Nevada
corporation, VIABLE MARKETING, a Florida
corporation doing business as View Marketing,
WEALTH TOOLS INTERNATIONAL, a Utah
limited liability company, VIRGIN OFFERS
MEDIA INTERNATIONAL, a Utah limited
liability company, IWORKS, a Utah corporation,
CPA UPSELL, a California corporation

Third-Party Defendants

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS BLOOSKY'S
THIRD-PARTY COMPLAINT**

Civil No.: 2:09-cv-01068-BSJ

Honorable Judge Bruce S. Jenkins

Defendant Pacific WebWorks, Inc. (“WebWorks”) hereby moves to dismiss the Third-Party Complaint filed by Bloosky Interactive, LLC (“Bloosky”) based on improper venue and failure to state a claim upon which relief may be granted.

SUMMARY

This Court should dismiss Bloosky’s Third Party Complaint for improper venue and failure to state a claim upon which relief may be granted. Each of Bloosky’s third-party claims against WebWorks is based on indemnification provisions in contracts between Bloosky and WebWorks, all of which contain exclusive jurisdiction provisions. With its Third-Party Complaint, Bloosky is asking the Court to honor the contractual terms for which the parties bargained. With this motion to dismiss, WebWorks asks this Court to do the same. The contracts which underlie Bloosky’s third-party claims all contain mandatory forum selection clauses requiring any litigation arising under their terms to take place in either California or Nevada. These contractual provisions were bargained for by sophisticated business parties and should be enforced.

Furthermore, because the identical indemnification provisions raised in Bloosky’s Third-Party Complaint are now at issue in two jurisdictions — and will likely arise in additional jurisdictions — judicial economy and fundamental fairness dictate that the Court dismiss Bloosky’s Third-Party Complaint so that these claims can be raised in the jurisdiction bargained for by WebWorks and Bloosky.

STATEMENT OF FACTS

1. This case began when Google filed a Complaint against WebWorks on December 7, 2009. (Complaint, Dkt. No. 2, Dec. 7, 2009.)

2. Google filed an Amended Complaint to add Bloosky as a co-defendant on May 18, 2010. (Am. Compl., Dkt. No. 44, May 18, 2010.) In the Amended Complaint, Google alleged causes of action against WebWorks, Bloosky, and unnamed defendants for (1) trademark infringement; (2) dilution; (3) unfair competition; (3) cyber-piracy under the Lanham Act, 15 U.S.C. § 1114 and 1125(a), (c) and (d); (4) state law trademark dilution under Utah Code Ann. §

70-3a-403; (5) common law trademark infringement; (6) violations of the Utah Consumer Sales Practice Act, Utah Code Ann. § 13-11-1- § 13-11-6 and § 13-11-19; and (7) violations of the Utah Unfair Competition Act, Utah Code Ann. §§ 13-5a-102 and 13-5a-103. (*Id.*, Preface.)

3. Google alleged that Bloosky worked with WebWorks and “created infringing Internet advertising, hosted infringing content on credit card processing sites and directed consumers to infringing websites that it owned and/or controlled.” (Am. Compl., ¶ 37.)

4. On May 24, 2010, Google and WebWorks filed a Stipulated Motion for Entry of Judgment and Order for Permanent Injunction against WebWorks. (Dkt. No. 46, May 24, 2010.)

5. On June 2, 2010, this Court entered the Stipulated Final Judgment and Order for Permanent Injunction Against Defendant Pacific WebWorks, Inc. (hereinafter “Stipulated Final Judgment”). (Dkt. No. 48, June 2, 2010.)

6. Under the Stipulated Final Judgment, Google’s causes of action against Pacific WebWorks were dismissed with prejudice as of June 2, 2010. The causes of action against Bloosky remained active. (*Id.* ¶ 13.)

7. On July 14, 2010, Bloosky filed a Third-Party Complaint against WebWorks (hereinafter “Third-Party Claim”). (Defendant and Third-Party Plaintiff Bloosky Interactive’s Third-Party Claim, Dkt. No. 60, July 16, 2010.) In its Third-Party Claim, Bloosky alleges the following causes of action against PWW: (1) breach of contract; (2) contractual indemnification; (3) equitable indemnification; and (4) contribution.

