UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LARRY JOE DAVIS, JR., an individual,

Plaintiff,

v. Case No.: 8:10-CV-2352-T27 TBM

AVVO, INC., a Washington corporation
d/b/a Avvo.com,

Defendant.
_______________________________________/

DEFENDANT'S RENEWED MOTION TO TRANSFER VENUE
AND SUPPORTING MEMORANDUM OF LAW

Pursuant to 28 U.S.C. § 1404(a), Defendant Avvo, Inc. ("Avvo") hereby renews its motion to transfer this matter to the parties' agreed venue of the Western District of Washington. (doc. 15). Grounds for this motion are set forth more fully in the following Memorandum of Law, the previously filed declarations of Avvo's General Counsel, Joshua King, and the previously filed Motion to Transfer to Western District of Washington, King County Division and supporting memorandum of law. (docs. 9, 15, 17).[1]

INTRODUCTION

This lawsuit arises out of information published on the Avvo.com website ("Avvo.com"), which was created by Avvo, a Washington corporation with its principal place of business in Seattle. Plaintiff, Larry Joe Davis, Jr. ("Davis"), is bound by a valid and

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[1] Avvo has filed a timely Motion to Dismiss the Third Amended Complaint with Supporting Memorandum of Law on March 23, 2011 and a timely Amended Motion to Strike directed at a number of paragraphs that are impertinent, immaterial, and prejudicial. (docs. 30, 31). However, in order to preserve its right to continue to seek transfer pursuant to 28 U.S.C. § 1404(a), and without waiving any arguments in its pending Motion to Dismiss Third Amended Complaint and Amended Motion to Strike, Avvo hereby files this Renewed Motion to Transfer Venue.

enforceable forum selection clause that requires this action to be litigated only in King County, Washington. Because the forum selection clause is enforceable under federal law[2] and because important policies support fulfilling the parties' contractual obligations and expectations, this Court should transfer this cause to the Western District of Washington, King County Division.

BACKGROUND

Avvo.com is a website that collects and displays publicly available information about attorneys from state bar associations and websites, including years of experience and disciplinary sanctions, and then rates attorneys in three basic areas: experience, industry recognition, and professional conduct. (doc. 9, Exhs. 3, 13, 16, 18, 20, 25, 27). Clients are able to submit reviews of their attorneys, and attorneys may submit peer endorsements. (doc. 9, Exh. 16). As with many websites,[3] access to and use of Avvo.com is subject to and governed by Terms and Conditions of Use (the "Terms"), which were unchanged at all times relevant hereto. (doc. 17 at ¶¶3-4). The Terms clearly and unambiguously provide for the application of Washington law to the "Site terms and your use of the Site…" (doc. 9, Exh. 8; doc. 17 at ¶5). The Terms also clearly and broadly require that any civil litigation concerning "any action at law or in equity *arising out of or relating to the Site* or these Site Terms shall be filed only in the state and federal courts located in King County, Washington and you hereby irrevocably and unconditionally consent and submit to the exclusive jurisdiction of such courts." (doc. 9, Exh. 8; doc. 17 at ¶6) (emphasis added). The "claim your profile" pages demonstrate that, in order to gain access to Avvo.com and participate in editing one's profile, a user must accept the Terms.

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[2] Consideration of whether to enforce a forum selection clause in a diversity jurisdiction case is governed by federal law. *Stewart Org., Inc. v. Ricoh Oil,* 487 U.S. 22, 28-29 (1988); *P&S Bus. Machines, Inc. v. Canon USA, Inc.,* 331 F.3d 804, 806 (11th Cir. 2003).

[3] *See, e.g.,* https://pacer.login.uscourts.gov/cgi-bin/login.pl (including links to website policies at bottom of page).

(doc. 9, Exh. 7). Virtually every page of Avvo.com, including its initial landing page and search result pages, including the "claim your profile" pages, includes a prominent link to the Terms. (doc. 9; doc. 17 at ¶7).

Davis is a Florida lawyer who has sued Avvo.com because of his dissatisfaction with his attorney profile on Avvo.com. Davis filed his Third Amended Complaint on April 25, 2011. (doc. 26). Although the legal theories vary from pleading to pleading, they rely on the same[4] factual allegations: Avvo allegedly published an incorrect business address, an inaccurate practice area listing and an unauthorized photo of Davis in his Avvo.com profile. Also common to all pleadings is the absence of any alleged damages; rather, Davis complains that he has received *additional* client inquiries.[5] Davis now contends that these alleged errors constitute false advertising, unfair trade practices, and commercial misappropriation of likeness.

