ACT 1 – JERRY'S APARTMENT

Jerry drinking a Snapple

Phone rings….it's George.

Jerry: Hey Georgie. What's up? *(looks startled).* What? My Facebook profile picture? You mean the one of me at the Friar's Club? Of course I didn't change it in the middle of the night? Let me take a look? OH NO… I wonder if any other of my stuff was changed. Come over now!!

At Jerry's apartment

Door buzzer …. Jerry pushes intercom

Elaine: It's Elaine.

Jerry: Come on up …

Elaine and George Enter

Jerry: All of my profiles were changed in the middle of the night.

Elaine: GET OUT! (*pushes Jerry)* Whaddaya mean all your profiles?

Jerry: Look at 'em. I just checked. Tinder, Match.com, JDate, and even E-Harmony. And OKStupid.

Elaine: Why'd you do that? I mean you're getting a ton of dates, right?

Jerry: I didn't do it.

George: Well how else could it happen? You think someone else did?

Jerry: Yessss. Each and everyone of them.

George: How did that happen?

Jerry: Someone is messing with me.

Elaine: Well who would mess with you?

Jerry: Let's figure that out later. In the meantime, look what they did to me!

George: Oh man. Look at these pictures. it looks like you were the one who posted them… You can't leave that stuff up there. Here, look at this

(scrolling through his phone) – Pictures will show on slides (PAUSE)

Jerry: *(holding his phone--showing the new profiles to George and Elaine)*

And look at my OKStupid.com profile. It says I'm an on again-off again comedian; I call my girlfriend "Schmoopie"; and to tease me about my shrinkage and I beat up an old lady for a Schnitzer's Rye.

Elaine: That's actually funny. Hey look at this comment: blamed my urge to urinate in a parking garage on uromyciticin.

Jerry: This is messed up. I just got on this site and there was a 3 day free trial period. Some of the girls were pretty good. But then I tried to cancel it after a few days but it was so complicated to cancel. I finally found a phone # and talked to a guy there and he said I'd be taken off the site in 48 hrs. But they still charged me money.

George: They suck you in. Ooh man I just looked at your OKStupid profile. It's bad; hysterical, but in a mean way. All the good stuff is gone. No references to the Tonight Show, nice upper west side apartment, BMW, Friars Club membership. It's all gone.

Elaine: Lemme see that. Oh wow. This one says

Jerry: What? It says THAT? How'd that happen?

(scrolling through his phone…)

Elaine: *(pushing/poking Jerry on top of his shoulders)*

You've been hacked; your site is compromised. You are not the master of your domain.

George: Oh man. Who could've done that?

Jerry: I don't know, but you know, I did take one woman, Sidra, to see Schindler's list, and yeah I may have been making out with her, but I

found out later that she went on a date with Newman like a week before me. And I think she was into me too but keep that on the DL ok? I don't wanna get Newman all in a tizzy.

George: Jerry---look at this on your OKStupid "hobbies and Interests-- it says that you love kissing in the movies, even ones like Schindler's List"

Jerry: Wait a minute. Who would know that?

George: well you said Newman went out with her, right? Maybe he was trailng you or something.

Elaine: Well, I mean there's no way Newman's gonna get a woman like her. I know her from the gym. She says they're real and they're spectacular to anyone who'll listen. I'm sure she's done with him by now….

Text Message "Ding"

Jerry: (*Excited)* Hey look!! I just got a message on OKStupid from Mulva. I liked her.

Here's what she said *(reading what his phone)*. Jerry, thanks for the dozen roses, but why would you address them to 'my favorite virgin'? I really liked your profile and thought you were sweet, but geez, get

your act together. And also, I couldn't care less that you won that kind of contest'.

(looking back at George and Elaine)

what's this all about? I didn't send her roses. Or that note.

Text Message "Ding"

Oh look. I just got another message … a text from SueEllen Mishkie -- "Hi Jerry, Happy Valentine's day to you too but What were you thinking though sending me a dozen roses calling me 'your favorite woman's body part'? My name isn't Delores. Send me a message when you get your act together.

George: Wait a minute? What's going on here? You sent them each roses?

Jerry: No!!! I don't know what they're talking about.

Text Message "Ding"

Oh no! what now. This is from Sidra. She says "Jerry-I got your roses. Very sweet. But why did the card say 'to my favorite candy-bar heiress who turns heads as she walks down every street'? I'm not an heiress to anything and *you know* I'm not the kinda woman who flaunts herself in public. Please don't contact me ever again. And by

the way, you'll never see them, but they're real. And they're spectacular.".

George gawks at picture of Sidra

Jerry: Get a good look, Costanza?

Elaine: *laughing* This is weird. It's not even like you to send roses to 3 different women. And to make it worse, it looks like you got them confused or something.

George: Jeez. You'd think with an algorythym of 29 of your personality dimensions, that they'd get it right.

Jerry: Oh wait a minute. I didn't get anything confused. I see what happened here. Look at the fine print of this website. It says that the first 3 women I swipe right to will get a dozen roses for Valentine's Day and a personalized Note card. I didn't know that was gonna happen.

Elaine: What do you mean you didn't know?

Jerry: I had no clue

George: Didn't you read the "terms of Service"?

Jerry: No!! of course not. Who does?

George: Let's go back and read it

(*we will put up terms of service on the screen that has the valentines roses in there).*

Look look, there it is.

Jerry: Oh man, well yeah I did swipe right on Mulva, Sidra and Sue Ellen. But why did their messages get crossed up like that? I liked those women - all 3 of them, and now I'm upset. I gotta lotta work cut out now to try to win them back. I don't even know where to begin.

Elaine: I'd like to know how it got messed up like that….

Knock on the door. It's Newman

Newman: *Hello,* Jerry

Jerry: Hellooooo Newman….what do you want?

Newman: So, anyone got any special Valentine's Day plans? Dinners, or dates?

Jerry: No Newman. We don't. Do you?

Newman: Oh not really…

Jerry: Too bad. What a surprise.

