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Attorneys for defendant Bloosky Interactive, LLC

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

GOOGLE, INC., a Delaware corporation, Plaintiff, v. BLOOSKY INTERACTIVE, LLC, a Nevada limited liability company, and DOES 2-50, Defendant.	**THIRD-PARTY PLAINTIFF BLOOSKY INTERACTIVE, LLC'S RESPONSE TO THIRD-PARTY DEFENDANT PACIFIC WEBWORKS, INC.'S MOTION TO DISMISS** Case No. 09-cv-1068-BSJ District Judge Bruce S. Jenkins

Bloosky Interactive, LLC's ("Bloosky") third-party claims against Pacific WebWorks, Inc. ("PWW") arise primarily out of, and depend upon, the same set of facts and issues as plaintiff Google, Inc.'s ("Google") underlying claims against PWW and Bloosky in this action, not a prior contractual relationship between Bloosky and PWW. Consequently, no forum selection clause in any agreement between Bloosky and PWW governs all of Bloosky's third-

party claims. Even if all of Bloosky's claims did arise directly out of a prior agreement between Bloosky and PWW, however, enforcement of the forum selection clause in such an agreement would be unreasonable under the circumstances of this case. Indeed, enforcement of any of the forum selection clauses PWW relies upon would result in parallel proceedings in different forums on the same set of facts and issues. This would be a gross waste of the parties' and the Court's resources, and numerous Courts have refused to enforce forum selection clauses under such circumstances.

I. RESPONSE TO STATEMENT OF FACTS[1]

1. This case began when Google filed a Complaint against WebWorks on December 7, 2009.

RESPONSE: Uncontroverted.

2. Google filed an Amended Complaint to add Bloosky as a co-defendant on 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; [4] cyber-piracy under the Lanham Act, 15 U.S.C. § 1114 and 1125(a), (c), and (d); [5] state law trademark dilution under Utah Code Ann. § 70-3a-403; [6] common law trademark infringement; [7] violations of the Utah Consumer Sales Practice Act, Utah Code Ann. § 13-11-1 – 13-11-6 and § 13-1-19; and [8] violations of the Utah Unfair Competition Act, Utah Code Ann. §§ 13-5a-102 and 13-5a-103.

RESPONSE: Controverted, given that cyber-piracy under the Lanham Act can arise only under 15 U.S.C. § 1125(d). Otherwise, uncontroverted.

[1] Bloosky includes this section in its response only because PWW in its motion included a statement of facts, as if its motion were a motion for summary judgment. Bloosky identified several errors and/or mischaracterizations in PWW's statement, and Bloosky responds accordingly herein.

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."

RESPONSE: Uncontroverted.

4. On May 24, 2010, Google and WebWorks filed a Stipulated Motion for Entry of Judgment and Order for Permanent Injunction against WebWorks.

RESPONSE: Uncontroverted.

5. On June 2, 2010, this Court entered the Stipulated Final Judgment and Order for Permanent Injunction Against Defendant Pacific WebWorks, Inc.

RESPONSE: Uncontroverted.

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.

RESPONSE: Uncontroverted.

7. On July 14, 2010, Bloosky filed a Third-Party Complaint against WebWorks. 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.

RESPONSE: Controverted, given that Bloosky filed its Third-Party Claim on July 16, 2010. (Dkt. No. 60). Otherwise, uncontroverted.

8. Bloosky's claims are based on various contracts in entered with WebWorks allegedly associated with the advertising and marketing of WebWorks' products. Each of the causes of action brought by Bloosky against WebWorks relate to three contracts between Bloosky and WebWorks. 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. 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. 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." 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.

RESPONSE: Controverted. Bloosky's third-party claims relate primarily to PWW's alleged conduct that Google placed at issue in its Complaint, not the contractual relationship between Bloosky and PWW. As Bloosky stated in its Third-Party Complaint, "Google's claims were directed at the acts performed by the Third-Party Defendants," including PWW, and "[b]ut for the Third-Party Defendants' alleged infringement of Google's Marks, Google would have no claim against Bloosky and would not have suffered any of its alleged damages as claimed in the Amended Complaint." (Dkt. No. 60, at ¶¶ 40, 60, 67). Even Bloosky's breach of contract claim depends upon the truth of the allegations made by Google in its Complaint. (See Dkt. No. 60, at ¶¶ 48-50). Moreover, Bloosky's equitable indemnification and contribution claims do not sound in contract and do not necessarily depend upon the Bloosky-PWW Agreements. (Dkt. No. 60, at ¶¶ 58-77).