Davis has acknowledged that he visited Avvo.com, designated a password, logged into (i.e., "claimed") his profile and attempted to correct the "misinformation." (doc. 26, ¶26). Davis did not cease registration or discontinue using Avvo.com when confronted with the Terms. Instead, Davis edited his profile, updated it with biographic information and solicited and accepted client endorsements. (doc. 2, ¶¶ 14, 16, 18, 29; doc. 3, ¶¶ 30, 32, 49, 58; doc. 26, ¶26). At no time prior to filing suit did Davis attempt to repudiate the Terms, including in the multiple electronic communications between Davis and Avvo, beginning on August 17, 2010, in which Davis voiced his dissatisfaction with his Avvo rating, particularly insofar as it had given particular weight (or lack thereof) to his prior disciplinary history and his board

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[4] Davis has apparently abandoned his prior complaint about the rating(s) that were assigned to him in his Avvo.com profile, which were quintessential opinion, as discussed in detail in Avvo's previously filed Motion to Dismiss Amended Complaint. (doc. 8).

[5] Specifically, Davis claims that he received client inquiries regarding hostile work environment cases, "which Plaintiff does not take as a health lawyer," although he insists that he "is versed in employer-side human resources compliance, as noted on his own web site, and is capable of consulting on 'hostile work environment' claims and compliance." (doc. 26, ¶¶ 21, 24).

certification. (doc. 17, ¶9 and Exhs. 2, 3, 5, 7, 9, 10, 11). It was only after Davis availed himself of the benefits of the website and was unhappy with the final results that he demanded to be "de-listed" from Avvo.com and thereafter filed suit.

ARGUMENT

In a diversity case in which a forum selection clause designates a domestic forum, an appropriate procedure for seeking enforcement of the clause is a motion to transfer venue pursuant to 28 U.S.C. § 1404(a). *See Stewart Org., Inc.,* 487 U.S. at 28-29; *P&S Bus. Machines, Inc.,* 331 F.3d at 807; *Food Mktg. Consultants, Inc. v. Sesame Workshop*, 2010 W.L. 1571206, *4 (S.D. Fla.), *approved,* 2010 W.L. 1571210 (S.D. Fla. 2010). Section 1404(a) provides that "[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." 28 U.S.C. § 1404(a).[6]

A forum selection clause is *"a significant* factor that figures *centrally* in the district court's calculus" under Section 1404(a). *Stewart Org., Inc.,* 487 U.S. at 29 (emphasis added). Indeed, "while other factors might `conceivably' mitigate against a transfer ... the venue mandated by a choice of forum clause will rarely be outweighed by other 1404(a) factors." *P&S Bus. Machines, Inc.,* 331 F.3d at 807 (quoting *In re Ricoh Corp.,* 870 F.2d 570, 573 (11th Cir. 1989)); *i9 Sports Corp. v. Cannova*, 2010 W.L. 4595666, *2 (M.D. Fla. 2010). By enforcing the contractual forum, a court is not attempting to limit the plaintiff's usual right to choose its forum, but is enforcing the forum the plaintiff already has chosen. *In re Ricoh Corp.,* 870 F.2d

[6] Because Avvo is domiciled, and has its principal place of business, in Seattle, Washington, the Western District of Washington, King County Division, is a proper venue for this action. *See* doc. 17 at ¶12; 28 U.S.C. § 1391(a)(1) (In a diversity action, venue is properly laid in "a judicial district where any defendant resides, if all defendants reside in the same state.")

at 573. Under such circumstances, the plaintiff's forum choice is not entitled to any deference. *Id.* (emphasis added). To the contrary, such deference "would only encourage parties to violate their contractual obligations, the integrity of which are vital to our judicial system." *Id. See also Murray v. Quiznos Franchising LLC*, 2006 W.L. 1529540, *2 (M.D. Fla. 2006) (plaintiff's forum choice not afforded deference when case was initially in a forum other than where agreed upon by parties). Instead, the opponent of a valid, reasonable choice of forum clause bears the heavy burden of persuading the court that the contractual forum is "sufficiently inconvenient" to justify retention. *In re Ricoh Corp.,* 870 F.2d at 573.