8. Bloosky’s claims are based on various contracts it entered with WebWorks allegedly associated with the advertising and marketing of WebWorks’ products. (Third-Party Claim, ¶¶ 14-20.) Each of the causes of action brought by Bloosky against WebWorks relate to three contracts between Bloosky and WebWorks. (*Id.*) In count one, Bloosky alleges that WebWorks breached the Master Advertising Agreement and Insertion Order by providing it with advertising that violated the law, as alleged in the Google complaint. (Third-Party Claim, ¶¶ 14, 46-47.) (For the convenience of the Court, these contracts are attached as Exhibit A and Exhibit B, respectively, to this Motion.) In count two, Bloosky alleges that Webworks is required to

indemnify it for any liability arising out of this action under the Master Advertising Agreement, Insertion Order, and Settlement Agreement. (*Id.* ¶¶ 52-57.) In count three, its equitable indemnification claim, Bloosky alleges, in part, that WebWorks was “negligent, misrepresented certain facts, breached fiduciary duties, and/or breached contracts with Bloosky.” (*Id.* ¶ 61.) In count four, its contribution claim, Bloosky alleges that it is not responsible for any liability arising from its contracts with WebWorks and consequently is entitled to a contribution from WebWorks covering any judgment against Bloosky. (*Id.* ¶¶ 65-68.)

9. Each of the contracts underlying Bloosky’s Third-Party Claim contains a forum-selection clause. For instance, the Master Advertising Agreement, attached hereto as Exhibit A, contains the following forum selection clause: “This Agreement shall be governed by the laws of the State of Nevada without respect to choice of law rules and the Parties hereby consent to exclusive jurisdiction and venue in the state and federal courts in and serving Clark County, Nevada.” (Master Advertising Agreement, §10.10, attached hereto as Exhibit A; *Id.*, Ex. A to Third-Party Claim, Dkt. No. 60, July 16, 2010.)

10. The “Online Success Kit” Insertion Order between WebWorks and Bloosky, attached hereto as Exhibit B, contains the following forum selection clause: “This IO shall be governed by the laws of the State of California without respect to choice of law rules and the Parties hereby consent to exclusive jurisdiction and venue in the state and federal courts in and serving Orange County, California.” (Insertion Order, ¶ 5, attached hereto as Exhibit B; *Id.*, Ex. A to Third-Party Claim, Dkt. No. 60, July 16, 2010.)

11. The “Settlement and Release Agreement” between WebWorks and Bloosky, attached hereto as Exhibit C, contains the following forum selection clause: “This Agreement shall be interpreted in accordance with the laws of the State of California. Any litigation shall be brought in a court of competent jurisdiction in the County of Orange, California, or in the U.S. District Court for the Central District of California (Southern Division), and the parties hereby expressly consent to personal jurisdiction and venue in such forums.” (Settlement and Release

Agreement, ¶ 14, attached hereto as Exhibit C; Id., Ex. A to Third-Party Claim, Dkt. No. 60, July 16, 2010.)

12. Parties represented by Edelson McQuire LLC, have brought class action cases against WebWorks based on its marketing practices in Illinois, Washington, California, Missouri, and Florida. (Decl. of R. Mansfield, ¶ 2.) Bloosky has been added as a co-defendant in the Illinois and Washington class actions. (Id. ¶ 3.) Given the nature of WebWork's marketing relationship with Bloosky, WebWorks anticipates that Bloosky will be added as a co-defendant in more of these class action cases. (Id.)

13. In the Illinois action, Bloosky recently brought a Cross-Complaint against WebWorks. (Ford, et al. v. Pacific WebWorks, Inc., et al., Case No. 09-07867-JHL/MD, Cross-Complaint, Dkt. No. 51, Aug. 3, 2010.) In this Cross-Complaint, Bloosky alleges (1) breach of written contract, (2) equitable indemnification, and (3) contribution against WebWorks based on the same indemnification clauses in the Master Advertising Agreement, "Online Success Kit" Insertion Order, and the Settlement and Release Agreement which form the heart of its Third-Party Claim in this action. (Decl. of R. Mansfield, ¶ 4.)

