

**CLOSED
CIVIL
CASE**

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

Case Number: 05-20149-CIV-MORENO

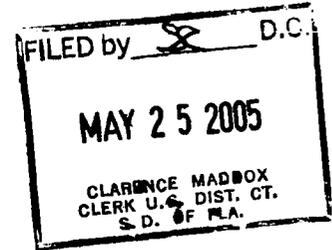
UNIVERSAL COMMUNICATIONS SYSTEMS,
INC., MICHAEL J. ZWEBNER and others
similarly situated,

Plaintiffs,

vs.

LYCOS, INC. d/b/a THE LYCOS NETWORK &
TERRA NETWORKS, S.A., *et al.*,

Defendants.



**ORDER TRANSFERRING CASE TO THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS**

This cause came before the Court upon Defendant Lycos, Inc.'s Motion to Dismiss or Transfer (**D.E. No. 31**), filed on March 3, 2005. For the reasons stated below, the Defendant's motion is GRANTED in PART. Accordingly, this case is transferred to the United States District Court for the District of Massachusetts.

I. Background

Plaintiff Zwebner is a citizen of both Israel and the United Kingdom, whose principal residence is in Israel. He lives part of the year in Miami Beach, Florida. He is the chief executive officer and chairman of the board of Plaintiff Universal Communications Systems, Inc. ("UCSY" - the stock ticker symbol for the company), a company incorporated in Nevada with its corporate offices in Miami Beach. The Plaintiffs bring suit on behalf of themselves and a class of persons against the Defendants for claims arising out of allegedly defamatory messages posted on an internet

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message board dedicated to messages related to Plaintiff UCSY.

According to the Plaintiffs, the corporate Defendants (Lycos, Inc. and Terra Networks, S.A., d/b/a The Lycos Network) all play some role in operating this message board (the alleged relationship among these three Defendants is unclear from the Plaintiffs' complaint). The Plaintiffs also bring claims against eight individual persons, all subscribers to the Lycos Network, who have posted allegedly defamatory messages on the message board. In Count I of the amended complaint, the Plaintiffs bring a claim for fraudulent securities transactions under Fla. Stat. § 517.301. In Count II, the Plaintiffs bring a claim for cyber stalking under 47 U.S.C. § 223. In Count III, the Plaintiffs bring a claim for dilution of trade name under Fla. Stat. § 495.151 *et seq.* Finally, in Count IV, the Plaintiffs bring a claim for cyber stalking under Fla. Stat. § 784.048 *et seq.*

In an action arising out of the same nucleus of operative facts - the allegedly defamatory message board postings - the same Plaintiffs brought suit against Lycos, Inc. and Terra Lyco, Inc. d/b/a The Lycos Network for consumer fraud under Massachusetts law, cyber stalking under federal law, and trade dilution in violation of Florida law. Judge Martinez found that venue in the Southern District of Florida was improper, and granted the Defendants' motion to transfer to the District of Massachusetts in that case under 28 U.S.C. § 1404(a). Judge Martinez reasoned that, because the claims were based primarily on the Defendants' alleged failure to enforce the terms and conditions of the Lycos Subscriber Agreement, which stated that Massachusetts was the exclusive venue for resolution of disputes, Massachusetts was the appropriate venue for the action.

II. Analysis

Lycos argues that this case should be dismissed for improper venue or transferred to the

District of Massachusetts under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406(a). Under § 1404(a), "[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." Under § 1406(a), "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Where venue is improper, change of venue is governed by § 1406, while § 1404 applies where venue is proper in both the transferor and transferee courts, but one location is better suited to the convenience of the parties and witnesses, and to the needs of justice. "The decision to transfer a case to another district is left to the sound discretion of the trial court." *Brown v. Connecticut General Life Ins. Co.*, 934 F.2d 1193, 1197 (11th Cir. 1991).