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."

RESPONSE: Uncontroverted.

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."

RESPONSE: Uncontroverted.

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."

RESPONSE: Uncontroverted.

12. Parties represented by Edelson McQuire [sic] LLC have brought class action cases against WebWorks based on its marketing practices in Illinois, Washington, California, Missouri, and Florida. Bloosky has been added as a co-defendant in the Illinois and Washington class actions. Given the nature of WebWorks' marketing relationship with Bloosky, WebWorks anticipates that Bloosky will be added as a co-defendant in more of these class action cases.

RESPONSE: Uncontroverted to the extent that parties represented by Edelson McGuire have initiated cases against PWW in Illinois, Washington, California, Missouri, and Florida (*see Ford v. Pacific Webworks, Inc., et al.*, Case No: 09-cv-7867 (N.D. Ill.); *Rasmussen v. Pacific Webworks, Inc., et al.*, Case No. 09-cv-01815 (W.D. Wash.); *Pelletier v. Pacific Webworks, Inc.*, Case No. 09-cv-3503 (E.D. Cal.); *Combe v. Intermark Communications, et al.*, Case No. 09-cv-09127 (C.D. Cal.); *Aikens v. Pacific Webworks, Inc.*, Case No. 4:10-cv-00875 (W.D. Mo.); and *Guffey v. Pacific Webworks, Inc., et al.*, Case No. 10-cv-00555 (M.D. Fla.)), and that Bloosky is a party to the *Ford* and *Rasmussen* actions. Controverted with respect to the remaining characterizations and speculation.

13. In the Illinois action, Bloosky recently brought a Cross-Complaint against WebWorks. 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.

RESPONSE: Uncontroverted to the extent that Bloosky filed cross-claims against PWW in the case titled, *Ford v. Pacific Webworks, Inc., et al.*, Case No: 09-cv-7867 (N.D. Ill.), and cited the Master Advertising Agreement, "Online Success Kit" Insertion Order, and the Settlement and Release Agreement in conjunction with such claims. Otherwise, controverted. Bloosky also asserted its cross-claims in the *Ford* case against The Quad Group, another co-defendant to the underlying claims at issue in that case. Case No. 09-cv-7867, Dkt. No. 51. Moreover, as in this case, Bloosky's cross-claims in the *Ford* case relate primarily to PWW's

and Quad's alleged conduct that plaintiff Ford placed at issue in her Complaint, not the contractual relationship between Bloosky and PWW and/or Quad. *See id.*

II. BACKGROUND

Google initiated this action in this forum against PWW on December 7, 2009, asserting trademark infringement, trademark dilution, cyber-piracy, and various forms of unfair competition. (Dkt. No. 2). PWW is what is known in the affiliate marketing industry as an "advertiser." (Dkt. No. 60, ¶ 12). It sells products or services to individual consumers and creates and provides corresponding marketing materials, including advertisements and landing pages, to online "advertising networks," such as Bloosky, for distribution to consumers. (Dkt. No. 60, at ¶ 12). Google in its Complaint alleged, among other things, that certain of PWW's advertisements "deceive the public by misusing the famous Google brand and GOOGLE marks to sell to consumers work-at-home kits purporting to train and enable consumers to earn money using Google services." (Dkt. No. 2, at ¶ 9). On June 2, 2010, the Court entered a Stipulated Final Judgment and Permanent Injunction against PWW. (Dkt. No. 48).

Bloosky, as an online advertising network, makes marketing materials from advertisers like PWW available to online "publishers," who then distribute advertisers' materials to individual consumers. (Dkt. No. 60, at ¶¶ 11, 13). According to Google, PWW utilized Bloosky's network of publishers in advertising and selling the work-at-home kits at issue in this case. As such, Google amended its Complaint on May 18, 2010, to add Bloosky as a defendant, alleging in the Amended Complaint that Bloosky "created infringing Internet advertising," "owns and/or has hosted domains" used in conjunction with advertisements for work-at-home kits, and otherwise "direct[s] consumers to infringing content." (*See* Dkt. No. 44, at ¶¶ 37, 38, 40). In its Answer to Google's Amended Complaint, Bloosky asserted, among its various

affirmative defenses, that "Google's alleged damages, if any, were caused solely by the acts and omissions of Google or by other persons or entities over whom Bloosky had no control and for which Bloosky is not responsible" and that "Google's alleged damages, if any, are due to the contributory fault of Google and to the comparative fault of others." (Dkt. No. 57, at p. 18).