Thus, "[a] valid forum selection clause [should be] given controlling weight in all but the most exceptional cases." *Stewart Org., Inc.*, 487 U.S. at 33. Although courts consider other factors such as plaintiff's initial choice of forum, convenience of the parties and witnesses, relative ease of access to sources of proof, availability of compulsory process for witnesses, location of relative documents, financial ability to bear the cost of the change, and all other practical problems that make trial of the case easy, expeditious, and inexpensive, these other factors rarely outweigh the venue mandated by a forum selection clause. *See, e.g., i9 Sports Corp.*, 2010 W.L. 4595666 at *4; *Pods, Inc. v. Paysource, Inc.,* 2006 W.L. 1382099, *3 (M.D. Fla. 2006); *American Aircraft Sales Internat'l, Inc. v. Airwarsaw, Inc.,* 55 F. Supp. 2d 1347, 1351 (M.D. Fla. 1999). Instead, "this Court must transfer this case to the contractually agreed upon forum unless this case presents one of the rarest or most exceptional situations." *Murray,* 2006 W.L. 1529540 at *3.

I. <u>The Forum Selection Clause Is Valid and Enforceable</u>

The validity of a forum selection clause is determined by the rules governing the enforcement of contracts in general. *See, e.g., In re Ricoh Corp.,* 870 F.2d at 573-74; *P & S Bus. Machines, Inc.,* 331 F.3d at 807; *Pods, Inc.,* 2006 W.L. 138209 at *1. Parties to a contract can agree in advance to submit to the jurisdiction of a given court. *See Alexander Proudfoot Co. World Headquarters, L.P. v. Thayer,* 877 F.2d 912, 921 (11th Cir. 1989); *Food Marketing Consultants, Inc*., 2010 W.L. 1571206 at *5; *Consolidated Mgmt. Sys., Inc. v. Dennis*, 2008 W.L. 2694107, *2 (M.D. Fla. 2008). Indeed, "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." *Stewart Org., Inc.*, 487 U.S. at 33 (Kennedy, J., concurring).

Consequently, forum selection clauses are presumptively valid. *See, e.g., M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Krenkel v. Kerzner Internat'l Hotels, Ltd.,* 579 F.3d 1279, 1281 (11th Cir. 2009); *P & S Bus. Machines, Inc.,* 331 F.3d at 807; *i9 Sports Corp.*, 2010 W.L. 4595666 at *2; *Uribe v. Tuscany Preserve Devel., Inc.*, 2009 W.L. 111667, *1 (M.D. Fla. 2009); *Pods, Inc.,* 2006 W.L. 1382099 at *1. Absent a "strong showing" that enforcement would be unfair or unreasonable under the circumstances, forum selection clauses must be enforced. *See, e.g., Krenkel*, 579 F.3d at 1281; *M/S Bremen*, 407 U.S. at 15; *Consolidated Mgmt. Sys., Inc.*, 2008 W.L. 2694107 at *2. This burden is "extremely difficult to overcome." *Picken v. Minuteman Press Internat'l, Inc.,* 854 F. Supp. 909, 911 (N.D. Ga. 1993) (citing *In re Ricoh*, 870 F.2d at 573).

A. Davis Has Failed to Satisfy the Heavy Burden to Invalidate the Forum Selection Clause

This Court should disregard the forum selection clause as unreasonable only if Davis demonstrates that (1) the formation of the forum selection clause resulted from fraud or over-reaching; (2) Davis would be deprived of his day in court because of inconvenience or unfairness; (3) the chosen law (Washington) would deprive Davis of a remedy; or (4) enforcement of the forum selection clause would contravene public policy. *See, e.g., Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1292 (11th Cir. 1998); *Van Zyl v. Aviatour, Inc.,* 2009 W.L. 2025159, *4 (M.D. Fla. 2009). None of these factors are present in this case.

Davis has not disputed that he accepted the Terms.[7] He has not claimed that the Terms, which are referenced via "hyperlink" at the bottom of each page of Avvo.com, were not readily accessible. (doc. 9, Exhs. 1-15; doc. 17 at ¶7). Davis does not argue that the forum selection clause was procured by fraud. Nor did he decline to register or discontinue using Avvo.com once confronted with the Terms. Instead, Davis claimed his profile, updated it with biographic information and solicited and accepted client endorsements. At no time did Davis repudiate, or attempt to repudiate, the Terms, including in the multiple electronic communications between Davis and Avvo regarding his unhappiness with his Avvo rating. (doc. 17 at ¶9 and Exhs. 2-11). Had Davis, a board-certified lawyer, at any time determined that the Terms were unsatisfactory, he was free to discontinue his account registration and cease using Avvo.com. Instead, he willingly and voluntarily accepted the Terms and the benefits of the contractual arrangement