Newman: Well, I was just wondering. You know Jerry, I thought there were a couple women you were interested in with from OKStupid. Whatever happened to them?

Jerry: How do you know that?

Newman: Oh well, you know. Just because I'm the mailman doesn't mean I don't know how to do other things. When you control the mail, you control infor-MATION …. Ta ta Jerry.

(*Newman leaves quickly*)

Jerry: Newman! He hacked my site. How'd he do that?

(*Kramer rushes in*)

Kramer: Hey buddy. Can I use your computer again?

Jerry: What do you mean *again?*

Kramer: Well last week my computer died. I needed to buy some Titleists and I saw your computer was on. I logged on when you weren't here.

George: Yeah. I remember. You did face time or Skyped me. Newman came in with Jerry's mail during the middle of it. But then you guys ended the call.

Kramer: Yeah so?

Jerry: Kramer, was Newman in my apartment alone with my computer after you went to play golf?

Kramer: I think so. He said he had to check on some mail deliveries or something.

Jerry: Oh no. Newman figured out my passwords and screwed up the ` Valentine's Day rose deliveries and Note cards.

Elaine: Well wouldn't OKStupid be sort of responsible for that?....

Jerry: When I signed up for those sights, the sites promised that they were secure. They were supposed to use iris or pupil recognition and only let the profile be changed if it came from my own computers' IP addresses.

George: What are you gonna do? You can't leave that stuff up there. Here, look at this -- *(scrolling through his phone*) (*Pictures will show on slides)*

(PAUSE)

Jerry: Oh man. What am I gonna do?

Elaine: What do we care? You wanted all that online dating. I prefer the human dating where I can show off my dancing (*Elaine DANCE).* And you did pretty well with it as far as I can tell …..

Jerry: *CRINGING at Elaine.* Ok, stop that. Now I was billed $150 for 3 dozen roses that I wish were never sent And after all that, I'm gonna be alone on Valentines Day. Not that there's anything wrong with it….

ACT II

Scene 1 – A non-descript office at Yankee Stadium

Wilhelm: Why don't you tell me about some of your previous job experiences?

George: Thank you, Mr. Wilhelm. Alrighty Ah ... my last job was in publishing ... I got fired for having sex in my office with the cleaning woman.

Wilhelm: Go on.

George: Alright, before that, I was in real estate. I quit, because the boss wouldn't let me use the handicapped bathroom. That was it.

Wilhelm: Do you talk to everybody like this?

George: Of course.

Wilhelm: I gotta tell you, you are the complete opposite of every applicant we've seen.

(*Steinbrenner Comes In*)

Wilhelm: Ah, Mr. Steinbrenner, sir. There's someone here I'd like you to meet. This is Mr. Costanza. He's one of the applicants.

Steinbrenner: Nice to meet you.

George: Well, I wish I could say the same, but I must say, with all due respect, I find it very hard to see the logic behind some of the moves you have made with this fine organization. In the past twenty years you have caused myself, and the city of New York, a good deal of distress, as we have watched you take our beloved Yankees and reduced them to a laughing stock, all for the glorification of your massive ego!

Steinbrenner: Wilhelm, hire this man!

(Steinbrenner Leaves)

Wilhelm: Well, Mr. Costanza, you should fit right in here.

George: Thank you, Mr. Wilhelm. Anything I should know?

Wilhelm: Do not be fooled by Mr. Steinbrenner today. He can change his mind very quickly. He's a devout Dentite. As you can see, we all wear suit and tie. No beards. No long hair. No drugs. And

he doesn't want his employees making waves out there. Stay out of trouble!

Scene 2 – Jerry's Apartment

George filling out on-line dating profile on site "Ok, Stupid"

GEORGE: Jerry, do you think I can pull off looking tall in this profile? I'm looking for a tall woman, like a giant. They don't want a short bald guy. Can I get away with saying I'm six feet tall? I could always "lift" like Kramer's friend Mickey.

JERRY: George, you're barely 5 6!

GEORGE: How about occupation? You know I always wanted to pretend I was an architect. Art Vandelay the architect?

JERRY: Can you do that? Can you lie on online dating profiles? That job with the Steinbrenner company is pret-tay good. Just be yourself on there.

GEORGE: Jerry, (*pause*) it's not a lie if you believe it.

JERRY: I have a bad feeling about this.

GEORGE: (to himself) Relationship Status: Single ... Drug Use Frequency … *DRUG USE FREQUENCY??* Why do they need THAT?

(to Jerry) Hey Jerry, check this out. The dating site wants my drug use frequency.

JERRY: Eh. It's good to get that out there, I guess. Plus, marijuana is legal here now so you may find some other recreational users. It's the same as them asking whether you are a smoker. It's all pipes.

GEORGE: Kramer does get the good stuff from his friend Bob Sacamano. I don't want to give it up so I wouldn't mind the future Ms. Costanza knowing about.

JERRY: That's the spirit!

GEORGE: *(completing profile)* It says at the end here that to complete the profile, I have to check off a box that says "You should appreciate that all information submitted on the Website might be publicly accessible and can be sold to third-parties. Is that legal? Who does this? Can they do that?

JERRY: That's a pretty big matzoh ball hanging out there.

GEORGE: Jerry, get this. Apparently when I click submit, the dating site OWNS my profile. Some alphabet soup law, the Digital Millennium Copyright Act of 1998.

JERRY: You are definitely not king of your castle.

GEORGE: Jerry, you know I need this job. I'm not going back to living with my parents. So you're saying I should admit to occasional recreational drug use? What if Steinbrenner finds out?

JERRY: *(PAUSE/SIGH)*. Ok. If you want, we can ask Kramer. He has that lawyer friend Jackie Chiles. I'll call him.

Conversation Between Jerry, Kramer and Jackie (Kramer and Jackie off to the side)

Jerry: Kramer, can you conference in your lawyer, Jackie.

Kramer: Sure buddy.

Jerry: Jackie, can the internet sites ask these questions? Can they use our information?