In addition to and in conjunction with these affirmative defenses to Google's claims, Bloosky on July 16, 2010, filed a Third-Party Complaint against PWW and others, asserting subordinate claims for indemnification and contribution, as well as a claim for breach of contract based upon Google's allegations concerning PWW. (Dkt. No. 60). As evidence of one — but not the only — source of PWW's duty and obligation to indemnify and/or provide contribution for any liability found against Bloosky in this action, Bloosky referenced three prior agreements between itself and PWW containing indemnity provisions: a September 2007 Master Agreement; a September 2008 Insertion Order; and a November 2009 Settlement Agreement (the "Bloosky-PWW Agreements"). (*See* Dkt. No. 60-1). These agreements contain conflicting forum selection (and choice-of-law) clauses. The Master Agreement designates Clark County, Nevada, as the proper forum, while the Insertion Order and Settlement Agreement designate Orange County, California. (Dkt. No. 60-1, at pp. 11, 15, 17).

III. LEGAL STANDARD

A motion to dismiss based upon a forum selection clause is analyzed as a motion to dismiss for improper venue pursuant to Fed. R. Civ. P. 12(b)(3). *K & V Scientific Co., Inc. v. BMW*, 314 F.3d 494, 497 (10th Cir. 2002). A forum selection clause may be unenforceable if enforcement would be unreasonable or unjust, and the plaintiff bears the burden of proving that an applicable forum selection clause should not be enforced.[2] *M/S Bremen v. Zapata Off-Shore*

[2] It is unclear whether federal or state law applies to this issue. PWW cites *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418 (10th Cir. 2006), for the proposition that state law applies, but it omits a

Co., 407 U.S. 1, 15 (1972); *Restatement (Second) of Conflicts* § 80 cmt. c (Supp. 1988). The Court should resolve all factual disputes in favor of the plaintiff. *Ben-Trei Overseas, L.L.C. v. Gerdau Ameristeel US, Inc.*, No. 09-CV-153, 2010 WL 582205, *3 (N.D. Okla. Feb. 10, 2010).

IV. ARGUMENT

A. Bloosky's claims arise primarily out of PWW's alleged conduct vis-à-vis Google, not PWW's contractual relationship with Bloosky.

The entire premise of PWW's motion is flawed. To invoke the forum selection clauses in the Bloosky-PWW Agreements, PWW asserts without discussion that "[a]ll of Bloosky's third-party claims arise from contracts between WebWorks and Bloosky." (Dkt. No. 74, at p. 5). This is not true. First, as PWW itself admits, "Bloosky alleges only one cause of action expressly in contract" (Dkt. No. 74, at p. 6), and that claim depends largely on whether Google's allegations are true. (*See* Dkt. No. 60, at ¶¶ 45-51). Moreover, Bloosky's equitable indemnification and contribution claims do not sound in contract and are not dependent upon the Bloosky-PWW Agreements. As such, Bloosky would have viable indemnification and contribution claims against PWW even if there were no Bloosky-PWW Agreements.

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key qualifier from that Court's treatment of the question. As the Court stated, "We see no particular reason, ***at least in the international context***, 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." *Id.* at 428 (emphasis added). Outside the international context, the Tenth Circuit has declined to offer a definitive statement on the issue. *See, e.g., K&V Scientific*, 314 F.3d at 497 n. 4 ("The district court concluded that the interpretation of the forum selection clause at issue was a matter of federal common law. Because neither party has disputed this conclusion, we will treat the choice of law rules employed by the district court as the law of the case."). This case, of course, does not arise in the international context. Moreover, other courts, including this district, have indicated that federal law governs, at least with respect to the question of whether a Court should ***enforce*** a forum selection clause. *See Hugger-Mugger, L.L.C. v. Netsuite, Inc.*, No. 04-CV-592, 2005 WL 2206128, *4 (D. Utah Sept. 12, 2005) ("Federal law governs the court's determination of whether to give effect to a forum selection clause."); *see also Ben-Trei Overseas*, 2010 WL 582205 at *4 n. 4 ("The application and enforceability of a forum selection clause is determined under federal law."). Bloosky submits that this Court may decline to enforce the forum selection clauses at issue as unreasonable regardless of the law applied.