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[7] State and federal courts within the Eleventh Circuit and elsewhere routinely uphold browsewrap agreements and similar web-based contracts, such as so-called "clickwrap" agreements, based upon general contract principles. *See, e.g., ProCD, Inc. v. Zeidenberg,* 86 F.3d 1447, 1449 (7th Cir. 1996); *Snap-on Bus. Solutions, Inc. v. O'Neil & Assocs., Inc.,* 708 F. Supp. 2d 669, 682-83 (N.D. Ohio 2010); *Exceptional Urgent Care Ctr. I, Inc. v. Protomed Med. Mgmt. Corp.,* 2009 W.L. 2151181, *6 (M.D. Fla. 2009); *Brueggemann v. NCOA Select, Inc.,* 2009 W.L. 1873651, *2 (S.D. Fla. 2009); *Southwest Airlines Co. v. BoardFirst, LLC*, 2007 W.L. 4823761, *5 (N.D. Tex. 2007); *Briceno v. Spring Spectrum, L.P.,* 911 So. 2d 176, 178 (Fla. 3d DCA 2005); *Cairo, Inc. v. Crossmedia Servs.,* 2005 W.L. 756610, *4-6 (N.D. Cal. 2005).

with Avvo that allowed him to modify and enhance his free Avvo profile. As discussed in detail in Avvo's previously filed Motion to Dismiss Amended Complaint and Supporting Memorandum of Law (doc. 8) and Motion to Transfer to Western District of Washington, King County Division (doc. 15), both of which Avvo incorporates by reference in their entirety as if fully set forth herein, the Terms govern the relationship of the parties, including the choice of law and forum for this dispute.

In a hasty and belated attempt to avoid the effect of these Terms, Davis now purports to dispense with them with a dismissive, sweeping, conclusory and wholly unsubstantiated claim of unenforceability "either due to duress, mistake, procurement of contract by illegality, fraud in the inducement, unconscionability, unclean hands, or other theories." (doc. 26, ¶26). This conclusory allegation is simply insufficient to satisfy Davis' weighty burden of showing that the forum selection clause *itself* is the product of fraud or that fraud caused the inclusion of the clause in the Terms. *See Scherk v. Alberta Culver Co.,* 417 U.S. 506, 519 n. 4 (1974). "By requiring the plaintiff specifically to allege that the choice clause itself is unenforceable, courts may ensure that more general claims of fraud will be litigated *in the chosen forum,* in accordance with the contractual expectations of the parties." *Lipcon*, 148 F.3d at 1296 (emphasis in original). This burden is based on sound policy favoring forum selection clauses, which are agreements by the parties concerning where disputes are to be resolved. A claim for fraud is just one of the many disputes that might arise. "If a forum clause were to be rejected whenever a plaintiff asserted a generic claim of fraud in the inducement, ... forum clauses would be rendered essentially meaningless." *REO Sales, Inc. v. Prudential Ins. Co.,* 925 F. Supp. 1491, 1495 (D. Colo. 1996).

As noted above, Davis has alleged no facts supporting a claim that Avvo procured the forum selection clause by fraud. Rather, that Davis freely assented to the Terms and the forum selection clause, logged into his Avvo.com profile, took advantage of the various features offered by the site, including adding information to his biographical data, soliciting clients to offer endorsements, accepting such endorsements, and including a reference to his board-certified status, and further ratified the Terms by continuing to use and access Avvo.com on numerous subsequent visits. (doc. 3, ¶¶10, 11, 19, 20, 30, 32, 34, 44, 49, 60; doc. 2, ¶¶14, 29, 43, 45, 51, 59, doc. 26, ¶26). Davis did not repudiate, or attempt to repudiate, the Terms, even during several back-and-forth electronic communications with Avvo regarding Davis' dissatisfaction with his Avvo rating. (doc. 17, ¶9, and Exhs. 2-11). Davis accepted the Terms, including the choice of law clause (Washington) and mandatory and exclusive forum selection clause (King County, Washington). *See, e.g., Mortgage Plus, Inc. v. DocMagic, Inc.,* 2004 W.L. 2331918, *6 (D. Kan. 2004).

