

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, S.S.

CONCORD DISTRICT COURT  
CIVIL ACTION NO:200847CV000497

US FINANCE GROUP,LLC )  
PLAINTIFF )  
V. )  
SUNNYMTG.COM OR )  
866-768-2274 LLC )  
DEFENDANTS )  
V. )  
BANK OF AMERICA )  
\_\_\_\_\_ )

DEFENDANTS BRIEF IN SUPPORT OF ITS  
MRCP Rule 12 (B) Motion to Dismiss<sup>1</sup>

In addressing the matters subject to this motion the defendant references and incorporates hereto the affidavit of Sunny Gaddh dated October 16, 2008 and submitted to the court in opposition to the plaintiff's Motion for Approval of Trustee Process for Bank Account Attachment. The exhibits submitted with the affidavit are additionally incorporated herein. The affidavit is identified hereto as exh. 1 with the exhibits thereto (A,B and C). For the convenience of the court I have appended hereto the important parts of these documents and highlighted them.

*First Argument*  
**Rule 12 (8) Misnomer of a party;**

The first and foremost point to note is that the plaintiff Us Finance Group, LLC (LLC) misnomers itself as the party entitled to the relief requested. The contract terms (exh. A&B) page 7 "assignment of rights" are clear see last sentence line 4 "The personal rights and abilities of the contractor are a material inducement to SM to enter into this agreement, and the contractor may not assign this agreement or to assign any rights (including the right to receive commissions.)"

M.R.C.P. Rule 17 Parties Plaintiff and Defendant: Capacity (a) Real Party in interest is clear in stating "every action shall be prosecuted in the name of the real party in interest"

Here the LLC claims itself to be the plaintiff when in fact it did not have any contract with the defendant (exh. 1 affidavit) para 2) page 1 "the plaintiff – was not granted authority to act as an independent contractor---" In fact the contracts were signed by Leis

<sup>1</sup> Defendants states that "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." (M.R.C.P. rule 12 (b))

Schaeffer (Schaeffer) and Robert Weiss (Weiss) (see exh A and B to affidavit) they were signing as “individuals” exh A and B para 1 page 1.

Understandably M.R.C.P. Rule 17 provides a “reasonable time” after this objection for the “substitution of, the real party in interest” which “shall have the same effect as if the action had been commenced in the name of the real party in interest.” However given the issue stated below the provisions of Rule 17 in this case do not apply due to lack of jurisdiction and venue.

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Before discussing the issues of Venue, Applicable Law and Jurisdiction defendant would note in Exhs. A&B page 6 (c) entitled “Advise of Counsel” the parties signed an agreement stating they had consulted with counsel of their choice and entered in this agreement “with complete knowledge and understanding of its terms”

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***Second Argument***  
***Rule 12 (B) (3) Improper venue;***

The contract between the “real parties in interest” to the contract (that being Schaeffer and Weiss) is clear as to the law, jurisdiction and venue to resolve any disputes regarding said contracts. Exh. A&B are the same contract types and both state clearly that any disputes be handled by means of arbitration

*“To the fullest extent allowed by law, any controversy, claim or dispute between SM ---- and contractor relating to or arising out of (i) this agreement or breach of this agreement---- will be submitted to final and binding private arbitration in the county and state where SM Corporate Headquarters is located in (as indicated on SM website) as of the date of the filing of any claim---- as the **exclusive remedy** for such controversy, claim or dispute and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.” (exh. A and B page 6 para (b) arbitration.)*

The contract therein states “BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH SM AND CONTRACTOR GIVES UP ALL RIGHTS TO TRIAL BY JURY.” (EXH. A&b) page 6 para (b)

Exh. A&B page 6 para. (d) again states as to the agreement that “*The above-described arbitration proceeding shall have sole jurisdiction over any dispute between the parties.*”

*“The place of performance of this agreement would be the county and state in which SM corporate headquarters is located (as indicated on SM website) as of the date of filing of any claim.” “Venue for any legal proceedings or arbitration shall be exclusively in the county and state where the Corporate head quarters of SM is located in (as indicated on the SM website)”*

For the record the defendant also notes EXH C which is the listed website of the SM on the date of this dispute. It lists its address as being in Fort Lauderdale, Florida.

That being the case the contract dispute is subject to the venue of the state of Florida and the dispute to be handled in Florida Arbitration.

The case of *Lambert v. Kysar* 983 F.2d 1110 C.A.1 (Mass.),1993 dealt with the issue of Venue. In that case the court found . Since the venue clause-implicitly mandating a Washington forum-is enforceable under both state and federal common law, the district court properly dismissed the action.”

In citing the Lambert decision the court in *WORLDWIDE NETWORK SERVICES, LLC v. DYNACORP INTERN.*496 F.Supp.2d 59 (D. D.C. 2007) found

*“Generally, forum selection clauses are granted significant weight in venue a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.” *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991)*

Lambert is also cited in *Summit Packaging Sys., Inc. v. Kenyon & Kenyon*, 273 F.3d 9, 13 (1st Cir.2001) (“When parties agree that they `will submit' their dispute to a specified forum, they do so to the exclusion of all other forums.”)

