UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

04-21618 CIV-MARTINEZ/Klein

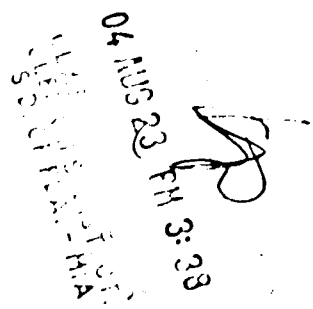
UNIVERSAL COMMUNICATION SYSTEMS, INC. (a Nevada Corporation), MICHAEL J. ZWEBNER (individually), and Others Similarly Situated,

Plaintiffs,

v.

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

Defendants.
_____/



**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER, FOR IMPROPER VENUE**

Plaintiffs Universal Communications Systems, Inc. ("Universal"), a Nevada corporation with offices in Florida, and Michael Zwebner ("Zwebner"), an Israeli and British citizen with a second residence in Florida, assert claims on behalf of themselves and a broad "class" of worldwide plaintiffs arising from supposedly defamatory comments posted by third parties on an Internet website allegedly maintained by two Massachusetts-based corporate defendants. The Plaintiffs' claims for relief which include a claim under the Massachusetts Consumer Protection Act, M.G.L. Ch. 93A—are based primarily upon the Defendants' alleged failure to enforce the terms and conditions of the Lycos Subscriber Agreement. See Complaint at Exhibit 1. The Plaintiffs allege that the Defendants' conduct caused the class members to suffer damages of approximately $300 million and further entitles them to a myriad of equitable relief.

Because the Subscriber Agreement contains a valid and enforceable forum-selection clause requiring this action to be brought in Massachusetts, this case should be dismissed for



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improper venue pursuant to Rule 12(b)(3). Alternatively, in accordance with 28 U.S.C. §§ 1404 and 1406, this Court should transfer this case to the United States District Court for the District of Massachusetts, where venue is proper.

## I
## BACKGROUND

### A. The Parties

According to the Complaint, Plaintiff Universal is a Nevada corporation with offices in Miami Beach, Florida. See Complaint ¶ 9. Universal is a public company listed on NASDAQ. Id. Its ticker symbol is "UCSY." Id. Plaintiff Zwebner is alleged to be Universal's Chairman of the Board of Directors and Chief Executive Officer. Id. ¶ 10. Defendant Lycos, Inc. ("Lycos") is a corporation with headquarters in Waltham, Massachusetts.[1] See Affidavit of Jaime Carney ("Carney Affidavit") ¶ 1.

Lycos operates a variety of Internet websites, including a website entitled "Raging Bull," from its Massachusetts offices. See Complaint ¶ 12; see also Carney Affidavit ¶ 3. One of the features of the Raging Bull website is the ability of Lycos subscribers to create message boards dedicated to particular businesses. Id. ¶ 21. The website contains a series of message boards devoted to discussions about various publicly-traded companies, including a message board devoted to a discussion regarding Universal. See Complaint ¶¶ 18, 21, 27.

### B. The Subscriber Agreement

In order to access the Raging Bull website and to participate in the discussions on the various Raging Bull message boards, individuals must go through an on-line registration process. Id. ¶ 19. The registration process requires subscribers to provide Lycos with their names and

[1] The other named defendant, Terra Lycos, is in fact not a separately-incorporated entity. Cf. Complaint ¶¶ 11-12 Accordingly, Terra Lycos lacks the capacity to be sued under Fed. R. Civ. P. 17(b).



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contact information. Id. ¶ 20. The registration process also requires each subscriber to review and accept certain Terms and Conditions (the "Subscriber Agreement"). Id. ¶¶ 19-20 & Exhibit 1. Only after this registration process is completed and the subscriber has agreed to the terms of the Subscriber Agreement is a subscriber allowed to participate in the discussions on Raging Bull's various message boards, including the message board relating to Universal. Id. ¶ 20.