Chiles: That the language is outrageous, egregious, preposterous. Read the whole thing before you sign to see if there are any other surprises in there.

GEORGE: (reading) Oh no. Oh no. This is bad. This is very bad. "Ok Stupid" is an Anti-Dentite online dating service!

JERRY: Just go ahead with it. They'll NEVER find out. And you can just tell them you didn't know. And if all else fails, you can call Jackie. Remember that settlement he got Kramer!

GEORGE: As the Marlboro man on a billboard? Some settlement! (Sigh). Ok, ok, ok, ok. Submitted.

Headline on Screen:

On-line Dating Sites Hacked!

Scene 3: Steinbrenner's Office

STEINBRENNER: Wilhelm. WILLLLL Helm. Wilhelm, I want you to get me a print out of everyone on that dating doohickey, Ok Stupid. I want to find out who at this company is using these online dating sites. I found out from Tim Whatley in accounting that the dating sites are Anti-Dentite. No one at this company can associate with an Anti-Dentitic

web site! No one at THIS company better be on that list. No sir.

WILHELM: Yes, Mr. Steinbrenner, right away, Mr. Steinbrenner.

STEINBRENNER: And where is my calzone! I need my fix of calzone!

WILHELM: Mr. Steinbrenner, our IT Department is getting that list right away, sir. I can assure you sir, everyone we hire knows how important appearances are.

(Someone passes Wilhelm the list)

Here are the managers on the list:

Virdon

Martin

Lemon

Martin

Showalter

Costanza

STEINBRENNER: Well, you can tell them they are all fired. They will not be part of this company!

WILHELM: Yes sir, Mr. Steinbrenner.

STEINBRENNER: Buhner. Mattingly. Phelps. The whole lot of them!

Scene 4: Coffee Shop

JERRY: Sorry to hear about the Yankees and Steinbrenner, George. Dentites. Who needs 'em.

GEORGE: I'm not an Anti-Dentite. Why did I use that stupid dating site? Why did I admit to occasional drug use! How could Ok, Stupid get hacked like that! I paid them to keep that information secure! "Oops, sorry about that. The whole world knows now. Your life is over."

JERRY: So you have a new job?

GEORGE: No.

JERRY: You got money?

GEORGE: No.

JERRY: Do you have a woman?

GEORGE: No.

JERRY: Do you have any prospects?

GEORGE: No.

JERRY: You got anything on the horizon?

GEORGE: Uh, no.

Jerry: Do you have any action at all?

GEORGE: No.

JERRY: Do you have any conceivable reason for even getting up in the morning?

GEORGE: I like to get the Daily News.

JERRY: That's a shame. Maybe we should both sue the dating sites.

GEORGE: Wait! I got it! This whole dating app thing gave me an idea though. The iToilet. It leads you by your phone's GPS to the nearest accessible toilet.

JERRY: Genius! Let's call Jackie …

ACT 3

A courtroom

Judge: Order, order! This is the resumption of Seinfeld and Costanza v. The Match Group. Mr. Chiles, please call your next witness.

Chiles: I call Newman.

Judge: Mr. Newman, do you swear to tell the truth?

Newman: I do.

Chiles: Mr. Newman, you unlawfully accessed Mr. Seinfeld's computer after Mr. Kramer left the apartment?

Newman: Well, I had, uh, gone up to Westchester. I go there every Tuesday. I do, uh, charity for the blind in my spare time. I was in the middle of a game of Parcheesi with an old blind man and I excused myself to call my friend, as he was very depressed lately because he never became a banker.

Chiles: Mr. Newman, please just answer my question.

Newman: I am but a simple postal worker. I always longed to pull Seinfeld out of his cushy lair and expose him to the light of justice as the monster

that he is! I thought Jerry and George were involved in some ill-conceived mail order pornography ring. (*show pictures from that episode).*

Yessss, I did it. I accessed Jerry's computer and I did it all! Ahahahahahah.

Chiles: I have no further questions for Mr. Newman.

Judge: Thank you, call your next witness, Mr. Chiles.

Chiles: I call David Puddy.

Judge: Mr. Puddy, do you swear to tell the truth?

Puddy: Of course, I don't want to go to hell.

Chiles: Mr. Puddy, you are the President of IAC/InterActiveCorp?

Puddy: Yeah that's right.

Chiles: Your company owns Match?

Puddy: Yeah that's right

Chiles: And you are here as the corporate representative of Match?

Puddy: Hey man, I'm just trying to support the team.

Judge: Mr. Puddy, how many sites are on the Match, uh, "team?"

Puddy: Let's see, we've got "black people meet," "chemistry dot com," "delightful" "how about we" "match" of course "meetic group" "ok cupid" "plenty of fish" "tinder" - just to name a few.

Chiles: All owned by one company?

Puddy: Yeah, that's right. We also own about.com, dictionary.com, vimeo, the daily beast and others.

Judge: So if I understand you Mr. Puddy, the defendant in this case also owns a lot of other dating website?

Puddy: yeah that's right. And a lotta other kinds of websites too.

Judge; yes….I see that. Ok. please move continue, Mr. Chiles

Chiles: 38 percent of Americans use online dating sites?

Puddy: Yeah that's right.

Chiles: Match.com is a site where singles can meet, establish relationships…some that even lead to marriage and what not?

Puddy: Yeah that's right. We are very proud of the happiness we have helped create.

Chiles: Match.com is not overtly sexual?

Puddy: Excuse me? I don't care for that term.

Chiles: Match.com is not marketed as a site where people can meet for casual or anonymous sexual encounters, is it?

Puddy: Oh no. Not at all.

Chiles: Your company also owns and operates Tinder.com?

Puddy: Yes we do.

Chiles: Tinder is different from Match.com isn't it?

Puddy: Yeah that's right. High five!

Chiles: Tinder is for the quick hook up? All right all right.

Puddy: Yeah that's right. High five!

