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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HYPERTOUCH, INC., a California corporation,

Plaintiff,

vs.

AZOOGLE, INC., a Delaware corporation, INTUIT, INC., a Delaware corporation, QUICKEN LOANS, INC., a Delaware corporation, ROCK HOLDINGS, INC., a Delaware corporation, and DOES 1-30,

Defendants.

Case No. CV-08-03739 (GHK) (PJW)

PLAINTIFF HYPERTOUCH, INC.'S OPPOSITION TO DEFENDANTS' RESPONSE TO ORDER TO SHOW CAUSE

I. INTRODUCTION

Plaintiff Hypertouch, Inc. ("Hypertouch") files this Opposition to defendant Azoogle.com, Inc.'s ("Defendant") Response to Order to Show Cause ("Defendant's Response") because it has made several, substantive misstatements of fact and law which Hypertouch believes warrants clarification for this Court.

On June 27, 2008, Defendants were ordered by the Court to provide data regarding their citizenship in order to establish diversity jurisdiction, or the Court would conclude it lacked subject matter jurisdiction, in which case "this action shall

be remanded to the state court from which it was removed." Order of June 27, 2008, at 3 ("(1) Notice of Potential Procedural Defect; and (2) Order to Show Cause").

Rather than simply provide the information requested by the Court, Defendants filed a screed impugning Hypertouch's motive for originally filing this action in state court. Defendants' papers are riddled with inaccurate statements of fact and law as outlined below:

A. Defendant improperly alleges that Hypertouch named Intuit, Inc. and Rock Holdings, Inc. to destroy diversity which is untrue. Hypertouch had a good faith belief at the time of filing this matter in California state court that those parties were proper defendants.

B. Defendant improperly alleges that Hypertouch fraudulently joined defendant Rock Holdings, Inc. Again, Hypertouch had a good faith belief at the time of filing this matter that Rock Holdings, Inc. was a proper defendant whose principal place of business was in Culver City, California—making venue in the Los Angeles Superior Court-West District- proper.

C. Defendant improperly alleges that this Court cannot remand the case to State Court if it finds lack of diversity jurisdiction which is simply contrary to the law.

D. Defendant improperly alleges that if the Court lacks diversity jurisdiction dismissal is proper. Again, Defendants fail to properly apply the law which provides that the court may either: (1) remand to State Court; or (2) transfer venue to a different federal court.

The attacks made by Defendant contain not only factual misstatements but are also legally incorrect. Based thereon, Hypertouch files this Opposition to provide the Court with the true and proper facts, and law, to consider when making its ruling on the OSC.

II. ARGUMENT

A. Defendant Improperly Alleges That Hypertouch Named Intuit, Inc. And Rock Holdings, Inc. To Destroy Diversity Which Is Untrue

Defendants allege that Hypertouch named Intuit, Inc. and Rock Holdings, Inc. "for the dual purposes of attempting to destory [sic] diversity jurisdiction and providing an ostensible basis for venue in Southern California." [Doc. 15 at 2]. Hypertouch originally filed this action in state court because it believed that the presence of Rock Holdings, Inc. in the case prevented the case from qualifying for diversity jurisdiction. Rock Holdings, Inc. is the parent corporation of Defendant Quicken Loans, Inc., and is the company that pays license fees for the use of the Quicken name to would-be defendant Intuit. "It is well established that when the owner of a trademark licenses the mark to others, he retains a duty to exercise control and supervision over the licensee's use of the mark." *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975 (9th Cir. 2006). If the licensor fails in its duty to control, then there exists a so-called "naked" license that would subject the mark to a claim of abandonment. On the other hand, based on the degree of control, the licensor can be held vicariously liable for the acts of the licensee. *See, e.g., LA Gear v. E.S. Originals*, 859 F. Supp. 1294 (C.D. Cal 1994). When it filed this action Hypertouch had a good faith belief that Intuit, which reaps substantial monetary benefit from the spam that it advertises the Quicken mark, including payments from Rock Holdings could, under these precedents be liable to Hypertouch and thus were proper defendants. For strategic reasons, Hypetouch has now decided to discontinue its suit against those entities.