The Subscriber Agreement includes a provision stating that "all legal issues arising from or related to the use of [Lycos'] Products and Services shall be construed in accordance with and all questions with respect thereto shall be determined by, the laws of the Commonwealth of Massachusetts applicable to contracts entered into and performed wholly within said state." See Complaint, Exhibit 1 ¶ 33. That same provision also provides that "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 users use of the Products and Services. By using the Products and Services, users consent to personal jurisdiction and venue in the state and federal courts in Massachusetts with respect to all such disputes." Id. (emphasis added).

Sometime prior to the initiation of this lawsuit, Zwebner reviewed and accepted the Subscriber Agreement and completed the registration process for the Raging Bull website. Id. ¶ 24. Thereafter, Zwebner began to participate on the Raging Bull message board. Id.

### C. Summary of Allegations

The Complaint is styled as a "class action," and purports to be brought on behalf of Universal, Zwebner, and "several hundred" companies and officers and directors that allegedly have been "the object of numerous anonymous false, defamatory and harassing message boards hosted by the Defendants." See Complaint ¶¶ 3-4. The Complaint purports to allege three


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separate causes of action that are common to all members of the classes to which the two named plaintiffs belong. Id. ¶ 5-6.

First, the Complaint alleges that the Defendants' failure to enforce the standards of conduct set forth in the Subscriber Agreement amounts to a violation of the Massachusetts Consumer Protection Act, M.G.L. ch. 93A. See id. Count I (¶¶ 22-38). Second, the Complaint attempts to assert a private right of action under 47 U.S.C. § 223 by alleging the Defendants' failure to monitor and curtail the defamatory and harassing messages on the Raging Bull message board somehow constitutes "Cyber Stalking." See id. Count II (¶¶ 39-46). Third, the Complaint alleges that the Defendants' failure to curtail the dissemination of the misleading messages on the Raging Bull website has somehow tarnished and diluted Universal's trade name in violation of Fla. Stat. § 495.151.[2] See id. Count III (¶¶ 47-55). The Complaint seeks damages of $100 million for each of these three causes of action, as well as injunctions requiring defendants to delete all postings on the Raging Bull UCSY message board and to delete the message board itself, and enjoining the defendants from creating and maintaining any UCSY message board.

## II
## STANDARD OF REVIEW

"Motions to dismiss upon the basis of choice-of-forum and choice-of-law clauses are properly brought pursuant to Fed. R. Civ. P. 12(b)(3) as motions to dismiss for improper venue." Webster v. Royal Caribbean Cruises, Ltd., 124 F. Supp. 2d 1317, 1320 (S.D. Fla. 2000) (citing Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1290 (11th Cir.1998)). In

[2] Although Count III is asserted under a Florida statute, it is clear that, to the extent that Count III asserts a claim for trade name dilution on behalf of a class of corporate plaintiffs from locations throughout the world. Accordingly, Florida law would not necessarily apply to those claims. Indeed, it is likely that the law of Massachusetts would apply to any trade dilution claim based on Lycos' supposed conduct, as Lycos' headquarters and operations are located primarily in Massachusetts. See Carney Affidavit ¶¶ 1, 6, 7.

considering such motions, a court "may consider matters outside the pleadings, and often must do so, since without aid of such outside materials the court would be unable to discern the actual basis, in fact, of a party's challenge to the bare allegation in the complaint that venue is proper in this court." Id.

Where a case is filed in an improper venue, a district court may, in lieu of dismissal, and "in the interest of justice," transfer that case "to any district or division in which it could have been brought." See 28 U.S.C. § 1406(a). In addition, any civil action may be transferred "to any other district or division where it might have been brought" where such a transfer would serve both "the interests of justice" and the "convenience of parties and witnesses." See 28 U.S.C. § 1404(a). In evaluating a motion to transfer venue, federal courts traditionally give considerable deference to a plaintiff's choice of forum. See In re Ricoh Corp., 870 F.2d 570, 573 (11th Cir. 1989). **No such deference attaches**, however, when the parties have entered into a contract containing a valid forum selection clause. Id.

A plaintiff's choice of forum is also given "less than normal deference in the following two situations: (1) where the suit is a class action and (2) where the operative facts underlying the action occurred outside the district in which the action is brought." Balloveras v. The Purdue Pharma Co., 2004 WL 1202854 (S.D. Fla. May 19, 2004); see also Moghaddam v. Dunkin Donuts, 2002 WL 1940724 at * 2-3 (S.D. Fla. August 13, 2002).

