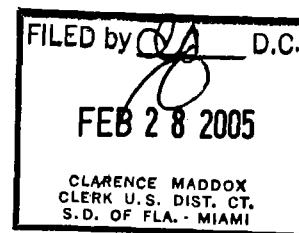


UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 04-21618-CIV-MARTINEZ-KLEIN



UNIVERSAL COMMUNICATION
SYSTEMS, INC., MICHAEL J. ZWEBNER
and others similarly situated,

Plaintiffs,

vs.

LYCOS INC., and TERRA LYCO, INC. d/b/a
THE LYCOS NETWORK,

Defendants.

**CLOSED
CIVIL
CASE**

**ORDER GRANTING DEFENDANTS' ALTERNATIVE MOTION
TO TRANSFER FOR IMPROPER VENUE**

THIS CAUSE came before the Court upon Defendants' Motion to Dismiss, or in the Alternative, Transfer for Improper Venue (**D.E. Nos. 15-1 and 15-2**), filed on **August 23, 2004**. Defendants' Motion to Dismiss, or in the Alternative, Transfer for Improper Venue has been fully briefed and is ripe for adjudication.

Plaintiffs, Universal Communication Systems, Inc. ("Universal") and Michael J. Zwebner ("Zwebner"), assert claims on behalf of themselves and a broad class of worldwide plaintiffs arising from alleged defamatory comments posted by third parties on Internet websites allegedly maintained by Defendants, Lycos, Inc., and Terra Lyco, Inc., d/b/a The Lycos Network (hereinafter collectively referred to as "Lycos"). Count I alleges Lycos committed consumer fraud in violation of Mass. Gen. Law § 93(A). The allegations of Count I are based upon Defendants' alleged failure to enforce the terms and conditions of the Lycos Subscriber

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Agreement. Count II alleges cyberstalking in violation of 47 U.S.C. § 223, which Plaintiffs allege has occurred as a result of Defendants' "failure to curtail the use of their telecommunications facility by authorized subscribers who have and continue to annoy, abuse, threaten and harass the [Plaintiffs]." Compl., ¶ 44. Count III alleges dilution of trade name in violation of Fla. Stat. § 495.151 *et seq.*, which Plaintiffs allege has occurred as a result of false and misleading information posted by authorized subscribers on the RAGING BULL website.

Lycos alleges the causes of action set forth in the Complaint arise from and relate to a contract, the Lycos Subscriber Agreement, which establishes that Massachusetts is the appropriate and exclusive venue for the resolution of any disputes. Therefore, Lycos alleges venue in the United States District Court for the Southern District of Florida is improper, and this case should be dismissed pursuant to Fed.R.Civ.P. 12(b)(3) and 28 U.S.C. § 1406(a).

Alternatively, Lycos alleges this case should be transferred to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1406(a) and/or 28 U.S.C. § 1404(a).

The Lycos Subscriber Agreement states in relevant part: "[T]he state and federal courts of Massachusetts shall be the exclusive forum and venue to resolve disputes arising of or relating to these Terms and Conditions or any user's use of the [Raging Bull website]." Compl., Ex. 1, at ¶ 33. Zwebner specifically alleges he "is a subscriber to [the Lycos Network] by virtue of (a) his truthful and accurate completion of [Defendants'] on-line registration requirements for access to their RAGING BULL web site, and (b) [Defendants'] acknowledgment of acceptance of [Zwebner's] registration at their corporate offices at Waltham, Massachusetts." Compl., ¶ 24 and Ex. 1. Thus, Zwebner admits he executed the Lycos Subscriber Agreement, which contains a forum selection clause. Upon review of the Complaint, the Court finds Plaintiffs' claims are

based primarily upon Defendants' alleged failure to enforce the terms and conditions of the Lycos Subscriber Agreement. Therefore, under the express terms of the Lycos Subscriber Agreement, venue in the District Court for the Southern District of Florida is improper.¹ See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing forum selection clause in form contract between cruise line and passenger); *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989) (holding where a party seeks to enforce a valid forum selection clause, this factor outweighs deference to plaintiff's choice of forum); and *P & S Business Machines, Inc. v. USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) (holding "[f]orum selection clauses are enforceable in federal courts.").

However, rather than dismissing this cause, the Court will transfer this action to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1404(a). The applicable standard to assess a case with regard to a *forum non conveniens* claim was recently set forth by the Eleventh Circuit in *Ford v. Brown*, 319 F.3d 1302 (11th Cir. 2003). First, this Court must engage in a two-part inquiry to determine: 1) the availability and 2) the adequacy of the alternate forum. *Id.* at 1311 (citing *C.A. La Seguridad v. Transytur Line*, 707 F.2d 1304 (11th Cir. 1983)). If the alternate forum is both available and adequate, then:

[T]he trial judge must consider all relevant factors of private interest, weighing in the balance a strong presumption against disturbing plaintiff's initial forum choice. If the trial judge finds this balance of private interests to be in equipoise or near equipoise, he must then determine whether or not factors of public interest tip the balance in favor of a foreign forum.