Further, when the case was originally filed in the Los Angeles Superior Court, West District, Hypertouch was informed and believed that defendant Rock Holdings, Inc. had its principal place of business in Culver City, California. Hypertouch later learned that the Rock Holdings, Inc. located in Culver City, California was not the entity that owned Quicken Loans, and that the Rock Holdings, Inc. that was the proper

entity had its principal place of business in Livonia, Michigan. Plaintiff rectified its mistake promptly after learning of it, by filing its First Amended Complaint omitting Rock Holdings, Inc. as a defendant, and expressly made counsel for Azoogle aware of these circumstances during a June 11, 2008 meet and confer call. Thus, there was no attempt to add sham defendants or destroy diversity, as Defendants scurrilously suggest; in fact, Hypertouch prefers federal court, did not contest removal, did not seek remand, and has a related action (*Beyond Systems, Inc. v. Connexus Corp. et al.*, Case No. CV 08-01039 (RGK)(PLAx) (C.D. Cal.)) in this very Court, and thus believes there are significant judicial economies to having the action litigated in this Court.

B. Defendant Improperly Alleges That Hypertouch Fraudulently Joined Defendant Rock Holdings, Inc. Which Is Also Untrue

Defendants suggest that Hypertouch fraudulently joined entities to get venue in Southern California. Defendants' suggestion is unsupported and inconsistent with law and common sense. Hypertouch could have laid venue in this district (had there been jurisdiction) to begin with. Venue is proper in this district. Venue requirements are set forth in 28 U.S.C. § 1391. The relevant section states:

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a). Residence of a corporate defendant is defined in 28 U.S.C. § 1391(c): "[A] defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is

1 commenced." Under the amended statute, it is possible for venue to be proper in more
2 than one judicial district. *HSD Corp. v. KLA-Tencor Corp.*, No. CV-05-286-CI, 2006
3 U.S. Dist. LEXIS 26803, at *4 (E.D. Wash. Apr. 18, 2006) (finding defendant
4 Delaware corporation with headquarters in San Jose, California which conducted
5 business in Washington subject to jurisdiction there and therefore venue proper)
6 (citing *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1371 (11th Cir. 2003)); *see Hope*
7 *v. Otis Elevator Co.*, 389 F. Supp. 2d 1235, 1243 (E.D. Cal. 2005) ("Venue is proper
8 in this District if both Defendants 'reside' in California, and at least one Defendant
9 'resides' in this District. 28 U.S.C. § 1391(a)(1). For purposes of venue, a
10 corporation is a resident of any judicial district in which it is subject to personal
11 jurisdiction."); *Sejus Corp. v. Baker Electronics, Inc.*, Civil No. 99-419-AS, 1999 U.S.
12 Dist. LEXIS 21865, at *13 (D. Or. Dec. 16, 1999) ("In light of the finding that this
13 court has personal jurisdiction over Defendant, venue is proper in this court.").
14 Defendants in this case are corporations which reside in California for venue purposes
15 by virtue of the fact that they are subject to personal jurisdiction here. Thus, under §
16 1391(a)(1) (or § 1391(a)(3)), an action against them may be brought in any district in
17 this State where they are subject to personal jurisdiction, as they are in the Central
18 District. Defendants do not contest personal jurisdiction – nor will they – and this
19 case is properly venued in this district. Defendants proffer not a speck of legal support
20 for their argument that venue is "improper" here, and their argument is incorrect as a
21 matter of law.
22 Defendants really only argue that venue might be "inconvenient" for them, as
23 they allege (prematurely) that "all witnesses, parties, and evidence" are in Northern
24 California. [Doc. 15 at 2]. However, they do not attempt to make out a transfer
25 argument under 28 U.S.C. § 1404, or under forum non conveniens, and given that
26 "[t]he burden is upon the moving party . . . to show that transfer is appropriate[,]
27 *Commodity Futures Trading Commission v. Savage,* 611 F.2d 270, 279 (9th Cir.
28 1979)[, and] [t]he plaintiff's choice of forum is generally accorded great weight[,] *Lou*