These facts underscore that Bloosky's third-party claims relate primarily to PWW's alleged conduct that Google placed at issue in its initial Complaint, not to the contractual relationship between Bloosky and PWW. Indeed, it was this same alleged conduct that caused Google to subsequently hail Bloosky into this forum. As Bloosky stated in its Third-Party Complaint, "Google's claims were directed at the acts performed by the Third-Party Defendants," including PWW, and "[b]ut for the Third-Party Defendants' alleged infringement of Google's Marks, Google would have no claim against Bloosky and would not have suffered any of its alleged damages as claimed in the Amended Complaint." (Dkt. No. 60, at ¶¶ 40, 60). Not surprisingly, several of Bloosky's affirmative defenses to Google's underlying claims raise the same issues as its third-party claims against PWW. (*See* Dkt. No. 57, at p. 18). In short, Bloosky's third-party claims and the issues raised by those claims, especially when taken as a whole, ultimately depend not on the existence of the Bloosky-PWW Agreements, but on the existence of Google's claims against PWW and Bloosky.

That the Bloosky-PWW Agreements may also relate to the alleged conduct that Google placed at issue in its initial Complaint does not dictate that all of Bloosky's third-party claims "arise directly" out of the agreements such that one or more of the agreements' forum selection clauses must apply to Bloosky's claims. In addition to the foregoing, there is nothing in the language of the agreements' forum selection clauses to suggest that they apply to non-contractual claims or a group of subordinate claims asserted in response to claims brought by a non-party to the agreements (*i.e.*, Google), as is the case here. The Insertion Order, for example, states only that "the Parties hereby consent to exclusive jurisdiction and venue in the state and federal courts in and serving Orange County, California," and does not designate the claims for which the parties so consent. (Dkt. No. 60-1, at p. 15; *see also id.* at pp. 11, 17).

PWW in its motion argues that contractual forum selection clauses can apply to non-contractual claims, but the case law it relies upon actually undercuts its position. None of the cases cited by PWW in this regard addresses the applicability of forum selection clauses to subordinate claims asserted in response to claims brought by a non-party to the relevant contract(s). In addition, the Court in *Cal-State Business Products & Services, Inc. v. Ricoh,* 16 Cal. Rptr. 2d 417, 423 (Cal. Ct. App. 1993), a decision PWW relies upon, emphasized that "common sense and commercial reality" dictate that parties rarely, if ever, intend choice-of-law/forum selection provisions to require the filing of multiple actions concerning the same controversy: "We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and businesslike resolution of possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy. . . ." It defies common sense to suggest that the Bloosky-PWW Agreements' generic forum selection clauses require Bloosky to sever its current third-party claims from the core controversy from which they arose and to which they are subordinate. It is similarly illogical to suggest that the clauses require Bloosky to sever only a subset of its third-party claims — *e.g.*, its breach of contract and/or contractual indemnity claim — from the other subordinate claims, particularly when all of its subordinate claims are related.

In sum, Bloosky's third-party claims do not "arise directly" out of the Bloosky-PWW Agreements and are not so related to the agreements that one or more of the agreements' forum selection clauses even apply to Bloosky's claims. The Court should therefore deny PWW's motion for this reason alone.

B. Enforcement of any of the forum selection clauses would be unreasonable.

Even if the forum selection clauses in the Bloosky-PWW Agreements can be said to apply to Bloosky's third-party claims, enforcement of one or more of the clauses would be unreasonable under the circumstances of this case.

1. Enforcement of any of the forum selection clauses would result in judicial inefficiency and a waste of resources.

The presence of a forum selection clause simply allows a court to decline to exercise jurisdiction that it otherwise already possesses. *See Bremen,* 407 U.S. at 12-13. Moreover, as noted above, forum selection clauses are not enforceable when enforcement would be unreasonable or unjust under the circumstances of the case. *Id.* at 15; *see Restatement (Second) of Conflicts* § 80; *see also Bancomer, S. A. v. Superior Court,* 44 Cal. App. 4th 1450, 1457 (Cal. App. 1996); *Tandy Computer Leasing v. Terina's Pizza, Inc.,* 784 P.2d 7, 8 (Nev. 1989); *Prows v. Pinpoint Retail Systems, Inc.,* 868 P.2d 809, 812-13 (Utah 1993). Enforcement may be unreasonable if it "would contravene a strong public policy of the forum in which suit is brought" or if the forum chosen in the clause is "seriously inconvenient." *Bremen*, 407 U.S. at 15-16.