## III
## ARGUMENT

### A. The Subscriber Agreement Requires The Plaintiffs To Bring This Case In Massachusetts

As noted above, the Subscriber Agreement invoked by the Plaintiffs in the Complaint contains a mandatory and exclusive forum selection clause. That clause states, in relevant part,

that "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 [Raging Bull website]." See Complaint, Exhibit 1 ¶ 33 (Subscriber Agreement) (emphasis added) ; see also Carney Affidavit ¶ 4. This provision clearly applies to the claims asserted in the Complaint, and the proper venue for this action is therefore the District of Massachusetts—not the Southern District of Florida.

Federal courts routinely enforce mandatory forum selection clauses, even in form contracts. See, e.g., Carnival Cruise Lines, Inc., v. Shute, 499 U.S. 585 (1991) (enforcing forum selection clause in a form contract); P & S Business Machines, Inc. v. Canon USA, Inc., 331 F.3d 804, 807 (11th Cir. 2003) ("Forum selection clauses in contracts are enforceable in federal courts."). Indeed, the policy encouraging court enforcement of forum selection clauses recognizes that the parties should be held to the bargain they struck in entering into their contract. See Ricoh, 870 F.2d at 573.

The Complaint in this case specifically alleges that Zwebner entered into and agreed to the terms of the Subscriber Agreement--including the forum selection clause. See Complaint ¶ 24 & Exhibit 1. Accordingly, there can be no dispute that Zwebner and any other similarly situated members of the plaintiff class consented to Massachusetts as the appropriate and exclusive forum for this dispute. Moreover, because Universal (and any other similarly situated corporations in the plaintiff class) are apparently suing as third-party beneficiaries to the Subscriber Agreement (see, e.g., Complaint ¶¶ 36-38), those plaintiffs are also subject to the forum selection clause. See InterGen N.V. v. Grina, 344 F.3d 134, 146 (1st Cir. 2003) ("[I]t is well settled that third-party beneficiary status does not allow the holder to avoid the effect of otherwise enforceable contract provisions."); Trans-Bay Eng'rs & Builders, Inc. v. Hills, 551

F.2d 370, 378 (D.C. Cir. 1976) ("The beneficiary cannot accept the benefits and avoid the burdens or limitations of a contract."); see also Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 203 (3d Cir. 1983) (dismissing case brought by non-signatory third-party beneficiary to contract based on forum selection clause in contract), overruled on other grounds by 490 U.S. 495 (1989).

In short, under the express terms of the Subscriber Agreement, venue is improper in this District, and pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a), the case should be dismissed. See, e.g., Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1289-90 (11th Cir. 1998) (affirming dismissal under Fed. R. Civ. P. 12(b)(3) based on international forum selection clause in contract).

### B. In The Alternative, The Civil Action Should Be Transferred To The United States District Court For The District Of Massachusetts

Of course, an outright dismissal is not the only available remedy for the Plaintiffs' failure to bring this action in Massachusetts. Section 1404(a) of Title 28 of the United States Code authorizes this Court to transfer this case to the District of Massachusetts where doing so is "in the interest of justice" and for the "convenience of the parties and witnesses." See 28 U.S.C. §§ 1404(a); see also 1406(a). In the Southern District of Florida, consideration of a motion to transfer has been split into a two part test: "(1) whether the action 'might have been brought' in the proposed transferee court and (2) whether various factors are satisfied so as to determine if a transfer to a more convenient forum is justified." Meterlogic, Inc. v. Copier Solutions, Inc., 185 F. Supp. 2d 1292, 1299 (S.D. Fla. 2002); see also Thermal Technologies, Inc. v. Dade Service Corp., 282 F. Supp. 2d 1373, 1376-79 (S.D. Fla. 2003) (applying above test); Del Monte Fresh Produce Co. v. Dole Food Co., Inc., 136 F. Supp. 2d 1271, 1281 (S.D. Fla. 2001) (same); Moit v. Kechijian, 830 F. Supp. 1460, 1465-66 (S.D. Fla. 1993) (same). A consideration of these two