ARGUMENT

I. Bloosky's Third-Party Claim Should be Dismissed Based on Mandatory Forum Selection Clauses Designating Jurisdiction and Venue.

Bloosky's Third-Party Claim against WebWorks should be dismissed under Rules 12(b)(3) and 12(b)(6) for improper venue and failure to state a claim upon which relief may be granted. Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir. 1992) ("A motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue under Fed.R.Civ. P. 12(b)(3)."); United Intern. Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1222 (10th Cir. 2000) ("Forum selection issues raise concerns . . . of improper venue or failure to state a claim on which relief may be granted."). All of Bloosky's third-party claims arise from contracts between WebWorks and Bloosky, which each contain a mandatory venue and jurisdiction provision requiring that any suit arising under

the contract be subject to the exclusive jurisdiction and venue of either Nevada or California. (Statement of Facts ¶¶ 8-11.) Because the parties also contracted that Nevada or California law would govern, this Court should interpret the validity and meaning of a forum selection clause by reference to those states' laws. *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006) ("We see no particular reason . . . why, a forum-selection clause, among the multitude of provisions in a contract, should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties."); *Brahma Group, Inc. v. Benham Constructors, LLC*, 2009 WL 1065419, at *5-6 (D. Utah, Apr. 20, 2009) (interpreting a forum selection clause under the choice of law designated in the contract).

Even though Bloosky alleges only one cause of action expressly in contract, its contractual and equitable indemnification claims, as well as its contribution claim, arise directly out of the contractual relationship between WebWorks and Bloosky. (*Id.*) Because each third-party claim arises from the parties' contractual relationship, the forum selection provisions in these contracts govern each of the third-party claims. *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1149 (Cal. 1992) (holding that the parties' contractual "choice-of-law clause is fully enforceable and applicable to claims for breach of the implied covenant of good faith and fair dealing and for breach of fiduciary duties allegedly arising out of the contract"); *Cal-State Business Products & Services, Inc. v. Ricoh*, 16 Cal. Rptr.2d 417, 423 (Cal. Ct. App. 1993) ("a valid choice-of-law clause, which provides that a specific body of law governs the agreement between the parties, encompasses all causes of action arising from or related to that agreement, regardless of how they are characterized . . . We see no reason to read any differently language in a choice-of-forum clause which is identical to that just emphasized").

The California Supreme Court provides that "forum selection clauses are valid and may be given effect, in the court's discretion and in the absence of a showing the enforcement of such a clause would be unreasonable." *Smith, Valentino & Smith, Inc. v. Superior Court*, 551 P.2d 1206, 1209 (Cal. 1976). California recognizes a policy preference for courts to decline "to exercise jurisdiction in recognition of the parties' free and voluntary choice of a different

forum.” *Id.* at 1209. In order to defeat a motion to dismiss based on a forum selection clause, the plaintiff bears the burden of showing that the bargained-for forum “would be unavailable or unable to accomplish substantial justice.” *CQL Original Products, Inc. v. National Hockey League Players’ Assn.*, 46 Cal. Rptr.2d 412, 416 (Cal. Ct. App. 1995). “Mere inconvenience and additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideration for these things.” *Smith*, 551 P.2d at 1209 (internal citations and quotation marks omitted). Likewise, the Nevada Supreme Court recognizes the validity of forum selection clauses, particularly when “such forum selection provisions have been obtained through ‘freely negotiated’ agreements and are not ‘unreasonable and unjust.’” *Tandy Computer Leasing, v. Terina’s Pizza, Inc.*, 784 P.2d 7, 8 (Nev. 1989) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n. 14 (1985)).