Courts have routinely held that the enforcement of a forum selection clause is unreasonable when it would give rise to parallel proceedings in different forums on the same set of facts. The decision in *Mylan Pharmaceuticals Inc. v. American Safety Razor Co.,* 265 F. Supp. 2d 635 (N.D.W. Va. 2002), is particularly on point. The plaintiff there sued multiple defendants in West Virginia under various theories based upon a defective product. *Id.* at 637. Certain defendants brought cross-claims for indemnification and contribution against each other, and one of the defendants moved to dismiss one of the cross-claims against it based upon the

existence of a contractual forum selection clause establishing exclusive jurisdiction in New York. *Id.*

The court in addressing the issue first noted that it could refuse to enforce the forum selection clause as unreasonable if "forcing [the parties] to refile subordinate claims in a separate court would be a gross waste of the parties' and the court's resources." *Id.* at 638. It then explained that, unlike the claims at issue in *U.S. Fidelity & Guarantee Co. v. Petroleo Brasileiro*, 2001 WL 300735, *16 (S.D.N.Y. Mar. 27, 2001) — a case relied upon by PWW in its motion — a dismissal of the cross-claim at issue would create an "inefficiency in the use of judicial resources" because it would require the cross-claimant to refile its claim in a district that "currently does not have any related litigation on its docket." *Mylan*, 265 F. Supp. 2d at 639. This inefficiency, the court continued, would be exacerbated not only because the parties to the cross-claim would remain parties to the underlying action in any event, but because "the cross claim at issue is one for contribution and indemnification, a subordinate claim that cannot be addressed until the main issue of liability is resolved." *Id.* The court was particularly concerned with the latter factor:

> Dismissing the cross claim and forcing the parties to refile in New York would not only increase their own costs, but also force the Southern District of New York to expend its resources in handling the case, by either letting it remain on its docket until this action is resolved, or, as discussed above, transferring it back to this Court. Such an exercise would be a gross waste of the parties' and the Court's resources.

Id. at 639-40. As such, enforcement of the forum selection clause would be unreasonable, the court concluded. *Id.* at 640.

Other courts have employed the same reasoning in declining to enforce forum selection clauses. The Northern District of Illinois — where Bloosky has asserted similar cross-claims

against PWW in a class action case first initiated against PWW — refused to enforce a forum selection clause where the claims subject to the clause (defendant's counterclaims) and the claims not subject to the clause (plaintiffs' claims) were "so intertwined that the resolution of one party's claims will necessarily impact on the resolution of the other's." *Ace Novelty Co., Inc. v. Vijuk Equipment, Inc.*, No. 90-cv-3116, 1991 WL 150191, *7 (N.D. Ill. July 31, 1991). "[F]orcing [the defendant] to bring its claims in state court while simultaneously adjudicating [the plaintiff's] claims in this court would be wasteful of judicial as well as the litigants' resources," the court concluded. *Id.* The court in *Woods v. Christensen Shipyards, Ltd.*, No. 04-cv-61432, 2005 WL 5654643, *11 (S.D. Fla. Sept. 23, 2005), similarly declined to enforce a forum selection clause because "the result of enforcement of the forum selection clause would be parallel proceedings in different forums on the same set of facts and legal issues." *See also LaSala v. E*Trade Securities, LLC*, No. 05-cv-5869, 2005 WL 2848853, *6 (S.D.N.Y. Oct. 31, 2005) ("Even if I dismissed this action for improper venue, E*TRADE would still remain in this Court as a defendant in the IPO Litigation. Thus, enforcing the forum selection clause would exacerbate, rather than ameliorate, defendant's burden.").

This case presents the same circumstances under which the courts in *Mylan*, *Ace Novelty*, *Woods*, and *LaSala* refused to enforce forum selection clauses. Enforcement of any of the forum selection clauses in the Bloosky-PWW Agreements (*i.e.*, a dismissal of Bloosky's third-party claims) would require Bloosky to refile its claims in either California or Nevada, and neither jurisdiction has any related litigation involving Bloosky on its docket. As such, and because Bloosky must remain in this forum to defend Google's claims and prosecute its related affirmative defenses in any event, enforcement of the clauses would necessarily create parallel proceedings in different forums on the same set of facts and legal issues. Moreover, just as in

Mylan, all of Bloosky's third-party claims (including its breach of contract claim) are dependent upon the resolution of Google's underlying claims in this action. Thus, forcing Bloosky to refile its claims not only would increase its own costs, but also would force a court (or courts) in California or Nevada to expend resources by letting the action(s) remain on its docket until this action is resolved. Just as in *Mylan*, *Ace Novelty*, *Woods*, and *LaSala*, enforcement of any of the Bloosky-PWW Agreements' forum selection clauses would be unreasonable.