1 *v. Belzberg,* 834 F.2d 730, 739 (9th Cir. 1987)," Defendants do not meet their burden
2 on these grounds either. *Bristow v. Lycoming Engines*, NO. CIV. S-06-1947
3 LKK/GGH, 2007 U.S. Dist. LEXIS 31350, at *5-6 (E.D. Cal. Apr. 9, 2007); *see*
4 *Jorgens v. P & V, Inc.*, NO. CIV. S-06-2932 LKK/DAD, 2007 U.S. Dist. LEXIS
5 24397, at *3 (E.D. Cal. Mar. 15, 2007) ("defendant must make a strong showing of
6 inconvenience"); *Hope v. Otis Elevator Co.*, 389 F. Supp. 2d at 1240 & 1243 ("strong
7 showing" required; Hawaiian corporation could not show inconvenience of litigating
8 in California; "in this 'era of fax machines and discount air travel, requiring
9 [Outrigger] to litigate in [California] is not constitutionally unreasonable.' *Panavision*
10 *Int'l L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998), cited in *Pacific Fisheries*
11 *Corp. v. Power Transmission Prods., Inc.*, 2000 U.S. Dist. LEXIS 20612, No. CIV 00-
12 00298, 2000 WL 1670917, at *9 (D. Haw. Oct. 17, 2000) (holding that it is reasonable
13 to compel an Oregon defendant with "few contacts" to litigate in Hawaii)."). Here,
14 Defendants appear merely to be complaining about having to litigate in the Central
15 District of California versus the Northern District.
16 Hypertouch does not advocate transfer, as it believes venue is proper in the
17 Central District, and while Hypertouch did agree initially not to contest Defendants
18 decision to seek a change of venue to the Northern District, it now submits that
19 judicial economy would be served in having this case remain here in the Central
20 District in this Court where it has a related case involving the same law and similar
21 facts as in the case at bar.
22
23 **C. Defendant Improperly Alleges That This Court Cannot Remand The**
24 **Case To State Court If It Finds Lack Of Diversity Jurisdiction Which**
25 **Is Simply Contrary To The Law**
26 Defendants also contend that if this Court concludes that federal jurisdiction is
27 not proper in this case, "the Court cannot remand," . This argument has no support in
28 law. First, the Court in its Show Cause Order stated that the action "shall be

remanded" if the Court lacks jurisdiction. Order of June 27, 2008, at 3. Second, the case cited by Defendants , *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062 (9th Cir. 1979), is inapposite, lends no support. In that case the court stated, directly contrary to Defendants' position, that "[t]he provisions of 28 U.S.C. § 1447(c) require the court to remand the case if at any time before final judgment it appears that the case was removed improvidently." *Id.*

D. Defendant Improperly Alleges That If The Court Lacks Jurisdiction That Dismissal Is Proper

Defendant concludes that "in the event the Court finds it has no subject matter jurisdiction over this action, the correct course would be to dismiss the case for lack of proper venue." Of course, those are two distinct issues. If on the one hand the Court lacks subject matter jurisdiction, the proper remedy is to remand, as the Court indicated it would. *See Vogel v. Dollar Tree Stores, Inc.*, NO. CIV. 07-2275 WBS EFB, 2008 U.S. Dist. LEXIS 2801, at *4 (E.D. Cal. Jan. 11, 2008) ("If removal was improper, 'the district court lack[s] subject matter jurisdiction, and the action should [be] remanded to the state court.' *Toumajian v. Frailey,* 135 F.3d 648, 653 (9th Cir. 1998) (citing § 1447(c))."). If, on the other hand, the Court finds that venue is improper, then it should transfer to a proper venue. *Meyers v. Ciano*, No. C 01-3955 THE, 2002 U.S. Dist. LEXIS 2556, at *3 (N.D. Cal. Feb. 12, 2002) ("Even if an action is filed in a federal district with improper venue, it can be transferred to any district in which it could have been properly brought. 28 U.S.C. § 1406(a); *District No. 1, Pacific Coast District v. Alaska*, 682 F.2d 797, 799 n.3 (9th Cir. 1982)."). And, if the Court believes that judicial economy would be served by retention of the case here, in the Central District, it can do that as well.

III. CONCLUSION

Based on the foregoing, Plaintiff Hypertouch, Inc. respectfully requests that this Court consider its Opposition to mischaracterizations of facts and misstatements of law contained in Defendant's Response to the OSC of June 27, 2008.

Dated: July 11, 2008

Respectfully submitted,

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