Davis had "every opportunity not to agree to be bound by the [Terms] and discontinue [using Avvo.com]." *Ploharski v. eBay, Inc.,* 2000 W.L. 35778242, *5 n. 8 (N.D. Ga. 2000). By his own admission, Davis is a sophisticated lawyer with decades of legal experience; presumably "he is aware that it is his obligation to apprise himself of all contractual provisions prior to" assenting to its terms. *Id.* Rather than challenge the Terms, he voluntarily agreed to them and deliberately accepted their benefits. To allow Davis to "disavow" such Terms would render illusory the enforcement of browsewrap agreements and other web-based and electronic or digital contracts. *See, e.g. Exceptional Urgent Care Ctr. I, Inc.,* 2009 W.L. 2151181, *8; *Burcham v. Expedia, Inc.,* 2009 W.L. 586513, *3-4 (E.D. Mo. 2009) (enforcing terms of use against user who did not see the terms but accepted the benefits of the website's services).

Given the complete absence of any factual allegations supporting Davis' sweeping and conclusory assertions of unenforceability, illegality, fraud, unconscionability, unclean hands, etc., Avvo respectfully submits that this Court can dispense with such unsubstantiated arguments in an equally summary fashion.

B. Davis' Attempt to "Disavow" the Terms Is Inadequate to Defeat a Valid Choice of Law Provision

Alternatively, Davis purports to "disavow[], *at this time*, reliance on any fact which occurred after Plaintiff logged on to the Avvo.com site (August 17, 2010)" (doc. 26) (emphasis added), while simultaneously reserving the right to "seek future leave of Court to supplement this action to allege post-filing allegations of fact and associated claims." (doc. 21). Davis further states that "[a]ll claims in this action accrued prior to this arguable 'start date' of the Terms of Use. As such, the Terms of Use are not applicable to any aspect of this action." (doc. 26, ¶26). Notwithstanding this purported "disavowal," the Third Amended Complaint is replete with allegations about events occurring after Davis claimed his profile or wholly irrelevant to the underlying claims. (doc. 26, ¶¶ 27, 28, 29, 31, 32, 34, and 41). Moreover, Davis' purported "disavowal" of certain time frames does not alter the facts that supposedly gave rise to his alleged injury, i.e., incorrect business address, inaccurate practice area, and unauthorized photo. Davis' attempt to "draft around" the Terms should be rejected as nothing more than an untimely attempt to repudiate the agreement after accepting its benefits.

II. The Entire Case Should Be Transferred to Washington

The forum selection clause contained in the Terms establishes a legal agreement between Davis and Avvo that encompasses Davis' claims. In the Eleventh Circuit, contractual

forum selection clauses “referencing ‘any lawsuit regarding this agreement’ and ‘any action brought by either party in any court’ have been broadly construed to include contract claims ‘arising directly or indirectly from’ the contractual relationship, as well as tort and extra-contractual claims.” *United States ex rel. Bayer Clothing Group, Inc. v. Tropical Shipping & Constr. Co.,* 2006 U.S. Dist. LEXIS 70671, *8 (M.D. Fla. 2006) (citations omitted); *see also Stewart Org., Inc. v. Ricoh Corp.,* 810 F.2d 1066, 1070 (11th Cir. 1987), *aff'd and remanded*, 487 U.S. 22 (1988) (it was "clear from the language of the agreement that the forum selection clause encompassed any dispute arising out of or in connection with the dealer-manufacturer relationship," because it referred to *"any* ‘case or controversy arising under or in connection with this Agreement’."); *Food Marketing Consultants, Inc.,* 2010 W.L. 1571206, at *11; *McNair v. Monsanto Co.,* 279 F. Supp. 2d 1290, 1307-08 (M.D. Ga. 2003); *Picken*, 854 F. Supp. at 911.

A. <u>The Forum Selection Clause Applies to All of Davis’ Claims, Regardless of their Current Labels</u>

Thus, clauses referencing “any lawsuit regarding this agreement” and “any action brought by either party in any court” have been construed broadly to include contract claims “arising directly or indirectly from” the contractual relationship, as well as tort and extra-contractual claims. *See, e.g., Pods, Inc.,* 2006 W.L. 1382099 at *2; *Stewart Org.,* 810 F.2d at 1070 (“[c]ommercial contractual issues are commonly intertwined with claims in tort or criminal or antitrust law”). This Court has recognized that claims such as unfair trade practices and other tort claims may fall within a valid forum selection clause. *Pods, Inc.,* 2006 W.L. 1382099 at *4 n. 5.

