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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.	**REPLY MEMORANDUM IN SUPPORT OF PACIFIC WEBWORKS INC.'S MOTION TO DISMISS BLOOSKY'S THIRD-PARTY COMPLAINT** Civil No.: 2:09CV01068BSJ Honorable Bruce S. Jenkins

Pacific WebWorks, Inc. hereby submits this reply memorandum in support of its Motion to Dismiss Bloosky Interactive LLC's Third-Party Complaint.

SUMMARY

Bloosky has described the dispute currently before the Court as one based on "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." Mem. in Opp. 1. Although Bloosky's position is not entirely incorrect, it is substantially inaccurate. Google's claims against Bloosky, although playing a role in determining whether WebWorks can be held liable to Bloosky, are not determinative of WebWork's alleged liability. The real question that forms the basis for Bloosky's claims against WebWorks is as follows: If Bloosky is held liable to Google on the basis of Google's claims against Bloosky, must WebWorks indemnify Bloosky for that liability? This issue turns substantially on the details of the marketing and advertising relationship between WebWorks and Bloosky—a relationship created and governed by contractual agreements which include mandatory forum selection clauses. Notably, these forum selection clauses were bargained-for by the parties and placed into the agreements by Bloosky.[1] The Court should not allow Bloosky to now avoid the operation of those agreements on a convoluted argument that WebWorks would be liable to Bloosky even if no agreements existed. The fact is that Bloosky's claims against WebWorks can only arise out of the business relationship between Bloosky and WebWorks. That relationship is founded on the written agreements at issue in WebWorks' motion.

ARGUMENT

I. The Court Should Grant WebWorks' Motion Because WebWork's Alleged Liability to Bloosky Arises out of the Contractual Relationship Between the Parties.

The Court should grant WebWorks' motion because Bloosky's alleged claims against WebWorks only exist due to the parties' contractual relationship. Bloosky argues at length that

[1] *See* Declaration of Kenneth Bell filed in *Rasmussen v. Pacific WebWorks, et al.*, Case No. C09-1815 (W.D. Wash. October 25, 2010) [Dkt. No. 63], attached as Exhibit A.

its third-party claims against WebWorks arise not because of a contractual relationship between the parties, but rather because of "PWW's alleged conduct that Google placed at issue in its initial Complaint." Bloosky's Mem. in Resp. 10. In essence, Bloosky contends that its claims against WebWorks are subordinate to the claims brought by Google and that "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." This statement is only partially correct.

Ultimately, resolution of the *Google v. Bloosky* complaint will only partly bear upon whether Bloosky has viable claims against WebWorks for indemnification, equitable indemnification, or contribution. For example, if Google is not successful in its suit against Bloosky, then there can be no basis to assert that WebWorks is liable to Bloosky. But comparatively, if Google is successful in its suit against Bloosky, then Bloosky may have a basis to assert that WebWorks is liable to it. The important fact that Bloosky wants to obscure is that resolution of the Google/Bloosky complaint will not determine WebWorks' alleged liability to Bloosky. It merely provides the first operative fact of many to establish such liability. At that stage, a court will be required to evaluate the relationship between WebWorks and Bloosky to determine whether that relationship gives rise to liability. Given that WebWorks and Bloosky's relationship developed out of contractual advertising agreements, with such advertisements being the alleged basis upon which Google initially sued WebWorks and has now sued Bloosky, a court will be required to analyze the terms of the agreements in order to evaluate the duties and obligations of the parties and whether WebWorks agreed to indemnify Bloosky for the type of conduct and liability that Google has alleged against Bloosky. Clearly, Bloosky's third-party claim contemplates substantially more than "PWW's alleged conduct that Google placed at issue in its Complaint."