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steps compels the conclusion that a transfer to the United States District Court for the District of Massachusetts is appropriate for this case.[3]

As an initial matter, there can be no dispute that this case "might have been brought" in the United States District Court for the District of Massachusetts. Lycos--the only properly named defendant in this case--is headquartered in Massachusetts and is amenable to service of process there. See 28 U.S.C. § 1391(b) and (c) (providing that venue is appropriate in "a judicial district in where any defendant resides, if all defendants reside in the same State"); Complaint ¶ 11; Carney Affidavit ¶ 1. [4]

Moreover, the Eleventh Circuit has held that "[t]he presence of a forum-selection clause . . . will be a significant factor that figures centrally in the district court's calculus." P & S Business Machines, Inc., 331 F.3d at 807 (further stating that "while other factors might 'conceivably' militate against transfer . . . the venue mandated by a choice of forum clause rarely will be outweighed by other 1404(a) factors"); see also Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring) ("Though state policies should be weighed in the balance, the authority and prerogative of the federal courts to determine the issue, as Congress has directed by § 1404(a), should be exercised so that a valid forum-selection clause is given controlling weight in all but the most exceptional cases." (emphasis added and citations omitted); Ricoh Corp., 870 F.2d at 573-74 (granting petition for mandamus and holding that a district court abused its discretion by failing to transfer venue under Section 1404(a) in

[3] Notably, Section 1404(a) requires the entire case, not just certain claims, to be transferred. See, e.g., Technosteel, LLC v. Beers Const. Co., 271 F.3d 151, 157 (4th Cir. 2001) ("courts have adhered to the general rule that [28 U.S.C.] § 1404 transfer 'contemplates a plenary transfer of the entire case'"); Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1518 (10th Cir. 1991) (same) (citing Wyndham Assoc. v. Bintliff, 398 F.2d 614, 618 (2d Cir. 1968)).

[4] Of course, as explained above, the forum selection clause in the Subscriber Agreement selects Massachusetts as the "exclusive forum and venue" to resolve disputes involving the Raging Bull website. See Complaint at Exhibit 1, ¶ 33 (Subscriber Agreement).



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accordance with a forum selection clause). Indeed, so strong is the preference for enforcing forum selection clauses that the Eleventh Circuit has shifted the burden of persuasion in this context: "The burden is on the party opposing the enforcement of the forum selection clause to show that the contractual forum is sufficiently inconvenient to justify retention of the dispute." P & S Business Machines, Inc., 331 F.3d at 807 (citing Ricoh Corp., 870 F.2d at 573) (emphasis added).

The Plaintiffs in this case cannot possibly satisfy their burden of showing that Massachusetts is so inconvenient that the case should not be transferred. To the contrary, Massachusetts is plainly the focal point of this litigation, as it is the one jurisdiction and venue in which all of the putative class members have consented to jurisdiction and service of process. See Complaint at Exhibit 1 ¶ 33.[5]

A transfer to Massachusetts is also appropriate under the various other factors relevant to transfer of venue under Section 1404(a). Those factors include: "[1] the convenience of the parties, [2] the convenience of the witnesses, [3] the relative ease of access to sources of proof, [4] the availability of service of process to compel the presence of unwilling witnesses, [5] the cost of obtaining the presence of witnesses, [6] the public interest, and [7] all other practical problems that make trial of the case easy, expeditious, and inexpensive." Meterlogic, Inc., 185 F. Supp. 2d at 1300. See also Jewelmasters, Inc. v. May Dept. Stores, Co., 840 F. Supp. 893, 895 (S.D. Fla. 1993) (listing § 1404(a) factors). Virtually all of these factors weigh in favor of transferring this matter to the District of Massachusetts.

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[5] Indeed, one of the Named Plaintiffs, Zwebner, has already shown a readiness and willingness to litigate in Massachusetts, as he is *presently* a litigant in Massachusetts. See, e.g., Polk v. Zwebner, Civil Action No. 03-01176 (Mass. Super. Ct.). Zwebner has also previously asserted claims relating to the Raging Bull website in both Massachusetts and its neighboring New Hampshire courts. See, e.g., Zwebner v. Dumont, Civil Action No. 98-00682 (D.N.H.); Zwebner v. Villasenor, Civil Action No. 00-02239 (Mass. Super. Ct.). Under these circumstances, the Named Plaintiffs can hardly claim Massachusetts as an inconvenient or inappropriate forum for this dispute.



