

1 Keith S. Knochel, Bar No. 009165
2 **LAW OFFICE OF KEITH S. KNOCHEL., P.C.**
3 2135 Highway 95, Suite 241
4 Bullhead City, AZ 86442
5 (928)444-1000 (Telephone)
6 (928)444-1015 (Facsimile)
7 *Attorney for Defendant*

8
9 **IN THE JUSTICE COURT OF THE STATE OF ARIZONA**
10
11 **IN AND FOR THE COUNTY OF MOHAVE**
12

13 CHRISTINE BAKER, an individual) Case No. 801-07-CV-2339-UN
14)
15 Plaintiff,) **DEFENDANT'S REPLY TO RESPONSE**
16) **TO MOTION TO DISMISS FOR LACK**
17 v.) **OF SUBJECT MATTER JURISDICTION**
18) **AND IMPROPER VENUE OR IN THE**
19 UNITED ONLINE, INC., a California) **ALTERNATIVE, MOTION FOR**
20 corporation) **SUMMARY JUDGMENT**
21)
22 Defendant.)
23)
24)
25)
26)
27)
28)

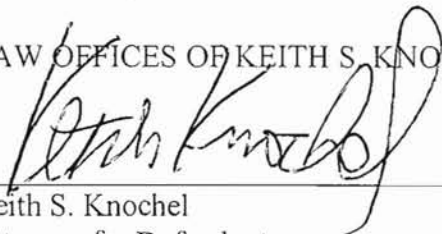
29 Defendant, through undersigned counsel and in compliance with Ariz. R. Civ. P.
30 56(c), hereby submits its Reply to Plaintiff's Response to Motion to Dismiss for Lack of Subject
31 Matter Jurisdiction and Improper Venue or in the Alternative Motion for Summary Judgment.
32 The Defendant remains content there are no material disputed facts which would justify not
33 granting the Defendant's motion.

34 This motion is supported by the Statement of Facts Supporting Defendant's Reply to
35 Response to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and
36 Improper Venue or in the Alternative Motion for Summary Judgment, all documents and exhibits
37 attached hereto, the existing file, pleadings and record in this manner, and the following
38 Memorandum of Points and Authorities.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respectfully submitted this 26th day of December, 2007.

LAW OFFICES OF KEITH S. KNOCHEL, P.C.



Keith S. Knochel
Attorney for Defendant

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S**
2 **MOTION FOR SUMMARY JUDGMENT**

3
4 **I. INTRODUCTION**

5 Defendant brought a Motion to Dismiss for lack of subject matter jurisdiction and improper venue or
6 in the alternative, Motion for Summary Judgment to have the Plaintiff's case dismissed for lack of venue
7 and jurisdiction. The Defendant made this motion because the terms of the agreement signed by the
8 Plaintiff clearly indicate venue and jurisdiction were to be in Los Angeles, California, *See* Statement of
9 Facts at Paragraph 2. The Defendant also requested summary judgment with respect to the Plaintiff not
10 being entitled to filing fees and costs.

11 **II. LEGAL STANDARD**

12 Summary judgment is properly granted when there are no genuine issues of material fact and the
13 movant is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c); Ledvina v. Cerasani, 2 CA-CV
14 2005-0035 (Ariz.App. 10-31-2006). The moving party bears the initial burden of providing a legal basis
15 for its motion and identifying portions of the record which demonstrate the absence of a genuine issue of
16 material fact, Wietecha v. Ameritas Life Insurance Corp., CV 05-0324-PHX-SMM (Ariz. 2006);
17 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

18
19 If the moving party meets its burden of proof with a properly supported motion, the party
20 opposing summary judgment "may not rest upon the mere allegations or denials of his pleading, but...
21 must set forth specific facts showing that there is a genuine issue for trial." Walters v. County of
22 Maricopa, CV 04-1920-PHX-NVW (Ariz. 2006) *quoting* Anderson v. Liberty Lobby, Inc., 477 U.S.
23 242, 247 (1986). Further, "all inferences drawn from the evidence must be viewed in the light most
24 favorable to the non-moving party." Wietecha v. Ameritas Life Insurance Corp., *Supra.*; *See also*
25 Celotex, *Supra.*
26
27
28

1
2 **III. LEGAL ARGUMENT**

3 As mentioned in the Defendant’s motion to dismiss for lack of subject matter jurisdiction and
4 improper venue or in the alternative, motion for summary judgment, the Plaintiff assented to the terms
5 of the “NetZero Services and NetZero Site Terms of Service” agreement. In bold print and in all capital
6 letters the first section of the agreement clearly states the following:

7
8 **BY CLICKING ON THE ‘I ACCEPT’ BUTTON OR BY**
9 **DOWNLOADING, INSTALLING OR USING ANY OF THE**
10 **NETZERO SOFTWARE OR SERVICES (INCLUDING WITHOUT**
11 **LIMITATION, THE NETZERO DSL AND DIAL UP INTERNET**
12 **ACCESS SERVICES, SOFTWARE DISTRIBUTED OR MADE**
13 **AVAILABLE BY NETZERO, E-MAIL SERVICES, AND ANY**
14 **SERVICES PROVIDED ON THE WEBSITES MANAGED OR**
15 **OWNED BY NETZERO (COLLECTIVELY, THE “NETZERO**
16 **SERVICE OR SERVICES”)), YOU AGREE TO BE BOUND BY**
17 **THESE TERMS OF SERVICE, THE ACCEPTABLE USE**
18 **GUIDELINES FOR THE NETZERO SERVICES , AND THE**
19 **NETZERO PRIVACY STATEMENT, WHICH ARE REFERRED**
20 **TO COLLECTIVELY AS THE RULES. IF YOU DO NOT AGREE**
21 **TO BE BOUND BY THESE RULES, YOU MUST DISCONTINUE**
22 **YOUR USE OF THE NETZERO SERVICES, UNINSTALL ANY**
23 **NETZERO SOFTWARE AND TERMINATE YOUR ACCOUNT.**

24 Here, the Plaintiff basically asserts it was not practical for her to read the terms of the agreement
25 because she was in route to Dallas, Texas, and by inference that a contract was not formed, *See*
26 *Statement of Facts at Paragraph 1)*. Baker also indicated she never signed an agreement, *See Plaintiff’s*
27 *Statement of Facts at Paragraph 3, but in Specht v. Netscape Communications Corp. and America*
28 *Online, Inc.* 150 F.Supp.2d 585 (2001), the court found “assent may be registered by a signature, a

1 handshake, **or a click of a computer mouse** transmitted across the invisible ether of the Internet.” Here
2 the Plaintiff assented to the terms the service agreement because she clicked “accept.”

3 The Plaintiff further argues because she did not have an attorney to negotiate the terms that the
4 contract should not be deemed formed. Plaintiff also indicates she did not read the agreement because
5 she did not have a printer and did not want to waste her precious time or resources. The instant facts are
6 similar to *Maxwell v. Fidelity Financial Services, Inc.* 179 Ariz. 544, 880 P.2d 1090, (1994), *citing*
7 *Broemmer v. Abortion Servs., Ltd.*, 173 Ariz. 148, 151, 840 P.2d 1013, 1016 (1992), where in the
8 context of a loan agreement Maxwell argued it was an adhesion contract meaning she neither negotiated
9 or could have negotiated the contract. Maxwell had only read portions of the contract and did not fully
10 understand the implications of the portions she did read. The court held “accepting the premise that the
11 loan documents constituted an adhesion contract which Maxwell neither read in its entirety nor
12 completely understood, however, does not make the agreement unconscionable and unenforceable.
13 Such a contract will be enforceable if it is within the reasonable expectations of the adhering party, and
14 is not unconscionable.” Under the instant facts the situation is analogous because the Plaintiff could
15 have reasonably expected a contractual provision regarding venue and jurisdiction as these types of
16 clauses are commonplace in the market place.

17 18 **IV. CONCLUSION**

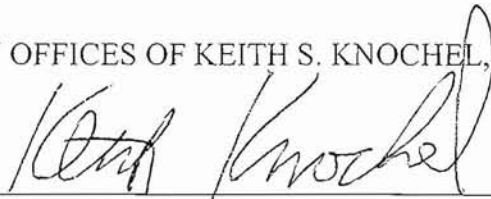
19 Because a contract was formed when Plaintiff clicked her mouse assenting to the terms of the
20 “NetZero Services and NetZero Site Terms of Service” agreement Plaintiff should be bound to the
21 corresponding venue and jurisdictional provisions. Accordingly, jurisdiction and venue in Arizona are
22 improper and the Defendant’s motion should be granted. Defendant also requests that the Plaintiff not
23 be awarded costs and filing fees, and that Defendant be rewards costs, filing fees and attorneys’ fees.

24
25 WHEREFORE, Defendant respectfully requests its motion be granted.

26
27 RESPECTFULLY SUBMITTED this 26th day of December, 2007.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LAW OFFICES OF KEITH S. KNOCHEL, P.C.

By: 

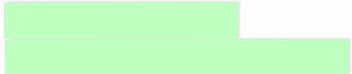
Keith S. Knochel, Esq.
Attorney for Defendant

An ORIGINAL and ONE (1) COPY of the foregoing filed this 26th of December, 2007 with:

Clerk of Court
Mohave County Superior Court
P.O. Box 29
524 W. Beale Street
Kingman, Arizona 86402

A COPY of the foregoing mailed thi 26th day of December 2007, to:

Christine Baker



By: 

An employee of the Law Offices of Keith S. Knochel, P.C.