Additionally, Bloosky's equitable indemnification and contribution claims, if they can even be brought,[2] are sufficiently related to the contracts between Bloosky and WebWorks to be governed by the forum selection clauses in those documents. Bloosky suggests that because its claims for equitable indemnification and contribution do not sound in contract, they are not governed by the forum selection clauses in the contracts. But forum selection clauses can apply to claims that are not contractual. *See Berrett v. Life Insurance Co. of the Southwest*, 623 F. Supp. 946, 949 (D. Utah 1985) ("Some courts have held on public policy grounds that tort as well as contract claims may be governed by forum selection clauses."); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) ("We first note that forum selection clauses can be equally applicable to contractual and tort causes of action.") Indeed, "[w]hether a forum selection clause applies [to a claim] depends on whether resolution of the claims relates to interpretation of the contract." *Manettt-Farrow*, 858 F.2d at 514.

In this case, a court will be required to interpret the contracts at issue in order to resolve even the equitable indemnification and contribution claims brought by Bloosky. Google's claims against Bloosky arise from Bloosky's allegedly unlawful acts. *See generally* First Amended Complaint [Dkt. No. 40-2]. Indeed, Google pursues its claims against Bloosky not on the basis of vicarious liability, but on the alleged basis that Bloosky itself has wronged Google. If Bloosky is held liable, a court will then be required to interpret the agreements between Bloosky and WebWorks to determine whether Bloosky's bad acts are the type of acts that qualify for indemnification or reimbursement by WebWorks—pursuant to the indemnification clause or otherwise. Regardless whether Bloosky's equitable indemnification claims and

[2] Pursuant to the Utah Code, "the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant." Utah Code. Ann. § 78B-5-820(1) (2010). Moreover, "[a] defendant is not entitled to contribution from any other person." *Id.* § 78B-5-820(2). In explaining the scope of the Utah Liability Reform Act, the Utah Court of Appeals has recognized that the Utah legislature eliminated actions to "seek to redistribute liability based on degree of fault." *National Service Industries, Inc. v. B.W. Norton Manufacturing Company*, 937 P.2d 551, 555 (Utah Ct. App. 1997). Accordingly, parties "may not evade the Act's ban on contribution suits by bringing what are in substance contribution causes of action renamed as . . . 'implied indemnity' . . . actions. *Id.* at 556.

contribution claims sound in contract, a court will be required to examine the contracts at issue to evaluate the rights, duties, and obligations of the parties. Accordingly, because interpretation of the contracts is necessary, the forum selection clauses govern and the Court should dismiss Bloosky's claims.

II. The Court Should Dismiss Bloosky's Claims Because Bloosky has Failed to meet its Heavy Burden of Demonstrating that Enforcement of the Forum Selection Clauses at Issue Would be Unreasonable Under the Circumstances.

The Court should grant WebWorks' motion because Bloosky has failed to demonstrate that enforcement of the forum selection clauses would be unreasonable under the circumstances. "According to the Tenth Circuit,[3] 'the only way for [a litigant] to avoid the effect of [a mandatory forum selection clause] is to demonstrate [that the clause] is unfair or unreasonable.'" *Daley v. Gulf Stream Coach, Inc.*, No. 2:99CV534C, 2000 WL 33710836, * 2 (D. Utah March 3, 2000) (unpublished) (quoting *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 321 (10th Cir. 1997)). Indeed, forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 10 (1972). Citing *The Bremen*, Judge Winder explained that in order to successfully challenge a forum selection clause as unreasonable "the moving party must clearly show either that: (1) the forum selection clause is invalid for fraud or overreaching[4] or; (2) forcing the moving party to proceed in the selected forum will be so gravely difficult and inconvenient that the clause, for all practical purposes, will deprive the moving party of his or her day in court." *Zions First Nat'l Bank v. Allen*, 688 F. Supp. 1495, 1498 (D. Utah 1988); *see also Daley*, 2000 WL 33710836, * 2; *The Bremen*, 407 U.S. at 15, 18. According to the Supreme Court, the party challenging a forum selection clause

[3] Bloosky states that whether federal or state law applies to enforcement of the forum selection clause is unclear. In its initial memorandum, WebWorks identified certain state law of Nevada and California in support of its motion to dismiss. Applying federal law, the result is equally, if not more clear, that the Court should dismiss Bloosky's third party claims against WebWorks.