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Because Lycos maintains its corporate headquarters in Massachusetts, Massachusetts is plainly more convenient for witnesses and will provide greater ease of access to sources of proof relevant to plaintiffs' claims. See Carney Affidavit ¶ 1. The Lycos employees with relevant knowledge, as well as any relevant the corporate records are all located at the company's Waltham, Massachusetts, headquarters. See Carney Affidavit ¶¶ 6-7. In addition, because all registered users of the Raging Bull website have agreed to service of process in Massachusetts in the Subscriber Agreement (see Complaint at Exhibit 1, ¶ 33), Massachusetts is the superior forum, from which the parties may compel the presence of unwilling witnesses, minimize the cost of obtaining the presence of those witnesses, and reduce practical problems that would make any trial of the case easier, more expeditious, and less expensive. See Meterlogic, Inc., 185 F. Supp. 2d at 1300.

The fact that the Complaint purports to allege a class action against Lycos further militates in favor of a transfer to Massachusetts. In Moghaddam v. Dunkin' Donuts, 2002 WL 1940724 (S.D. Fla. August 13, 2002), a Florida resident filed a class action lawsuit against a Massachusetts-based corporation. In granting the corporate defendant's motion to transfer the case to the District of Massachusetts, the court explained that, in a class action, "a plaintiff's choice of forum will be afforded less deference." Id. at *2. Quoting the Supreme Court, the Moghaddam court explained:

> [W]here there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened.

Id. at *3 (quoting Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)). After reviewing the allegations in the case, along with the other relevant facts, the Moghaddam court

held that Massachusetts was a more appropriate forum for the action in part because the defendants' corporate headquarters, the majority of defense witnesses, and the "bulk of relevant documents" were all located there. Moghaddam, 2002 WL 1940724 at *3-5.

The Moghaddam decision is directly on point here, where the Plaintiffs have filed a class action lawsuit in Florida that purports to represent "hundreds" of class members who reside in jurisdictions all over the world. See Complaint ¶¶ 3-4; see also Carney Affidavit ¶ 5 (explaining that there are more than one million registered users on the Raging Bull website). Under these circumstances, Massachusetts—the location of Lycos' corporate headquarters—is the only logical venue for the resolution of the Plaintiffs' claims. See Moghaddam, 2002 WL 1940724 at *3-5; see also Balloveras, 2004 WL 1202854 at *1-2 (transferring a class action lawsuit to the district where the corporate defendant's operations were located and explaining that, in class actions, the plaintiff's choice of forum is entitled to less deference, because the plaintiff is merely a "class representative").

Finally, because Massachusetts law will necessarily apply to this dispute, see Complaint at Exhibit 1 ¶ 33, a transfer of this case to Massachusetts would serve the public interest by ensuring that those issues of Massachusetts law will be resolved by a federal judge that is familiar with that law. See Van Dusen v. Barrack, 376 U.S. 612, 645 (1964). A transfer to Massachusetts would also further the public interest in encouraging parties to bargain for the selection of a forum if it is material to either side's decision making. See, e.g., Stewart Organization, Inc., 487 U.S. at 33 (Kennedy, J., concurring) (explaining that "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system").


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## IV
## CONCLUSION

Accordingly, for all the reasons stated above, Defendants respectfully request that this Court grant their Motion and dismiss the case for improper venue, or , in the alternative, transfer this case in its entirety to the United States District Court for the District of Massachusetts.

Dated: August 23, 2004

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the *Defendants' Memorandum of Law in Support of Their Motion to Dismiss or, in the Alternative, Transfer, for Improper Venue* was sent via U.S. Mail this 23rd day of August, 2004 to: **David A. Bunis, Esq.**, DWYER & COLLORA, LLP, 600 Atlantic Avenue, Boston, MA 02210 and via Hand Delivery to: **John J. Faro, Esq.**, Faro & Associates, 44 West Flagler Street, Suite 1100, Miami, Florida 33130.

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