

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**LEROY GREER,
Plaintiff,**

v.

**1-800-FLOWERS.COM, INC.,
1-800-FLOWERS ACQUISITION
CORP., 1-800-FLOWERS. COM
FRANCHISE CO., INC.,
1-800-FLOWERS TEAM SERVICES,
INC., 1-800-FLOWERS SERVICE
SUPPORT CENTER, INC. AND
1-800-FLOWERS RETAIL, INC.**

§
§
§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. 4:07-cv-02543

**PLAINTIFF’S RESPONSE TO DEFENDANTS’
MOTION TO DISMISS FOR IMPROPER VENUE**

Pursuant to Federal Rule of Civil Procedure 12(b)(3), Plaintiff Leroy Greer (hereinafter “Mr. Greer”) files this Response to Defendants’ Motion to Dismiss for Improper Venue and would show this Court as follows:

I. SUMMARY OF THE ARGUMENT

A. Venue

1. According to 20 U.S.C. §1391 when jurisdiction is based solely on diversity of citizenship, venue is proper in a district in which a substantial part of the events or omissions on which the claims are based occurred. 28 U.S.C. §1391(a)(2). Mr. Greer placed his phone call to 1-800-FLOWERS from Texas

and the flowers were delivered in Texas.

B. Factual Background

2. Leroy Greer placed a phone call to 1-800-FLOWERS to purchase flowers for his then girlfriend. During the conversation with the customer service representative, Mr. Greer asked about what policies 1-800-FLOWERS had regarding the privacy of his transaction. The customer service representative forwarded Mr. Greer to the Privacy Policy online.

3. Mr. Greer then agreed to the telephone purchase of flowers and completed the transaction over the phone. Mr. Greer's claims are based on the actions of Defendants' release of Mr. Greer's transaction information to a non-party to the transaction based on his telephonic order of flowers.

C. Argument

4. Mr. Greer contends that the contract between himself and 1-800-FLOWERS was made through a telephone transaction. When Mr. Greer inquired about the privacy policies of 1-800-FLOWERS during his telephone transaction he was referred to the online Privacy Policy as an assurance of how his transaction would be handled. The Privacy Policy alone does not include a forum-selection clause. (See Exhibit "1") Defendants' Privacy Policy only refers to the Terms Of Use Policy in regard to web site transactions. The Terms Of Use Policy nor the Privacy Policy refer to any transactions that are not conducted through 1-800-

FLOWERS.com. Mr. Greer made his purchase by telephone based on the promise and inducements made by Defendants. The Terms of Use Policy does not apply to Mr. Greer because he is not a customer of 1-800-FLOWERS.com. (See Exhibit “1“ page 1) All portions of the Privacy Policy and the Terms of Use Policy refer to the use of the website and not transactions made by telephone. Mr. Greer is only privy to the protections of the Privacy Policy posted on the website of Defendants because he was directed there by Defendants agents. Therefore, Mr. Greer is entitled to rely on the Privacy Policy and the Terms of Use Policy should either be totally disregarded or not allowed to be applied in this instance.

5. To subject Mr. Greer to a forum-selection clause that was not part of his contract would be unreasonable under the circumstances. In addition, transfer of the forum would strongly contravene a strong public policy by giving Defendants overweening bargaining power with regards to this transaction. The choice of forum by Defendants in the forum-selection clause was not made in an arm’s length negotiation in which fraud was used in the inducement to get Mr. Greer to agree to a contract with the intent of overreaching the contract bounds to secure Mr. Greer’s consent to the clause and the transaction. Mr. Greer had no notice of the forum-selection clause because it was not part of the contract in which he was a party.

II. GROUNDS FOR DISREGARDING FORUM-SELECTION CLAUSE

A. The forum-selection clause in Defendants' Term Of Use" Policy should be disregarded because transfer to the forum would be **fundamentally unfair** when Mr. Greer did not have notice of the forum-selection clause because it was not included in his contract.

6. Mr. Greer was referred to the Privacy Policy on the 1-800-FLOWERS website. The Privacy Policy clearly states:

This Privacy Policy is part of the Terms of Use, which *governs your use of our website* located at www.1800flowers.com... The Web Site is owned by 1-800-Flowers.com, Inc. (the "Company"). This Privacy Policy does not cover information provided to our Company-owned or franchised retail stores."

After reading the Policy and asking more questions related to the release of his purchase of flowers, Mr. Greer was assured by the customer service representative that he could only find such absolute protections with 1-800-FLOWERS and was pressed into his purchase based upon these assurances. At no time during his conversation with 1-800-FLOWERS was Mr. Greer forwarded to the Terms of Use Policy or any other documents for conclusion of his transaction. Defendants' reference *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) as governing case law that forum selection clauses are prima facie valid and should be enforced unless the resisting party proves that enforcement is unreasonable under the circumstances. Mr. Greer's case is very distinguishable in its facts from *M/S Bremen* **but** is a specific example of "unreasonable" circumstances. *Id.* The choice of forum in Mr. Greer's case was **not** made "in an arm's length negotiation

process by experienced and sophisticated businessmen.” *Id.* at 12. Mr. Greer was relying on the disclosure of a company representative as to the full extent of the transaction into which he was becoming a party. *M/S Bremen* is distinguishable because it was an admiralty law case involving sophisticated parties and contractual term negotiations; Mr. Greer is a layperson purchasing flowers via telephone.