The forum selection clauses at issue here are mandatory; they require that suits related to the contracts be brought in California or Nevada. When forum selection clauses are mandatory, as opposed to permissive, they should be enforced “without any analysis of convenience; the only question is whether enforcement of the clause would be unreasonable.” *Intershop Communications v. Superior Court*, 127 Cal. Rptr. 2d 847, 850 (Cal. Ct. App. 2002). Clauses that clearly designate a specific forum as “exclusive” or use compulsory language like “shall” — as is the case with each of the three contracts at issue here — are mandatory, under a plain language analysis of their terms. *Id.* at 851 (citing *Cal-State Business Products & Services, Inc. v. Ricoh*, 46 Cal. Rptr. 2d 417, 420 n. 4 (Cal. Ct. App. 1993.)); cf. Ringle v. Bruton, 86 P.3d 1032, 1039 (Nev. 2004) (“when a contract is clear, unambiguous, and complete, its terms must be given their plain meaning and the contract must be enforced as written”).

Each of the contracts Bloosky relies upon to assert its third-party claims has a mandatory forum selection clause. The “Online Success Kit” Insertion Order and the Settlement & Release Agreement contain mandatory language dictating exclusive jurisdiction and venue in state or federal courts in Orange County, California for disputes arising under those contracts. (Statement of Facts ¶¶ 10-11.) By entering the Master Advertising Agreement, the parties

consented to exclusive jurisdiction and venue in Clark County, Nevada, for disputes arising under that contract. (Statement of Facts ¶ 9.) The plain meaning of the terms, “exclusive” and “shall,” coupled with a specific designation of both jurisdiction and venue shows that the forum selection clauses entered into between WebWorks and Bloosky are mandatory. Given the strong policy favoring enforcement of forum selection clauses, the Court should dismiss Bloosky’s Third-Party Claim against WebWorks for improper venue and failure to state a claim upon which relief may be granted.

II. Forum Selection Clauses Should Be Enforced Even When the Parties Assert Claims Under Supplemental Jurisdiction

Bloosky’s assertion of supplemental jurisdiction under 28 U.S.C. § 1337 does not change the enforceability of the forum selection clauses in the contracts at issue. (Third-Party Claim, ¶ 8.) Although the court can exercise supplemental jurisdiction under 28 U.S.C. § 1337 in its discretion, the enforcement of private contract rights — in this instance, forum selection clauses — trumps the court’s consolidation of actions under supplemental jurisdiction. The case of U.S. Fidelity & Guar. Co. v. Petroleo Brasileiro S.A. – Petrobras, 2001 WL 300735 (S.D.N.Y. Mar. 27, 2001), squarely addressed the issue. In Petrobras, a co-defendant moved to dismiss crossclaims based on mandatory forum selection clauses. The cross-claimants argued that the strong presumption in favor of forum selection clauses should not apply because of the purportedly stronger policy preference for granting supplemental jurisdiction. Id. at *16. The court rejected the premise of this argument: “[s]imply because a court has jurisdiction does not mean that a court should exercise that jurisdiction and refuse to enforce a forum selection clause.” Id. To do so would unduly limit parties’ private rights to contract. Id. (“Dismissal of claims based on a forum selection clause is not based on lack of jurisdiction, but rather is based on the principle that the court should not exercise its jurisdiction because the parties chose by private contract to litigate those cross-claims in another forum.”). In sum, this Court has wide latitude to enforce the forum selection clauses at issue regardless of the jurisdiction hook used by the third-party plaintiff.