Other courts in this circuit have construed similar forum selection clauses apply to claims such fraud and negligence. In *McNair,* for example, plaintiffs purchased cottonseed pursuant to an agreement that contained a forum selection clause designating venue for "all disputes arising under [the] Agreement." 279 F. Supp. 2d at 1307. Plaintiffs subsequently sued for breach of warranty, product liability, negligence, and fraud. Noting that "the intention of the parties as reflected by the wording of particular clauses and the facts of each case" governs whether tort claims are subject to a forum selection clause, the court focused on the "expansive" nature of the clause to conclude that *all* claims were subject to the forum selection clause because all arose from the purchase and planting of the cottonseed that was the subject of the agreement containing the forum selection clause. *Id.* at 1307-08. Moreover, even if the forum selection clause had not covered some of the claims, a court could transfer the non-covered causes of action along with those that were subject to the forum selection clause in the interest of justice, particularly where doing so provides for an efficient use of court resources. *Id.*

Likewise, in *Smith v. Professional Claims, Inc.,* 19 F. Supp. 2d 1276 (M.D. Ala. 1998), the court noted that "whether a forum clause applies to a tort claim depends on the relation of the tort claim to the contract." *Id.* at 1282. The court held that the forum selection clause applied to tort and statutory claims, including claims for fraud, misrepresentation, and violations of the Alabama Deceptive Trade Practices Act, because "the crux of [the plaintiffs'] complaint [was] that the products and services which they received were not the same ones that had been represented to them before the purchase." *Id. See also Manetti-Farrow, Inc. v. Gucci America, Inc.,* 858 F.2d 509, 514 (9th Cir. 1988)[8]; *Picken*, 854 F. Supp. at 910-12 (applying forum selection clause to fraud, deceit and breach of fiduciary duty claims along with contractual claims because to do "otherwise would mean that the mere recitation of a form of action would

[8] The Eleventh Circuit has cited to the *Manetti* decision with approval in *Lipcon*, 148 F.3d at 1299.

dictate the enforceability of a forum selection clause. Such a restrictive reading would frustrate commercial reliance on such clauses which are encouraged.").

"Regardless of the labels used, [Davis'] allegations reference and relate to the terms and scope of the [Terms]." *Pods, Inc.,* 2006 W.L. 1382099 at *2. Because public policy dictates that forum selection clauses should be enforced, they should not be defeated merely by attempts at artful pleading. *See Pods, Inc.,* 2006 W.L. 1382099 at *2 n. 2. All of Davis' claims arise out of the Avvo.com website and all fall squarely within the Terms, regardless of the individual theories of liability in which they are wrapped. Whether currently denominated as "false advertising," "misappropriation," or "unfair trade practices," all of these claims directly arise out of the information collected by and published on Avvo.com and these facts are unchanged by Davis' expression of "buyer's remorse" in belatedly "disavowing" the effect of his informed and voluntary acceptance of the Terms.

B. <u>The Forum Selection Clause Is Mandatory</u>

A forum selection clause is mandatory if it is clear, unequivocal and contains language of exclusivity. *See Global Satellite Comm'n Co. v. Starmill U.K. Ltd*., 378 F.3d 1269, 1272 (11th Cir. 2004). The forum selection clause, which states that the "Site terms and your use of the Site…" shall be governed by the laws of Washington and that the courts in King County, Washington shall be the exclusive venue for all litigation, is clearly "mandatory." (doc. 9, Exh. 8). Where a forum selection clause, as here, uses mandatory language such as "shall" and names a specific location with no ambiguity in the chosen forum, the forum selection clause is deemed mandatory and enforceable. *See Advanced Mktg. Int'l v. Morgan,* 2006 W.L. 1679219,

*3 (M.D. Fla. 2006). Under the forum selection clause, the only proper jurisdiction for litigation of these claims relating to Avvo.com is King County, Washington.

C. King County, Washington Is The Proper Venue for This Action

Davis cannot argue reasonably that he will be deprived of his day in court if he is required to litigate in the agreed-upon venue of King County, Washington. *See Carnival Cruise Lines, Inc.,* 499 U.S. at 594-95 (inconvenience of trying case in one state versus another is insufficient to invalidate forum selection clause). Because the parties entered into a contract with a valid, enforceable and mandatory provision requiring any litigation to be instituted exclusively in the state or federal courts of King County, Washington, it is not unfair to expect Davis to abide by such provision. Avvo is incorporated in Washington and has its principal place of business in Seattle, Washington. (doc. 17, ¶¶2, 12). Pursuant to 28 U.S.C. §1391(a)(1), in a diversity action, venue is properly laid in "a judicial district in which any defendant resides, if all defendants reside in the same state." 28 U.S.C. §1391(a)(1). The Western District of Washington is a proper venue for this case.