Like the case transferred by Judge Martinez, the claims here all arise out of allegedly defamatory postings on the UCSY message board. As the Plaintiffs themselves stated, "[t]he claims asserted in this co-pending action [the action currently before the Court], are substantively the same as those contained in the proposed *Amended Complaint* [in 04-21618-CIV-MARTINEZ] Upon consolidation of this newly filed action with the instant proceedings [04-21618-CIV-MARTINEZ], the Plaintiffs shall either withdraw their pending *Motion to Amend*, or dismiss this newly filed action upon the granting of their *Motion to Amend* and the entry of their proposed *Amended Complaint*." Plaintiffs' Notice of Related Co-Pending Litigation at 2 in 04-21618-CIV-MARTINEZ. All of the individual Defendants are alleged to be subscribers, having agreed to the Lycos Subscriber Agreement, and additionally, Plaintiff Zwebner has asserted that he is also a subscriber. See Complaint at ¶ 24 in 04-21618-CIV-MARTINEZ.

The Subscriber Agreement provides, "the state and federal courts of Massachusetts shall be

the exclusive forum and venue to resolve disputes arising out of or relating to these Terms and Conditions or any user's use of the Products and Services [including the message boards]. By using the products and services and thereby agreeing to these Terms and Conditions, users consent to personal jurisdiction and venue in the state and federal courts in Massachusetts with respect to all such disputes." Exh. 1 to the Original Complaint (**D.E. No. 1**), filed on **January 19, 2005**, at ¶ 33.

As Judge Martinez determined in the earlier filed case based on the same allegedly defamatory messages, given the forum selection clause, this Court concludes that venue is improper in the Southern District of Florida. Accordingly, the Court must look to § 1406(a) rather than § 1404(a) in determining whether to transfer the action. Under the circumstances here, the Court finds that, instead of dismissing this case, transfer under § 1406(a) is more appropriate.

The individual Plaintiff, Defendant Lycos, Inc., and all eight of the John Doe Subscriber Defendants have assented to the forum selection clause in the Lycos subscriber agreement. Defendant Lycos, Inc. is located in Massachusetts.¹ Although Defendant Zwebner states that transfer to the District of Massachusetts shall create "unreasonable personal hardship" upon him, *see* Declaration of Michael J. Zwebner (**D.E. No. 30**), filed on **March 3, 2005**, his statements are undermined by his

¹ The Court notes that the allegations relating to Defendant Terra Networks, S.A. are unclear. Further, Defendant Terra Networks, S.A. has entered only a limited appearance to contest service and personal jurisdiction, and whether this Court has personal jurisdiction over Terra Networks, S.A. is undecided. *See* Defendant Terra Networks, S.A.'s Motion to Dismiss (**D.E. No. 27**), filed on **February 22, 2005**. Whether this Court has personal jurisdiction over Defendant Terra Networks, S.A., however, does not affect the appropriateness of transfer under § 1406(a). *See, e.g., Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962) ("The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not.").

filing of complaints in Massachusetts and New Hampshire.² *See, e.g., Zwebner v. Villasenor*, 98-CV-682 (D.N.H. 1998). Given that the case formerly before Judge Martinez is already in Massachusetts and that the Plaintiffs in this case assented to the transfer of this case and consolidation with the earlier filed case, the Court finds that, in "the interest of justice," this case should be transferred to the District of Massachusetts rather than be dismissed. Transfer will allow this case to be considered by the same court, and at the same time, as the previously filed action transferred by Judge Martinez.

III. Conclusion

The Court finds that venue is improper here in the Southern District of Florida, but rather than dismissing the case, the Court finds that transfer to the District of Massachusetts is appropriate under the circumstances here. Accordingly, Defendant Lycos, Inc.'s Motion to Dismiss or Transfer is GRANTED IN PART. This case is transferred to the United States District Court for the District of Massachusetts.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of May, 2005.



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

² The credibility of Zwebner's claims of hardship upon transfer to Massachusetts is further weakened by his sworn statement, "I do not believe that any of the above named defendants reside, or engage in business in Boston, Massachusetts or elsewhere within the Commonwealth of Massachusetts, and, thus, I directed my counsel to file this case in the federal court in Miami-Dade County, Florida." *See* Declaration of Michael J. Zwebner (D.E. No. 30), filed on **March 3, 2005**. Contrary to this declaration, Plaintiffs assert in the complaint that named Defendant Lycos, Inc. is organized and existing under the laws of Massachusetts and has its principle place of business in Massachusetts. *See* First Amended Complaint (D.E. No. 5), filed on **February 2, 2005**, at ¶ 13.

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