Chiles: Tinder is designed for people to see who is close by and to enable them to meet for immediate and sometimes anonymous sex? That is flouting society's conventions! Like a woman wearing a bra but no top.

Puddy: I don't know that it was designed that way….

Chiles: But that is what it is used for. Right?

Puddy: I suppose there are some who use Tinder that way.

Chiles: Everyone uses Tinder for the quick hook up right? That's it's lewd, lascivious, salacious, outrageous.

Puddy: I don't know about everyone…

Chiles: My client, Mr. Seinfeld, signed up for Match.com?

Puddy: Yeah that's right.

Chiles: Mr. Seinfeld didn't sign up for Tinder did he?

Puddy: No he didn't.

Chiles: Nevertheless, within 24 hours of his registration on Match.com, he was getting propositions on Tinder!

Puddy: As a member of our Match.com community, Mr. Seinfeld was entitled to all the benefits of our family of sites.

Chiles: But Mr. Seinfeld didn't sign up for anything other than Match.com?

Puddy: Our terms of use provide for simultaneous registration on all our sites.

Judge: Excuse me Mr Puddy. Just how large of a company is Match Group?

Puddy we have a market cap of 4 and a half billion dollars, we operate in 190 countries, using 39 different languages.

Judge: Is it a publicly traded company?

Puddy: On the Nasdaq. Ticker symbol is MTCH. Closed at 17.50 this afternoon. Up a quarter.

Judge: I see. Thank you. Mr Chiles, please continue.

Chiles: thank you, Your Honor. Now, Mr. Seinfeld didn't ask that his picture be posted to Tinder, to OK Stupid nor PlentyofFish, did he?

Puddy: We try to give all our registrants the full benefits of all our family of sites…

Judge: Let me get this straight – when Mr. Seinfeld signed up for Match.com, his profile was also posted at all of your other sites as well?

Puddy: Some of them.

Chiles: When Mr. Seinfeld asked you to remove his picture from all your sites, you did not respond.

Puddy: Those images are our property. We can use them as we see fit.

Chiles: So you can turn this beautiful specimen into a horrible twisted freak, if you so choose?

Puddy: Yeah, that's right.

Chiles: Ever since my client entered his profile on your site, he gets emails from all kinds of marketers offering to sell him diet supplements,

prescription pills and anatomical enhancement devices. I'll tell you what this is, it's a public humiliation of Mr. Seinfeld.

Puddy: Yes, we bring so many people together…

Chiles: Mr. Puddy, your company owns "positive singles," the internet's most popular STD dating site?

Puddy: Yeah that's right, and we are very proud of it.

Judge: Mr. Puddy, can you explain positive singles to the court?

Puddy: Positive Singles is world's largest home for people with Herpes, HPV, HIV / AIDS and other STDs. Over a million quality singles!

Chiles: And did you or did you not accidentally post Mr. Costanza's profile to www.positivesingles.com when he submitted to Ok, Stupid?

Puddy: That was a regrettable mistake, yes.

Chiles: And so now Mr. Costanza is defamed, ashamed and scandalized.

Puddy: Yeah that's right.

Chiles: You sell participants' data and identities to third party marketers of this nonsense? That's deplorable, unfathomable, improbable.

Puddy: Our terms of service permit us to make these "introductions."

Chiles: My clients didn't agree to that!

Puddy: Their choice. When they clicked "I Accept" the terms of service when they initially enrolled. They also clicked the box that said "I have read the terms of service in their entirety."

Chiles: And how about safeguards to prevent your sites from getting hacked. My clients paid good money to you and now their information is all over the internet. And the world thinks Mr. Costanza has an STD!

Puddy: Yeah that's right.

Chiles: Do you do anything to keep the data secure?

Puddy: We do what we can.

Chiles: You heard the testimony of my expert?

Puddy: Yeah that's right.

Chiles: And you are familiar with the "Up Guard" Web Site Risk Grader?

Puddy: Yeah that's right.

Chiles: The top score is 950. For match.com, the expert stated that the overall web security is good, but could be better with a few improvements. And being a paid subscription service, there's really no reason to not go whole hog.

Puddy: Yeah that's right.

Chiles: And your sites do not use secure communications, making it easy for hackers to intercept personal data being exchanged between the app and the server.

Puddy: Yeah that's right.

Judge: So Mr. Puddy, you are agreeing that your dating sites leave personal data vulnerable to hackers?

Chiles: And perhaps most egregious, Plenty of Fish – which touts itself as the largest online site – is constantly infected with malware ads?

Puddy: You get what you pay for.

Judge: Plenty of Fish is free?

Puddy: Yeah that's right.

Chiles: No further questions.

2010 WL 654390
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
D. Oregon.

Terry L. BEARD, doing business as TheBigDay.com; et al., Plaintiffs,
v.
PAYPAL, INC., a Delaware corporation, Defendant.

Civil No. 09–1339–JO.
|
Feb. 19, 2010.

Attorneys and Law Firms

Daniel H. Skerritt, Tonkon Torp LLP, Portland, OR, for Plaintiffs.

Christopher W. Angius, Garrett S. Garfield, Holland & Knight LLP, Portland, OR, for Defendant.

Opinion

JONES, Judge.

***1** Plaintiffs brought this action against defendant PayPal, Inc., an internet business that enables individuals or businesses to securely send and receive payments online, alleging claims for conversion, unjust enrichment, declaratory judgment, and breach of contract arising out of defendant's decision to increase plaintiffs' reserve amount. Plaintiffs seek not less than $316,148.44 in damages, plus prejudgment interest, attorneys' fees, and costs.

The case is now before the court on defendant's motion (# 4) to dismiss the action entirely for improper venue, based on a contract forum selection clause. For the reasons stated, defendant's motion to dismiss with prejudice is denied, but this action is transferred to the United States District Court for the Northern District of California, sitting in Santa Clara County.