D. Washington Is a Reasonable And Fair Forum for This Litigation

As noted earlier, enforcement of the forum selection clause is reasonable because it encourages parties to honor their contractual obligations and promotes the use of forum selection clauses to spare time and expense to determine the proper forum. *See, e.g., In re Ricoh Corp.,* 870 F.2d at 573; *Carnival Cruise Lines, Inc.,* 499 U.S. at 594-95. When a forum selection clause is involved, Section 1404(a) "encompasses consideration of the parties' private expression of their venue preferences." *Stewart Org., Inc.,* 487 U.S. at 28-29. The Court,

therefore, focuses on "the convenience of a [Washington] forum given the *parties' expressed preference for that venue." In re Ricoh Corp.,* 870 F.2d at 573 (emphasis added). As detailed below, the occurrences allegedly giving rise to Davis' claims took place primarily in Washington, the key witnesses and evidence are located in Washington, and all or most of the relevant documents are located in Washington. (doc. 17 at ¶¶12-18). The Western District of Washington clearly has a substantial connection to this dispute, making it an entirely appropriate and reasonable venue.

E. Private Interests Favor Transfer

Litigating this matter in Florida would place a significant, and wholly unnecessary, strain on many of Avvo's officers and employees and cause a major disruption in Avvo's business. (doc. 17 at ¶19). It is this very strain - of being required to litigate claims in any distant venue in which a disgruntled website visitor resides - that motivates online businesses, such as Avvo, to incorporate enforceable forum selection clauses in their website terms of use and Davis cannot demonstrate a legitimate reason for the Court to disregard such provision in this matter. (doc. 17 at ¶¶19-20, 23).

All of Avvo's officers, senior executives and relevant employees are employed at its headquarters in Seattle, Washington, including those responsible for corporate policies, such as the types of publicly available information gathered by Avvo.com and procedures and rules applicable to "claiming" profiles, as well as employees responsible for developing, programming, updating, monitoring and maintaining of Avvo.com, responding to inquiries or complaints regarding Avvo.com, and/or developing, creating and evolving the mathematical formulate used to create attorney "ratings" and other Avvo.com features. (doc. 17 at ¶¶13, 14).

All Avvo's personnel who had any involvement with Davis during the relevant time periods, and/or otherwise have knowledge of facts relevant to this dispute, including any alleged wrongful "intent," work at the Washington headquarters and principal place of business. (doc. 17 at ¶¶21, 22).

The relative ease of access to sources of proof, including the location of relevant documentation and records regarding Davis' claims, also favors transfer to Washington. All documents and files relating to Avvo, its business and Avvo.com, both paper and electronic, are located and maintained in Seattle. (doc. 17 at ¶15). The primary servers for Avvo.com are located in, and controlled from, Washington. (doc. 17 at ¶16). All of Avvo's accounting takes place in Seattle. (doc. 17 at ¶17). *See, e.g., Gould v. National Life Ins. Co.,* 990 F. Supp. 1354, 1359 (M.D. Ala. 1998) (transferring case to state where the defendant had its principal place of business and where corporate officers would be key witnesses in a fraud case).

F. <u>Public Interest Factors Favor Transfer</u>

The public interest factors, including the interest in having the trial in a district of the state whose law is to govern the case, the unfairness of imposing jury duty on citizens in an unrelated forum, and the relative congestion of court dockets, also favor transfer. *See E-One, Inc. v. R. Cushman & Assoc.,* 2006 W.L. 2599130, *3 (M.D. Fla. 2006); *Chierchia v. Treasure Cay Servs.,* 738 F. Supp. 1386, 1388 (S.D. Fla. 1990). The claims asserted by Davis in this case are governed by Washington law. *See supra.* While this Court is clearly capable of construing Washington law, federal courts in Washington engage in that exercise with far greater frequency and, thus, can fairly be expected to have developed some expertise in that area.

Moreover, "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system," thus contributing to the interests of justice in this matter. *See Stewart,* 487 U.S. at 33 (Kennedy, J., concurring). As this Court has recognized, "forum selection clauses are broadly construed to effectuate an orderly and efficient resolution of all claims arising between the parties to a contract and to promote enforcement of those clauses consistent with the parties' intent." *Pods, Inc.,* 2006 W.L. 1382099 at *2. Public policy favors the enforcement of contracts. *Id.* at 1382099, *4 (citing *In re Ricoh Corp.,* 870 F.2d at 573).

Finally, as this Court no doubt is acutely aware, the docket for the Middle District of Florida is one of the busiest dockets in the federal civil judicial system. According to the 2010 Annual Report of the Director of the Administrative Office of the United States Courts, the Middle District of Florida had the third (3rd) most congested federal district court docket of the ninety-four (94) districts in the United States.[9] The public interest favors transfer to the Western District of Washington, King County Division.