9A Mass. Prac., Civil Practice § 51.2

§ 51.2. Agreement to submit to arbitration—Venue and jurisdiction of court  
*Louison v. Fischman*, 341 Mass. 309, 313–314, 168 N.E.2d 340, 343–344 (1960).

The venue of the action to enforce the agreement and to enter judgment thereunder is determined by the agreement. If the agreement specifies the place of the arbitration hearing, the Superior Court for that county is the proper forum.

Again defendant would note that when Weiss and Schaeffer signed the contract on the signature page page 8 of exhs. A&B the sentence just above their signing stated “I signify and acknowledge that I have received, read, and understand, and agree to be bound by --- the terms of this agreement.”

### *Argument Three*

#### ***Rule 12 (B)(1) Lack of jurisdiction over the subject matter;***

The contract is equally clear that the matter is not to be heard before a court but rather before an arbitration entity. The contract states (exh. A&B page 6 Enforcement and Governing Law (a)) *“It is agreed that this agreement shall be governed by, construed and enforced in accordance with the law of the State in which SM corporate headquarters is located (as indicated on SM website) as of the date of the filing of this claim. The contract in section B goes on to state in paragraph (b) Arbitration: In agreeing to arbitration, both SM and Contractor understand that 1) we are waiving our right to have any case determined in court: 2) arbitration is final and binding. This provision as indicated above states that based on the corporate headquarters the forum to handle this matter is in Florida (see exh. C)*

Further the contract goes onto provide on page 6 of exhibits A&B (d) “Choice of Law/Jurisdiction” “This agreement and any dispute arising under or relating to this agreement, shall be governed by and construed pursuant to the laws of the state in which SM corporate headquarters is located---as of the date of filing any claim and shall be arbitrated in the same state.”

The law is clear as outlined by the following;

**Restatement of the Law – Conflict of Laws  
Restatement (Second) of Conflict of Laws  
Current through March 2008**

Chapter 8. Contracts  
Topic 1. Validity Of Contracts And Rights Created Thereby  
Title A. General Principles

§ 187. Law Of The State Chosen By The Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

Massachusetts has recognized in law that the jurisdiction for disputes once set in arbitration by contract shall occur there

**M.G.L.A. 106 Chapter 106. Uniform Commercial Code  
§ 1-105. Territorial Application of Chapter; Parties' Power to Choose Applicable Law**

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this chapter applies to transactions bearing an appropriate relation to this state.

## Choice of Law by Agreement:

M.G.L. annotated footnote 2. Choice of law

Absent serious conflict with public policy, Massachusetts courts will respect contractual choice of law provision. Vision Graphics, Inc. v. E.I. Du Pont de Nemours & Co., D.Mass.1999, 41 F.Supp.2d 93.

## MGL Chapter 251 Uniform Arbitration Act for Commercial Disputes

### Chapter 251 § 1. Validity of agreements;

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

### 9A Mass. Prac., Civil Practice § 51.2

**§ 51.2. Agreement to submit to arbitration—Venue and jurisdiction of court**  
Parties may agree to submit a controversy to arbitration in either of two ways: (1) by a written agreement to arbitrate, or; (2) by providing in a written contract for arbitration. Such an agreement or contract is enforceable and irrevocable except on grounds recognized as the basis for revocation in the law of contracts. However, the controversy submitted to arbitration must be an "existing controversy." Louison v. Fischman, 341 Mass. 309, 313–314, 168 N.E.2d 340, 343–344 (1960).

The venue of the action to enforce the agreement and to enter judgment thereunder is determined by the agreement. If the agreement specifies the place of the arbitration hearing, the Superior Court for that county is the proper forum.

Supreme Court of the United States

Arnold M. PRESTON, Petitioner,

v.

Alex E. FERRER.

No. 06-1463.

Argued Jan. 14, 2008.

Decided Feb. 20, 2008.

**Holding:** The Supreme Court, Justice Ginsburg, held that when parties agree to arbitrate all questions arising under contract, Federal Arbitration Act (FAA) supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.

Justice GINSBURG delivered the opinion of the Court.

[1] As this Court recognized in Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), the Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 *et seq.* (2000 ed. and Supp. V), establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution. The Act, which rests on Congress' authority under the Commerce Clause, supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration. 465 U.S., at 16, 104 S.Ct. 852. More recently, in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), the Court clarified that, when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court.

The instant petition presents the following question: Does the FAA override not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency? We hold today that, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.”

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Florida law also recognizes arbitration in commercial contract disputes

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**Florida Statutes**

Chapter 682 ARBITRATION CODE

682.02 Arbitration agreements made valid, irrevocable, and enforceable; scope.

“Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof.”

“Such agreement or provision shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy; provided that this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder.”

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**Argument Four**

**(6) Failure to state a claim upon which relief can be granted;**

**For** the reasons stated above as to Misnomer of Plaintiff, Improper Venue, Improper Jurisdiction, and Improper assertion of laws of the Commonwealth of Massachusetts. The defendant again asserts the plaintiff has failed to assert a claim upon which relief may be granted.

The defendant by its counsel respectfully submits this brief in support of its Rule 12 (b) Motion to Dismiss.

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Sunnymtg.com by its Counsel  
Maurice LaRiviere, Jr.