DISCUSSION

1. *Standards*

Defendant brings this motion pursuant to Federal Rule of Civil Procedure 12(b)(3). The parties dispute whether the motion should be analyzed as a motion to dismiss under Rule 12(b)(3), or under the federal statute governing venue, 28 U.S.C. § 1404(a). As plaintiffs admit, Ninth Circuit precedent holds that a motion to dismiss for improper venue based on a forum selection clause must be analyzed under Rule 12(b)(3). *See, e.g., Doe 1 v. AOL LLC,* 552 F.3d 1077, 1081 (9th Cir.2009); *Chudner v. Transunion Interactive, Inc.,* 626 F.Supp.2d 1084, 1087–88 (D.Or.2009)(Acosta, J.)(adopted by King, J.). [1]

Under Rule 12(b)(3), pleadings need not be accepted as true, and facts outside the pleadings may be considered. *Doe 1,* 552 F.3d at 1081.

2. *The Forum Selection Clause*

When plaintiffs signed up to use defendant's online service, they were required to agree to the express terms of the User Agreement for PayPal Service. Typical of internet-based business transactions, to register for defendant's service, an individual must affirmatively accept the terms of the User Agreement by checking the appropriate box on the registration webpage. An individual must also affirmatively check a box stating "I have read my rights with regard to the arbitration of claims as outlined in the Legal Disputes section of the User Agreement." Affidavit of Michelle Squires, ¶ 7 and Exhibit A (User Agreement). If the individual fails to check either box, registration cannot be completed. *See generally,* Memorandum in Support of Motion to Dismiss Complaint, pp. 2–4 and p. 3 n. 2.

Some courts refer to this type of internet agreement as "clickwrap agreements." In *Feldman v. Google, Inc.,* 513 F.Supp.2d 229 (E.D.Pa.2007), the Eastern District of Pennsylvania described clickwrap agreements as follows:

> A clickwrap agreement appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a

> dialog box on the screen in order to proceed with the internet transaction ... Even though they are electronic, clickwrap agreements are considered to be writings because they are printable and storable.

***2** 513 F.Supp.2d at 236 (rejecting the argument that the clickwrap agreement was not a valid express contract) (citations omitted). As the court noted, "[a]bsent a showing of fraud, failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms." *Id.* (citations omitted).

3. *Enforceability of Forum Selection Clauses*

The forum selection clause at issue here requires users to file claims in a court in Santa Clara County, where defendant has its principal place of business, or in Omaha, Nebraska.

Federal law governs the enforceability of forum selection clauses. A forum selection clause is presumptively valid: "[T]he party seeking to avoid a forum selection clause bears a 'heavy burden' to establish a ground upon which [the court] will conclude the clause is unenforceable." *Doe 1,* 552 F.3d at 1083 (*quoting M/S Bremen v. Zapata Off–Shore co.,* 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)). In *M/S Bremen,* the Court explained that a forum selection clause should be enforced unless the non-moving party "could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *M/S Bremen,* 404 U.S. at 15. The exceptions set forth in *M/S Bremen* are narrowly construed:

> A forum selection clause is unreasonable if (1) its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived of its day in court; or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought.

Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 325 (9th Cir.1996)(internal citations and quotations omitted).

4. *Plaintiffs' Arguments Against Enforceability*

Plaintiffs make three arguments against enforceability. The three arguments are: (1) the forum selection clause is the product of defendant's overreaching; (2) plaintiffs had insufficient notice of the clause; and (3) its enforcement would contravene a strong public policy of Oregon.

a. *Overreaching*

Plaintiffs admit that allegations of unequal bargaining power and non-negotiability, alone, are insufficient to establish overreaching. *See, e.g., Chudner,* 626 F.Supp.2d at 1090. Plaintiffs contend, however, that overreaching exists here because "[t]he list of provisions that advance [defendant's] interests at plaintiffs' expense is long." Plaintiffs' Response, p. 5. Plaintiffs complain about many provisions, but they criticize the relevant provision—the forum selection clause—as overreaching and unreasonable because the User Agreement leaves defendant free to bring suit against a user anywhere it likes, but requires users to bring suit only in the courts of Santa Clara County, California, or Omaha, Nebraska.

I have considered plaintiffs' arguments and submissions, and find that plaintiffs have not met their heavy burden of establishing that the forum selection clause was the product of defendant's overreaching, nor have they demonstrated fraud, duress, or overweening bargaining power.

b. *Notice*

***3** Plaintiffs next claim that they did not receive sufficient notice of the clause. Judge Acosta rejected a similar argument in *Chudner,* explaining that

> Although Chudner contends that [the fact that the clause was contained in a text-box] renders the forum selection clause hidden and, thus, unenforceable, that fact

> is simply insufficient to render the forum selection clause invalid due to surprise. Furthermore, the Service Agreement is fully accessible in its entirety from Defendants' website home page, under "Terms of Use."

626 F.Supp.2d at 1090. Similarly, plaintiffs had access to the entire User Agreement on defendant's website, and have submitted no evidence to support their claimed lack of notice.

c. *Oregon Public Policy*

Plaintiffs rely on *Reeves v. Chem Industrial Company,* 262 Or. 95, 98, 495 P.2d 729 (1972) for the proposition that Oregon law "reflects a strong public policy against the enforcement of forum selection clauses like the one at issue here." Plaintiffs' Response, p. 7. And, indeed, in 2008 the Oregon legislature enacted ORS 81.150, permits consumers to revoke "a provision in a consumer contract that requires the consumer to assert a claim against the other party to the contract, or respond to a claim by the other party to the contract, in a forum that is not in this state." However, the parties in this case entered into the User Agreement in 2007, before enactment of ORS 81.150, which, in any event, applies only to "consumers" as defined in the statute. Moreover, " '[f]ederal law governs the validity of a forum selection clause.' " *Chudner,* 626 F.Supp.2d at 1092 (*quoting Argueta, supra,* 87 F.3d at 324). As noted, under federal law, forum selection clauses are presumptively valid, a presumption that plaintiffs have failed to overcome.