[4] Bloosky has not argued, and in light of the fact that Bloosky drafted or provided the contractual agreements to WebWorks, cannot argue that the clauses are invalid for fraud or overreaching.

bears the "heavy burden of showing not only that the balance of convenience" weighs in favor of setting aside the forum selection clause, but also that the inconvenience of litigating in the selected forum is so manifest and so grave that the litigant will be deprived of a meaningful day in court." *The Bremen*, 407 U.S. at 19.

Although Bloosky argues adamantly that litigating its claims against WebWorks in an agreed upon forum is inconvenient, Bloosky has done nothing to suggest that it will be deprived of a meaningful day in court. This failure is devastating to its opposition.

A. Case law Relied upon by Bloosky is not Determinative of the Current Claims Before the Court.

Although Bloosky relies upon case law from several different jurisdictions for its proposition that the bargained-for forum selection clauses should not be enforced, those cases are factually distinct and inapplicable here. Bloosky suggests that enforcement of the clauses may be unreasonable due to certain inefficiencies. For support, Bloosky relies heavily upon *Mylan Pharmaceuticals Inc. v. American Safety Razor Co.*, 265 F. Supp. 2d 635 (N.D. W. Va. 2002). Although the court in that case chose not to enforce a forum selection clause because it found it unreasonable, *id.* at 640, that case is highly distinguishable from the case at hand. In that case, the plaintiff brought suit against four separate defendants. *Id.* at 637. Each defendant then brought its own cross claims for contribution and indemnification against either two or three other co-defendants. *Id.* But only one defendant, a defendant having three cross claims alleged against it by three separate cross claimants, sought to dismiss or transfer a single cross claim on the basis of a forum selection clause. *Id.* According to the court, this amounted to a gross waste of resources. *Id.* at 640. This was because, in part, even if the moving party was successful in its dismissal motion, it would remain before the court to answer the complaint and remaining cross claims. *Id.* at 639. Both parties would therefore remain before the court regardless of the dismissal. *Id.*

Factually, the case before the Court is distinct from *Mylan*. In this case, WebWorks will not remain before the court once Bloosky's Third Party Complaint is dismissed—the case does

not involve intertwined cross claims between multiple defendants to the main action. And although the *Mylan* court was concerned that the cross claim at issue involved subordinate indemnification and contribution claims, and that the selected forum had no related litigation on its docket, *id.* at 639-40, this Court should not follow *Mylan*. First, although the *Mylan* court suggested it was following the approach outlined in *The Bremen*, *id.* at 638, the court cited district court case law to define unreasonable to include the "possibility of prejudice to the parties through conflicting judgments by the concurrent litigation in two courts, or when [filing] subordinate claims in a separate court would be a gross waste of the parties' and the court's resources." *Id.* This Court should require Bloosky to meet the burden assigned by *The Bremen* and addressed by Judges Winder and Campbell. So far Bloosky has not.[5]

Second, although the selected forums do not currently have related litigation on their dockets, and although Google's claims against Bloosky must be adjudicated before Bloosky's claims against WebWorks, this is not to say that litigation in the selected forums is inappropriate. At this stage, Bloosky has brought breach of contract, indemnification, and contribution claims against WebWorks in three cases—one in the Western District of Washington, one in the Northern District of Illinois, and the one before this Court. In each of these actions, Bloosky has relied upon the agreements and indemnification provisions that are at issue in this case.