B. In the alternative, contractual choice of forum clause should be held unenforceable because enforcing it would **contravene a strong public policy** when the clause did not figure prominently in the parties calculation or agreement.

7. Specifically, the Supreme Court said in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) that its rationale when denying a forum selection clause is “to protect those in need of goods or services from being overreached by others who have power to drive hard bargains.” *Id.* at 91. Equal Bargaining Stature has been a fundamental public policy issue when it comes to contract law from its inception. Defendants’ hocus pocus act of including a clause from a separate document by reference does not make it right or even legal, especially in this circumstance. Subjecting consumers to a legal standard and convoluted language of forum-selection clause is unfair and outside of good business practice specifically when related to a purchase of nominal gifts such as flowers versus an oil-related overseas transactions.

8. Forum selection clauses have traditionally not been favorably looked upon by American courts because of cases like this case where Defendants' use cunning techniques such as overreaching to say a clause was part of an agreement in which it was not present.

III. CONCLUSION

9. In conclusion, for the foregoing reasons, Plaintiff Mr. Greer argues that the forum in this case is not improper. The forum selection clause referenced under the Terms Of Use Policy by Defendants is not part of the contract or agreement in which Mr. Greer ordered his flowers. The legal effect of a forum selection clause depends in the first instance upon whether its existence was reasonably communicated to the plaintiff. *Spataro v. Kloster Cruise, Ltd.*, 894 F.2d 44, 45-46 (2d Cir. 1990) (per curium).

10. All of the cases referenced by Defendants and other jurisdictions regarding forum-selection clauses, specifically *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Effron v. Sun Line Cruises*, 67 F.3d 7 (2nd Cir. 1995); *R.A. Argueta v. Banco Mexicano*, 87 F.3d 320 (9th Cir. 1996); *S.A., Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005) are distinguishable from the case at bar because they involve an acceptance of terms either through a signed contract or by the parties subjecting themselves to specific terms designated by those they entered into a contractual relationship with. Notice of a forum selection clause and

its contents was provided in all of the aforementioned cases. The Plaintiffs in all of the aforementioned cases were either aware of or should have been aware of the forum selection clauses they were subject to. Additionally, all of the plaintiff's in the above listed cases **were** subject to the forum selection clause located in their contracts or contained on their tickets because they were given sufficient notice of the terms they were subject to. These terms were either negotiated by the plaintiff or the plaintiff was put on notice that by the use of this particular service or thing you are subject to our forum selection clause. In every instance the plaintiff agreed to subject themselves to the forum selection clause, whether by explicit or implicit agreement.

11. In the case at bar, Leroy Greer was not given notice of a forum selection clause nor is he subject to one. It is our contention that the telephone order placed by Leroy Greer did not apprise him of or give him notice of a forum selection clause in the event of injury or damage caused by his conduct of business with defendant. Defendants did not inform Leroy Greer that by placing a telephone order that he was subjecting himself to suit in New York despite all or a major portion of the transaction occurring in Texas. The phone call, made to a 1-800 number did not inform Greer as to the region to which he was placing his call. The Privacy Policy that refers to the Terms of Use Policy for 1-800-FLOWERS.com customers is only applicable and actionable in this instance because defendant

directed Leroy Greer to the online policy as an assurance that 1-800-FLOWERS “ recognizes and respects the importance of maintaining the privacy of our customers...and established this Privacy Policy as a result.”(See Exhibit 1.)

12. Mr. Greer procured services from defendants only after assurances that defendants had a privacy policy and that he would be protected by it. Mr. Greer did not request that he be directed to the online policy, he was directed to the online policy by defendants. Defendants did not inform Leroy Greer that by apprising him of the protections of the Privacy Policy that he would be subject to a Terms of Use Policy, or more specifically a forum selection clause. Moreover, it is our contention that Leroy Greer is **not** subject to the forum selection clause contained within the Terms of Use Policy because it specifically states, “This Privacy Policy is part of the Terms of Use which governs your use of our web site located at 1-800-FLOWERS.com.” (See Exhibit 1). Plaintiff did not use the services of 1-800-FLOWERS.com, therefore the Terms of Use Policy is not applicable, thus nullifying the forum selection clause located within it.

13. Plaintiff, Leroy Greer, respectfully requests that this Court deny Defendants’ Motion to Dismiss for Improper Venue and that the Court grant Plaintiff all such further relief at law or in equity to which he is justly entitled.

Respectfully submitted,

Law Office of Kennitra M. Foote & Associates,

P.C.

By: /s/ Kennitra M. Foote

Kennitra M. Foote

Texas Bar No. 24029552

Tara N. Long

Texas Bar No. 24032680

1502 State Street

Houston, TX 77007

Tel. (713)395-0525

Fax. (713)395-0529

Attorneys for Plaintiff

Leroy Greer

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Plaintiff's Response to Defendants' Motion & Order to Dismiss for Improper Venue was mailed by certified mail return receipt requested this 24th day of September, 2007 to:

John B. Beckworth

Watt Beckworth Thompson & Henneman, LLP

1800 Pennzoil Place, South Tower

711 Louisiana

Houston, Texas 77002

 /s/ Kennitra M. Foote
Kennitra M. Foote