CONCLUSION

Defendant's motion (# 4) to dismiss with prejudice is denied; however, this action is transferred to the United States District Court for the Northern District of California, sitting in Santa Clara County.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 654390

Footnotes

1 Plaintiffs state that they have raised this argument to preserve it for appeal.

2009 WL 3490277
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Barry BRODSKY, individually and on behalf of others similarly situated, Plaintiff,
v.
MATCH.COM LLC, et al., Defendants.

No. 09 Civ. 5328(NRB).
|
Oct. 28, 2009.

Attorneys and Law Firms

Norah Hart, Esq., Treuhaft & Zakarin LLP, New York, NY, for Plaintiffs.

John R. Cuti, Esq., Davis Wright Tremaine LLP, New York, NY, for Defendants.

MEMORANDUM and ORDER

NAOMI REICE BUCHWALD, District Judge.

***1** The instant motion relates to a purported class action brought by plaintiffs, [1] former subscribers of Match.com, the online dating website, against defendantsMatch.com LLC ("Match") and IAC/InterActiveCorp ("IAC") alleging various causes of action arising from plaintiffs' experience with theMatch.com website and service. Plaintiffs' claim to have suffered harm owing to, *inter alia,* Match's allegedly misleading distinction between "users" and "subscribers" and the (in) ability of each to communicate with the other via email on the Match website. Plaintiffs allege causes of action under RICO, New York's deceptive practices and false advertising statutes, and common law claims for breach of the covenant of good faith and fair dealing, fraud, fraudulent inducement, negligent misrepresentation, and breach of contract.

The Complaint in this action, naming Sean McGinn as lead plaintiff, was originally filed on June 6, 2009 and was amended on July 13, 2009. Defendants' instant motion to dismiss the Amended Complaint was filed on August 12, 2009. Owing to Mr. McGinn's desire to terminate his association with this litigation, however, plaintiffs were granted leave to file a Second Amended Complaint, which was filed on September 9, 2009, naming Barry Brodsky as new lead plaintiff. The caption has been changed to reflect this second amended pleading, which, the parties agreed, would not affect the substance of defendants' August 12, 2009 motion.

Although defendants' motion was otherwise fully briefed by September 23, 2009, the parties exchanged letters, dated October 9 and October 12, 2009, regarding plaintiffs' anticipated request to amend their pleading to add additional New York statutory claims. Our response to these letters was reserved pending analysis of defendants' instant motion—namely, their motion to dismiss or, alternatively, to transfer this action to Texas pursuant to the forum selection clause in Match's Terms of Use Agreement ("User Agreement"). [2]

For purposes of this motion, only brief factual background is necessary. [3] Prior to continuing and completing Match's subscription and payment process, each subscriber to Match.com, including Brodsky and other putative class plaintiffs, must check a box on the website affirming "I agree to the Match.com *terms of use,"* which statement is hyperlinked to a complete copy of the 11–page User Agreement. (Cuti Decl. Ex. 2; *id.* Ex. 1 at 11.) The first paragraph of the User Agreement states: "If you object to anything in this Agreement or theMatch.com Privacy Policy, do not use the Website or the Service." (*Id.* Ex. 1 at 1.) The User Agreement also includes the following choice of law and forum selection clause:

> **23. Jurisdiction and Choice of Law.** If there is any dispute arising out of the Website and/or the Service, by using the Website, you expressly agree that any such dispute shall be governed by the laws of the State of Texas, without regard to its conflict of law provisions, and you expressly agree and consent to the exclusive jurisdiction and venue of the state and federal courts of

the State of Texas, in Dallas or Collin County, for the resolution of any such dispute.

***2** (*Id.* at ¶ 23.)

For the reasons discussed more fully below, we enforce the forum selection clause and grant defendants' motion insofar as it seeks transfer of the case. Defendants' motion to dismiss is denied since, in the interests of justice and as noted in the papers of both parties, the case may be transferred to the Northern District of Texas. In addition, as noted below, we deny plaintiffs' anticipated application to further amend their complaint, since such amendment would be futile.

DISCUSSION

I. Enforceability of the Forum Selection Clause

Determining whether a forum selection clause is enforceable requires a three-part inquiry. *Phillips v. Audio Active Ltd.,* 494 F.3d 378, 383 (2d Cir.2007). The Court inquires whether the clause was reasonably communicated to the party resisting enforcement, whether the clause is mandatory or permissive, and then whether the claims involved are subject to the clause. *Id.* If these three threshold requirements are met, then the clause is presumptively enforceable. *Id.*

The plaintiff may rebut the presumption of enforceability by making a strong showing either that enforcement would be "unreasonable or unjust" or "that the clause was invalid for such reasons as fraud or overreaching." *Id.* (citing *M/S Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) ("The Bremen")). However, the Second Circuit has a " 'strong policy' of enforcing forum selection agreements." *Roby v. Corporation of Lloyds,* 996 F.2d 1353, 1361 (2d Cir.1993); *T5R Silicon Res., Inc. v. Broadway Com. Corp.,* No. 06 Civ. 9419(NRB), 2007 WL 4457770, at *4 (S.D.N.Y. Dec.14, 2007). Accordingly, exceptions to the presumption of enforceability are narrowly construed. In *Roby v. Corporation of Lloyd's,* the Second Circuit discussed four such instances where enforcement of a forum selection clause would be unreasonable: "(1) if incorporation [of the clause] into the agreement was the result of fraud or overreaching; (2) if the complaining party will for all practical purposes be deprived of his day in court, due to the grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state." *Id.* at 1363 (quoting *The Bremen,* 407 U.S. at 15).

In this case, when evaluated in light of the factors noted above, it is clear that the forum selection clause in Match's User Agreement is reasonably communicated and mandatory, and that it covers the claims involved here —i.e., it is presumptively enforceable. Indeed, plaintiffs' opposition does not press arguments to the contrary. Rather, plaintiffs' argue that they have made the "strong showing" of exceptional circumstances required to rebut the presumption of enforceability. Although we will consider each of plaintiffs' arguments in turn, we ultimately find all of their arguments unpersuasive and insufficient to override the presumption of enforceability and policy favoring enforcement of the forum selection clause.