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[5] Bloosky also cites two other unpublished decisions for its proposition that the Court should find enforcement of the forum selection clauses unreasonable; however, these cases should not have any bearing on the Court's decision in this case. In *Lasala v. E*Trade Securities LLC*, No. 05 Civ. 5869(SAS), 2005 WL 2848853 (S.D.N.Y. October 31, 2005), the court described its decision to disregard the forum selection clause as "a rare exception where enforcing such a clause would be unreasonable." *Id.* *6 (emphasis added). This was due to "an egregious waste of judicial resources," and the fact that litigation involving over seventy similar actions and another dozen actions remained "pending in a court uniquely familiar with the underlying facts common to all of the[] proceedings." *Id.* (emphasis added). And in *Woods v. Christensen Shipyards, Ltd.*, No. 04-61432-CIV, 2005 WL 5654643 *11 (S.D. Fla. Sept. 23, 2005), the court chose not to enforce a forum selection clause because otherwise, litigation of two plaintiffs' claims against a singular defendant would be split between multiple forums. This would have resulted in "parallel proceedings in different forums on the same set of facts and legal issues." *Id.* In this case, litigating Bloosky's claims pursuant to a chosen forum does not create the same result because although Bloosky's claims against WebWorks can only ripen after litigating the pending Google claims, WebWorks' potential liability to Bloosky is ultimately based on other facts, i.e. whether or not WebWorks' relationship with Bloosky provides a basis for contribution or indemnification.

WebWorks has likewise sought dismissal of each action on the basis of the forum selection clauses. Based on the presumptive validity of forum selection clauses, the selected forums are likely to have related litigation in the near future. And more importantly, by requiring Bloosky's claims to be brought pursuant to the forum selection clauses, the agreements that form the basis of WebWorks and Bloosky's relationship will be subject to singular review, as opposed to review by multiple judges in multiple forums. This will result in a singular interpretation of the forum selection clauses that will apply uniformly to the claims alleged by Bloosky—even if the factual bases of those claims are individualized due to adjudication of the primary claims in their respective forums.

Bloosky also relies upon an unpublished opinion of the Northern District of Illinois—*Ace Novelty Co., Inc. v. Vijuk Equipment, Inc.*, No. 90 C 3116, 1991 WL 150191 (N.D. Ill. July 31, 1991) (unpublished). That case is distinguishable and should not be followed. There, after only briefly addressing the forum selection clauses at issue, the court stated that it would not enforce the forum selection clauses because "[t]he claims asserted by [two parties] were so intertwined that the resolution of one party's claims will necessarily impact on the resolution of the other's. Under such circumstances, dividing the parties' claims among different forums could result in either the preclusion of one party's claims or conflicting judgments." *Id.* *7. In this case, this forum's resolution of Google's claims against Bloosky will not result in the preclusion of Bloosky's claims against WebWorks or in conflicting judgments, despite Bloosky's suggestions otherwise. In fact, because Bloosky has brought similar causes of action against WebWorks in several jurisdictions, currently there exists a risk of conflicting judgments regarding the rights,

obligations, and duties that exist between WebWorks and Bloosky. Consequently, enforcing the forum selection clauses will provide needed consistency.[6]

B. Dismissal of the Third Party Complaint is also Appropriate Because a Singular Interpretation of the Parties' Relationship is Needed to Avoid the Conflicting Rulings Regarding the Terms of the Parties' Agreements and the Rights, Duties and Obligations Applicable.

The fact that Bloosky has brought claims against WebWorks in other jurisdictions, on the basis of the same relationship that is at issue in this case between Bloosky and WebWorks, also supports dismissal of the Third Party Complaint. Bloosky alleges that "all of [its] 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." Bloosky suggests that because of this, "there is already a potential for inconsistency with respect to liability claims that Bloosky and PWW face in the various pending actions, [and] it is more consistent and efficient to simply litigate the respective groups of liability and subordinate claims together." But Bloosky is not correct. First, as already discussed above, success by Google on its claims against Bloosky will not automatically result in Bloosky's success against WebWorks.[7] At that stage, a court must consider the relationship between Bloosky and WebWorks, the agreements that created the relationship, and the respective rights, duties, and obligations of WebWorks and Bloosky pursuant to the agreements. Because WebWorks' alleged liability turns on this latter