III. Judicial Economy and Fundamental Fairness Weigh in Favor of Dismissal.

There are strong public policy interests in favor of determining the indemnification issues raised in Bloosky's Third-Party Claim in the jurisdictions previously designated by the parties. Parties represented by Edelson McGuire LLC have brought almost identical class action cases against WebWorks in Illinois, Washington, California, Missouri, and Florida. (Statement of Facts, ¶ 12.) Allegations relating to WebWorks' marketing and advertising campaigns are at the heart of these class action cases, just as they are in this action. Bloosky has already been added as a defendant in the Illinois and Washington actions. (Id.) Given the nature of WebWork's marketing relationship with Bloosky and the course these similar cases have taken, WebWorks anticipates that Bloosky will be added as a co-defendant in a number of these actions. WebWorks also anticipates that Bloosky will file claims against WebWorks based on its contractual indemnification agreements, as it has done in this case and in the Illinois class action. (Id. ¶¶ 12-13; Decl. of R. Mansfield ¶¶ 3-4.) In the Illinois class action, Bloosky brought a Cross-Complaint against WebWorks alleging (1) breach of written contract, (2) equitable indemnification, and (3) contribution against WebWorks based on the same indemnification clauses in the Master Advertising Agreement, "Online Success Kit" Insertion Order, and the Settlement and Release Agreement which form the heart of its Third-Party Claim here. (Decl. of R. Mansfield, ¶ 4.)

In order to avoid inconsistent interpretations in different jurisdictions at different times, judicial economy and fairness dictate that Bloosky bring all of their contract-based indemnification claims in the forum previously selected by the parties. See Bugna v. Fike, 95 Cal. Rptr.2d 161, 165 (Cal. Ct. App. 2000) (holding that honoring forum selection clauses is consistent with "general principles of judicial economy by making all parties closely allied to the contractual relationship accountable in the same forum, thereby abating a proliferation of actions and inconsistent rulings"). Based upon these principles, this Court should dismiss Bloosky's Third-Party Claim against Webworks.

CONCLUSION

This Court's exercise of jurisdiction over WebWorks would be contrary to enforceable, mandatory forum selection clauses entered into by WebWorks and Bloosky. In addition, judicial economy and fairness require that the various third party claims asserted by Bloosky be litigated in the forum selected by the parties, and not in several different jurisdictions. Accordingly, WebWorks respectfully requests that this Court dismiss the Bloosky's Third-Party Claim without prejudice.

DATED this 1st day of September, 2010.

SNELL & WILMER, L.L.P.

/s/ Robert E. Mansfield
Robert E. Mansfield (#6272)
Todd Shaughnessy (#6651)
Attorneys for Pacific WebWorks, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2010, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BLOOSKY'S THIRD-PARTY COMPLAINT** to be served by ECF on the following:

George M. Haley
Blaine J. Benard
Craig A. Buschmann
Holme Roberts & Owen LLP
299 South Main Street, Suite 1800
Salt Lake City, UT 84111-2263
(801)521-5800
blaine.benard@hro.com
craig.buschmann@hro.com
george.haley@hro.com

Roger R. Myers
Holme Roberts & Owen LLP
560 Mission Street, 25th Floor
San Francisco, CA 94105-2994
roger.myers@hro.com

Scott R. Bialecki
Holme Roberts & Owen LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203
scott.bialecki@hro.com

Kenneth C. White
Bloosky Interactive LLC
9 Pasteur, Suite 100
Irvine, CA 92618
(866)200-5883
kwhite@bloosky.com

Loren E. Weiss
Van Cott, Bagley, Cornwall & McCarthy
36 S. State Street, Suite 1900
PO Box 45340
Salt Lake City, UT 84111
(801)532-3333
lweiss@vancott.com

Jeffery M. Lillywhite
953 East 12400 South, Suite A
Draper, UT 84020
(801)416-0746
jlillywhitepc@comcast.net

Blair R. Jackson
Gregory J. Christiansen
Christiansen & Jackson PC
10421 South Jordan Gateway Suite 600
South Jordan, UT 84095
(801)576-2662
blair@cjlawnv.com
greg@cjlawnv.com

Blaine C. Kimrey
Bryan K. Clark
Lathrop & Gage LLP (IL)
100 North Riverside Plaza, Suite 2100
Chicago, IL 60606
(312)920-3302
bkimrey@lathropgage.com
bclark@lathropgage.com

A. Jeff Ifrah
Amy M. Lloyd
Ifrah PLLC
1627 I Street NW, Suite 1100
Washington, DC 20006
(202)912-4823
jeff@ifrahlaw.com
alloyd@ifrahlaw.com

/s/ Mindi Mordue