A. Fraud or Overreaching

***3** First, plaintiffs argue that the forum selection clause is overreaching because the clause is part of a contract of adhesion between parties with unequal bargaining power. (Opp. at 3.) Plaintiffs' argument cannot withstand scrutiny in light of Supreme Court authority and case law in this Circuit, which makes clear that a forum selection clause is not unenforceable even if it appears in a contract of adhesion, *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 593–95, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991), including so-called "click wrap" contracts, such as the one plaintiffs entered into here, where parties manifest assent by clicking on an icon, *Person v. Google,* 456 F.Supp.2d 488, 496–497 (S.D.N.Y.2006); *ESL Worldwide.com, Inc. v. Interland,* Inc., No. 06–CV–2503(LBS), 2006 WL 1716881, at *2 (S.D.N.Y. June 21, 2006). [4]

Plaintiffs further argue, without citing any supporting authority, that the clause is "tainted by fraud"—not because the forum selection clause itself was included as the result of fraud, but because the entire User Agreement was, they claim, the result of fraudulent inducement, a contention asserted in the Amended Complaints. (Opp. at 3–4.) However, general allegations that the contract as a whole was tainted by fraudulent inducement are

insufficient to invalidate a forum selection clause where, as here, a plaintiff has not alleged fraudulent inducement with respect to the forum selection clause itself. *Scherk v. Alberto–Culver Co.,* 417 U.S. 506, 519 n. 14, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *Person,* 456 F.Supp.2d at 494; *Mercury West A.G., Inc. v. R.J. Reynolds Tobacco Co.,* No. 03 Civ. 5262(JFK), 2004 WL 421793, at *4 (S.D.N.Y. Mar.5, 2004). Were the law otherwise, plaintiffs could easily thwart the parties' reasonable expectations regarding forum selection simply by alleging fraud in their complaint.

B. Deprivation of Plaintiffs' Day in Court

Plaintiffs claim that enforcement of the Texas forum selection and choice of law clause would deprive them of their day in court because Texas' consumer protection statute is supposedly weaker than New York's, has a shorter statute of limitations than New York's, and, in contrast to New York law, requires a finding of willfulness before an award of treble damages can be assessed. However, none of these arguments is sufficient to amount to a "deprivation of remedy" under the *Roby* analysis.

Indeed, in *Roby* itself, the Second Circuit rejected a similar argument, reasoning that "it is not enough that the foreign law or procedure merely be different or less favorable than" that of the forum in which plaintiffs brought their claims. 996 F.2d at 1363, 1366. Notably, of the eight causes of action in plaintiff's amended pleadings, only two [5] arise under New York's consumer protection laws. Thus, even assuming Texas consumer protection law is less favorable to plaintiffs, there are still ample remedies available in a district court in Texas. [6]

Similarly, that the applicable statute of limitations for certain claims may be shorter in Texas cannot, as plaintiffs contend, render the forum selection clause unenforceable. The shortened statute of limitations would, by plaintiffs' own admission, affect only certain members of the purported class. (Opp. at 6.) Furthermore, even an expired limitations period in the selected forum would be insufficient to render the clause unenforceable. As courts in this Circuit have recognized, accepting plaintiffs' statute of limitations argument would "create a large loophole for the party seeking to avoid enforcement of the forum selection clause [who could] simply postpone [his] cause of action until the statute of limitations has run in the chosen forum and then file [his] action in a more convenient forum." *New Moon Shipping Co. v. MAN B & W Diesel AG,* 121 F.3d 24, 33 (2d Cir.1997); *see also Kelso Enterprises Ltd. v. M/V Diadema,* No. 08 Civ. 8226(SAS), 2009 WL 1788110, at *2 (S.D.N.Y. June 23, 2009) ("The Second Circuit has not directly ruled on whether the expiration of the statute of limitations in the forum selected by an enforceable forum selection clause would render enforcement of the clause unjust. However, courts in this district have overwhelmingly answered that question in the negative.") (citations omitted).

C. The Public Policy and Laws of New York

***4** Plaintiffs' additional arguments—that the forum selection clause would contravene the public policy and laws of New York—fare no better than the arguments already discussed. As a threshold matter, New York has a strong public policy of *enforcing* forum selection clauses so that parties are able to rely on the terms of the contracts they make. *E.g., Micro Balanced Prods. Corp. v. Hlavin Indus. Ltd.,* 238 A.D.2d 284, 285, 667 N.Y.S.2d 1 (1st Dep't 1997). Plaintiffs advance no persuasive reason to depart from this well-established policy. Rather, they argue that the forum selection clause to which they assented would frustrate New York's policy of protecting its consumers, specifically in the context of New York's Dating Services Law, a statute plaintiffs raise for the first time in opposition to defendants' motion. (Opp. at 4.) However, courts have held that New York's interest in protecting its consumers and businesses does not override its policy of enforcing forum selection clauses. *See, e.g., Luv2BFit, Inc. v. Curves Int'l, Inc.,* No. 06 CV 1541(CSH), 2008 WL 4443961, at *3 (S.D.N.Y. Sept.29, 2008); *Novak v. Tucows, Inc.,* No. 06–CV–1909(JFB)(ARL), 2007 WL 922306, at *12 (E.D.N.Y. Mar. 26, 2007), *aff'd,* 330 Fed. Appx. 204, 206 (2d Cir.2009).

Moreover, and much like plaintiffs' fraudulent inducement argument, their arguments based upon New York's consumer fraud statutes, including their late-added argument that defendants' entire User Agreement is void and unenforceable for allegedly violating the New York Dating Services Law, General Business Law § 394–c, are insufficient to overcome the presumptive enforceability of

the forum selection clause here.[7] The State of New York no doubt has a great interest in protecting its consumers and in seeing its laws enforced. Yet plaintiffs cannot avoid compliance with the forum selection clause to which they validly assented simply by invoking a statute peculiar to the forum in which they filed suit (expressly in defiance of the forum selection clause). As the Second Circuit has explained, "[i]t defies reason to suggest that a plaintiff may circumvent forum selection ... clauses merely by stating claims under laws not recognized by the forum selected in the agreement." *Roby,* 996 F.2d at 1360. Like the court of appeals in *Roby,* we "refuse to allow a party's solemn promise to be defeated by artful pleading." *Id.; see also id.* at 1361 (agreement to submit to the jurisdiction of the contractually selected forum must be enforced even if such agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum).