G. <u>Davis Cannot Show That The Selected Venue Is "Sufficiently Inconvenient</u>"

As discussed above, Davis bears the heavy burden of persuasion that Washington, the contractually agreed-upon forum, "is sufficiently inconvenient" to justify retention of the dispute. *See In re Ricoh Corp.,* 870 F.2d at 573. To do so, Davis must demonstrate that proceeding with the case in Washington would impose such grave difficulty and inconvenience that, for all practical purposes, Davis would be deprived of his day in court. *Id.* He cannot satisfy this burden.

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[9] *See* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C00Sep10.pdf.

Specifically, Davis cannot proffer sufficient facts to demonstrate such "grave difficulty and inconvenience that, for all practical purposes, [he] would be deprived of [his] day in court" by proceeding in the Western District of Washington. *See P & S Bus. Machines, Inc.,* 331 F.3d at 807. *Accord M/S Bremen,* 407 U.S. at 10. Although Washington may be an inconvenient forum for Davis, Florida is no less inconvenient for Avvo. (doc. 17 at ¶¶18, 23); *Ortho-Med, Inc. v. Micro-Aire Surgical Instruments,* 1993 W.L. 560528, *3 (M.D. Fla. 1993) (defendant's inconvenience is considered in enforcing contractually selected forum); *see XR Co. v. Block & Balestri, P.C.,* 44 F. Supp. 2d 1296, 1300 (S.D. Fla. 1999) (plaintiff did not carry burden of showing that Texas was more inconvenient than Florida when defendants resided in Dallas); *Smith,* 19 F. Supp. 2d at 1280-81 (forum selection clause was fundamentally fair to plaintiff where selected forum was state of defendant's principal place of business). Davis cannot point to "concrete facts mitigating against a change of venue other than the expense and inconvenience that will be occasioned on [Davis] and [his] witnesses if the forum selection clause is enforced." *Pods, Inc., 2006* W.L. 1382099 at *4.

While it may be more expensive and inconvenient for Davis to litigate this case in Washington, keeping this case in Tampa will not eliminate all inconvenience to Davis. He still is likely to be required to travel to Washington for depositions of various witnesses, because Avvo is not required to produce all potential witnesses in Tampa. Besides, the financial difficulty that Davis "might have in litigating in the selected forum is not a sufficient ground by itself for refusal to enforce a valid forum selection clause," *P&S Bus. Machs., Inc.,* 331 F.3d at 806; *see also Carnival Cruise Lines, Inc.,* 499 U.S. at 594-95 (rejecting argument that plaintiffs were physically and financially incapable of litigating in the agreed upon forum); *Moses v. Business Card Exp., Inc.,* 929 F.2d 1131, 1138-39 (6th Cir. 1991) (enforcing forum selection

clause despite claims of economic disparity and financial hardship); *i9 Sports Corp.,* 2010 W.L. 4595666 at *2; *Murray*, 2006 W.L. 1529540 at *2. Of course, Avvo will incur substantially greater expense and inconvenience by further litigation in Florida, particularly because virtually all of the relevant evidence, documents and witnesses are located in Washington. (doc. 17 at ¶¶11-19, 21-23). Davis simply cannot demonstrate sufficient inconvenience to justify abrogating the parties' contractual expectations.

CONCLUSION

Davis cannot show that the forum selection clause is unenforceable or that Washington is a sufficiently inconvenient forum to justify retention of this case in Florida. In accordance with the presumption of validity accorded to forum selection clauses and the absence of the "exceptional circumstances" that would warrant ignoring the parties' agreement, Avvo respectfully submits that this Court should transfer this case to the contractually agreed-upon forum.

WHEREFORE, Defendant Avvo, Inc., pursuant to 28 U.S.C. § 1404(a), again respectfully requests that the Court transfer this case to the United States District Court for the Western District of Washington, King County Division, and grant all such other and further relief to which Avvo justly may be entitled.

GOOD FAITH CERTIFICATE

WE HEREBY CERTIFY that counsel for Defendant has conferred with Plaintiff (pro se) regarding the subject of the above Renewed Motion to Transfer, but that the parties have not been able to agree upon resolution of said Motion.

Dated: May 31, 2011

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing is being electronically filed and will be furnished via CM/ECF to L. Joe Davis, Jr., Esq., 155 5th Avenue North, St. Petersburg, FL 33701 on this 31st day of May, 2011.

__/s/ Susan Tillotson Bunch_______
Attorney