Enforcement of any of the agreements' forum selection clauses would also contravene public policy in Utah. In refusing to enforce the forum selection clause at issue in *Prows v. Pinpoint Retail Systems, Inc.*, the Supreme Court of Utah explained that enforcing the clause would require separate trials on the same issues, a result that "contravenes the 'objective of modern procedure,' which is to 'litigate all claims in one action if that is possible.'" 868 P.2d at 812-13. Here, as explained above, both Google's underlying claims and Bloosky's third-party claims relate to the alleged conduct that Google placed at issue in its initial Complaint. All of these claims should be litigated in this forum, and the Court should therefore deny PWW's motion.

2. The existence of related pending or prospective actions involving indemnity and contribution claims further cuts against dismissal.

The fact that Bloosky and PWW are or may be involved in additional related actions involving subordinate indemnity and contribution claims in other jurisdictions does not weigh in favor of dismissal in this case, as PWW suggests. First, as the Court in *Mylan* explained, all of Bloosky's indemnity and contribution claims are dependent upon the underlying liability claims at issue in the individual actions. The same is true of Bloosky's breach of contract claims, which largely depend upon the truth of Google's and the other plaintiffs' underlying allegations. As such, and given that there is already a potential for inconsistency with respect to the liability

claims that Bloosky and PWW face in the various pending actions, it is more consistent and efficient to simply litigate the respective groups of liability and subordinate claims together. In addition, Bloosky's affirmative defenses to the underlying liability claims in this and other cases raise many of the same issues as its indemnity and contribution claims. As such, this Court and other courts will address the issues raised by Bloosky's third-party claims in any event, and those issues likely will affect the underlying liability claims.

Second, notwithstanding the fact that there are multiple pending or prospective cases involving Bloosky and PWW, requiring Bloosky to refile its indemnity and contribution claims in one or more additional forums that have no related litigation on their dockets still results in judicial inefficiency and a waste of resources. PWW's suggestion that the parties simply litigate all of Bloosky's subordinate claims from the various cases "in the forum previously selected by the parties" is both inefficient and shortsighted, given that the Bloosky-PWW Agreements contain conflicting forum selection clauses — the Master Agreement designating Nevada and the two other agreements designating California. Will PWW object to venue in either California or Nevada? Must Bloosky refile its claims in both jurisdictions and engage in *more* litigation merely to determine the forum for such claims? Or, worse still, must Bloosky proceed on separate contracts in separate forums? Either way, PWW's suggested approach would ultimately result in "a gross waste of the parties' and the court's resources." *Mylan*, 265 F. Supp. 2d at 639.

At a minimum, and given the existence of additional related actions involving subordinate indemnity and contribution claims in other jurisdictions, the Court should defer ruling on PWW's motion until the posture of the global dispute involving Bloosky and PWW becomes clearer. The outcomes of the class certification decisions in the related class action cases cited by PWW, for example, will likely have a significant impact on the viability of all of

the claims at issue in those cases. Those outcomes may, by extension, further counsel against enforcement of the Bloosky-PWW Agreements' forum selection clauses in this case. Moreover, if Bloosky is added as a co-defendant in a number of additional cases, as PWW speculates, there will be an increased likelihood that the various related cases will be consolidated pursuant to the procedures for conducting multidistrict litigation. *See* 28 U.S.C. § 1407. Such an occurrence would also likely impact any decision concerning the enforcement of the Bloosky-PWW Agreements' forum selection clauses. A decision in PWW's favor at this point on the forum selection issue would simply multiply the complexity and inefficiency of the dispute. And because Bloosky's subordinate claims are dependent upon a determination of liability in any event, deferring decision on PWW's motion will not result in any prejudicial delay.

V. CONCLUSION

Bloosky's third-party claims relate to the same facts and issues as Google's underlying claims in this action, and requiring Bloosky to refile these claims in a new forum would be a waste of time and resources. As a result, Bloosky respectfully requests that this Court deny, or, at a minimum, defer decision on, PWW's Motion to Dismiss Bloosky's Third-Party Complaint, and grant such further relief that it deems just and proper.

Dated: October 13, 2010

Respectfully submitted,

/s/ Blaine C. Kimrey
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CERTIFICATE OF SERVICE

I, Blaine C. Kimrey, hereby certify that on this 13th day of October, 2010, a true and correct copy of the foregoing was served by CM/ECF to the parties registered with the Court's CM/ECF system.

/s/ Blaine C. Kimrey