[6] Bloosky also cites the Utah case of *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809, 812-13 (Utah 1994) for the proposition that enforcing the forum selection clauses in this case would contravene Utah public policy. Bloosky mischaracterizes the holding of that case. First, the Court never mentioned that it declined to enforce the clause at issue due to the public policy of Utah. *See id.* Second, the Court applied the test outlined in *The Bremen* to find enforcement of the clause at issue would be unreasonable. *Id.* The Court did state that a bifurcated trial on identical issues would contravene "the 'objective of modern procedure.'" *Id.* at 813. But the Court went on to state that setting this aside, enforcing the forum selection clause at issue would be unreasonable because requiring the plaintiff to "litigate against [one party] in New York and [another party] in Utah would twice impose on him the onerous burden of proving a 'conspiracy' between two defendants, only one of whom is present at each trial." *Id.* The Court held that this was "unjust and for all practical purposes denies [the plaintiff] his day in court." *Id.*

[7] Similarly, success by each individual plaintiff in the cases filed in Illinois and Washington will not determine WebWorks' alleged liability to Bloosky.

inquiry, the forum selection clauses at issue require that this inquiry, an inquiry largely distinct from Google's claims against WebWorks, be made in a forum that was bargained-for and agreed upon by the parties.

Additionally, contrary to Bloosky's proposition, litigating WebWorks' liability to Bloosky in multiple forums is not a more consistent method of adjudication. Bloosky correctly notes that it and WebWorks face the potential for differing liability determinations in the various actions. But assuming a just judicial system, this potential for differing liability will be the result of individualized facts surrounding each plaintiff's claims—not a differing relationship between WebWorks and Bloosky. In order to achieve consistency, WebWorks' alleged liability to Bloosky should turn on a singular evaluation of WebWorks and Bloosky's relationship and a singular interpretation of the agreements that bind that relationship. And contrary to Bloosky's apparent position, such an approach will not result in parallel proceedings because Bloosky's claims for indemnification and contribution will not even ripen (if ever) until after each individual plaintiff has resolved his or her claims against Bloosky.

For many of the same reasons discussed above, WebWorks respectfully asks the Court to rule on the current motion at this time. Bloosky suggests that deciding whether the forum selection clauses should be honored at this time will result in further inefficiency. But Bloosky ignores the fact that such a decision by the Court would be inefficient and unjust to WebWorks because but-for Bloosky's Third Party Claims against WebWorks, WebWorks would no longer be a part of this suit. The current posture of this case involves claims by Google that it has been harmed by Bloosky's wrongful conduct. Therefore, if the Court defers ruling on WebWorks motion at this time, WebWorks will be forced to expend its resources to participate and otherwise defend itself in this case. The Court should rule on WebWorks' motion at this time and should grant WebWorks' Motion to Dismiss Bloosky's Third Party Complaint.

CONCLUSION

The Court should grant WebWorks' Motion to Dismiss Bloosky's Third Party Complaint. Bloosky's claims against WebWorks will not be determined by a finding that Bloosky is liable to

Google. Instead, a court will be required to evaluate the rights, duties, and obligations that exist in Bloosky's relationship with WebWorks. That relationship was formed by, and is governed by, the advertising and other agreements that Bloosky placed at issue in its Third Party Complaint. Bloosky has done nothing to demonstrate that the forum selection clauses in those agreements are unreasonable, i.e. that enforcement of those provisions will effectively deprive Bloosky of its day in court against WebWorks. As such, the Court should enforce the mandatory, presumptively valid forum selection clauses and dismiss Bloosky's Third Party Complaint for improper venue.

DATED this 1st day of November, 2010.

SNELL & WILMER, L.L.P.

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CERTIFICATE OF SERVICE

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

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