SME Racks, Inc. v. Sistemas Mecanicos Electronica, S.A., 382 F.3d 1097, 1100 (11th Cir. 2004)

¹Plaintiffs have not argued, nor is there evidence before the Court, that the forum selection clause in the Lycos Subscriber Agreement should be invalidated as fundamentally unfair. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. at 595.

(citing *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983)). Further, the defendant has the burden of persuasion as to all elements of a *forum non conveniens* motion to dismiss. *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001).

As there is no dispute the United States District Court for the District of Massachusetts is both available and adequate, the Court will consider whether the balance of private and public interest factors strongly favors the United States District Court for the District of Massachusetts. In *Gulf Oil Corp. v. Gilbert*, the United States Supreme Court explained the balancing test the Court must apply:

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, “vex,” “harass,” or “oppress” the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.

330 U.S. 501, 508-09 (1947).

In this case, Lycos maintains its corporate headquarters in Massachusetts. *Carney Aff.*, ¶ 1. In addition, the relevant corporate records and Lycos employees with relevant knowledge are located at Lycos’ Waltham, Massachusetts headquarters. *Id.* at ¶¶ 6-7. Further, because all registered users of the Raging Bull website have executed the Lycos Subscriber Agreement, they have agreed to service of process in Massachusetts. *Compl.*, ¶ 33. To the extent Zwebner alleges his physical limitations would make it unduly burdensome to litigate this action in Massachusetts, this does outweigh the other reasons which make Massachusetts a more suitable forum for this

case, particularly in light of the forum selection clause. *In re Ricoh Corp.*, 870 F.2d at 573.²

Therefore, the Court finds the balance of private and public interest factors weighs strongly in favor of the United States District Court for the District of Massachusetts. Accordingly, it is hereby:

ORDERED AND ADJUDGED that

1. Defendants' Motion to Dismiss, or in the Alternative, Transfer for Improper Venue (**D.E. Nos. 15-1 and 15-2**) is GRANTED in part and DENIED in part. This case shall be transferred to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1406(a) and/or 28 U.S.C. § 1404(a).

2. Defendants' Request for Oral Argument on Motion to Dismiss, or in the Alternative, to Transfer for Improper Venue (**D.E. No. 19**), filed on **August 23, 2004**, is DENIED.

3. Plaintiffs' Motion to Strike Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss (**D.E. No. 33**), filed on **September 30, 2004**, is DENIED as MOOT.

4. Defendants' Motion for Status Conference, or Alternatively, Stay of All Discovery (**D.E. No. 54-1 and 54-2**), filed on **December 3, 2004**, is DENIED as moot.

5. Plaintiffs' Motion Under Rule 37 to Compel Initial Disclosures, Under Rule 26(a)(1) and L.R. 26.1.A, Responsive Answers to Plaintiffs' Rule 26.1.G Interrogatories and Request for Production of Documents (**D.E. No. 65**), filed on **December 20, 2004**, is DENIED.

²The Court also finds Zwebner's allegation is undermined by the evidence of Zwebner's recent litigation in Massachusetts and past litigation in Oregon and New Hampshire. (D.E. No. 32, at Ex. A and B; and Compl., at Ex. 2).

6. Plaintiffs' Request for Oral Hearing on Plaintiffs' Rule 37 Motion to Compel (D.E. No. 66), filed on December 20, 2004, is DENIED.

7. Plaintiffs' Request for Expenses (Including Attorney's Fees) (D.E. No. 70), filed on January 4, 2005, is DENIED.


7. Plaintiffs' Request for an Expedited Hearing and/or Decision Upon Plaintiffs' Motion Under Rule 27 to Compel (D.E. NO. 73-1 and 73-2), filed on January 11, 2005, is DENIED.

8. Lycos Inc.'s Motion for Protective Order (D.E. No. 75), filed on January 12, 2005, is DENIED as MOOT.

9. Plaintiff's Renewed Supplemental Citation of Authority in Support of Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion to Amend Complaint (D.E. No. 85), filed on February 15, 2005, violates Local Rule 7.1. The Renewed Supplemental Citation of Authority, like its predecessor (D.E. No. 82), is a sur-response brief which has been filed without prior leave of Court. *The Clerk is directed to STRIKE this docket entry from the record.*

10. *The Clerk is Ordered to transfer this case to the United States District Court for the District of Massachusetts.*

DONE AND ORDERED in Chambers at Miami, Florida, this 28 day of February, 2005.



JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Klein
All Counsel of Record