It is perfectly reasonable and legitimate for Match—in operating a website and service accessible to users anywhere in the country[8]—to have decided that any disputes about its website and services should be litigated in Texas, the State in which it is headquartered and where all of its employees reside. Indeed, as a website and service provider, Match would appear to have no practical alternative than to include a forum selection and choice of law clause in its User Agreement, since otherwise Match could potentially be subject to suit in any of the fifty states arising from its website or service. Accordingly, because Match's forum selection clause meets the standard for presumptive enforceability under well-settled law and plaintiffs have failed to make the strong showing required to overcome that presumption, we shall give effect to the forum selection clause.

II. Enforcing the Contractually Selected Forum

***5** Having determined that the forum selection clause is valid and enforceable, we must determine how best to enforce the forum selection clause—since either dismissal without prejudice or transfer may be appropriate. In this case, plaintiffs specifically requested transfer of venue to the Northern District of Texas, rather than dismissal, in the event that the forum selection clause were enforced. (Opp. at 8.) Such transfer would be consistent with the terms of the forum selection clause. In addition, defendants do not object to transferring the case to the Northern District of Texas as an alternative to the without-prejudice dismissal they would prefer. (*See* Reply at 10.) Under these circumstances, and particularly given that defendants do not press the issue, we find that transfer, rather than dismissal without prejudice, is in the interests of justice and will minimize unnecessary delay and inconvenience in a case that has already had a somewhat convoluted posture. In addition, we need not resolve the question of whether venue in this district was improper in the first instance since district courts have discretion to transfer cases under either 28 U.S.C. § 1406(a) or § 1404(a).

CONCLUSION

For the foregoing reasons, we find that the User Agreement's forum selection clause is valid and enforceable. Defendants motion to dismiss and/or to transfer for improper venue is granted. Under the circumstances, transfer of this case to the Northern District of Texas is preferable to dismissal without prejudice. In addition, plaintiffs' anticipated motion to amend is denied.

The Clerk of the Court is respectfully instructed to transfer this case forthwith to the Northern District of Texas.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 3490277

Footnotes

1 Although no class has been certified in this action, we refer to the purported class of plaintiffs in the plural throughout this opinion.

2 Recognizing that the Second Circuit has not designated a single procedural mechanism under Rule 12(b) of the Federal Rules of Civil Procedure through which a party must request dismissal based on a forum selection clause, *see Asoma*

Corp. v. SK Shipping Co., Ltd., 467 F.3d 817, 822 (2d Cir.2006), defendants bring the instant motion both as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and as a motion to dismiss (or to transfer) for improper venue pursuant to Rule 12(b) (3). (Mem. at 4 n. 6.) Because the waiveability of Rule 12(b)(3) defenses promotes more efficient resolution of forum selection questions in litigation, *see, e.g.,* 17 MOORE'S FEDERAL PRACTICE § 111.04[3][b] (3d ed.2008), and because the parties have invoked Rule 12(b)(3) as well as Rule 12(b)(1), we analyze defendants' motion under Rule 12(b)(3).

3 The facts relevant to the forum selection clause of the User Agreement are not in dispute. These facts are drawn from the pleadings and exhibits submitted by the parties, as is appropriate when considering a Rule 12(b)(3) motion.

4 The single case plaintiffs cite in support of their argument on this score, *Jelich v. Warner Bros., Inc.,* No. 95 CIV. 10016(LLS), 1996 WL 209973 (S.D.N.Y. Apr.30, 1996), is inapposite since the court in *Jelich* held that a forum selection clause in an employment contract was unenforceable because the plaintiff was presented with the contract fourteen years after her employment had begun and the employer had coerced her into signing the contract. *Id.* at *2. In addition, we note that the plaintiff in *Jelich* was proceeding *pro se* and thus, unlike plaintiffs' here, could not rely on the ability of counsel to travel to pursue the litigation in the forum selected by the contract. *See Effron v. Sun Line Cruises, Inc.,* 67 F.3d 7, 10–11 (2d Cir.1995).

5 As discussed below, that plaintiffs have also signaled their intention to seek leave to amend their complaint a third time to assert violations of the New York Dating Services Law does not change the analysis here.

6 Plaintiffs additional arguments that enforcing the forum selection clause would “exonerate a culpable defendant,” “absolve” them of wrongdoing, and, therefore, the clause was created in bad faith, are wholly unpersuasive. Plaintiffs' suggested standard misstates the law and would presume a merits analysis that is both inappropriate and unnecessary when assessing the enforceability of a forum selection clause.

7 Notably, as Plaintiffs have sought to comply with this Court's individual practice by submitting what in essence is a surreply letter including a pre-motion request to amend their pleading, no motion to amend the pleading to add these claims is currently before this Court. However, insofar as plaintiffs have requested (implicitly by argument in their opposition papers and explicitly by letter submission after defendants' motion was fully briefed) to amend their complaint to assert violations of the New York Dating Services Law, *see* Hart Letter, Oct. 8, 2009, that anticipated motion to amend would be, and hereby is, denied. Under the circumstances, justice does not require granting leave to file the amended pleading as plaintiffs anticipate. Firstly, plaintiffs did not raise this substantive amendment when they recently requested leave to file a Second Amended Complaint, which was granted. In addition, for the reasons discussed elsewhere in this opinion, allowing plaintiffs to amend their pleading to add additional violations of New York statutes would not prevent enforcement of the forum selection clause, *Roby,* 996 F.2d at 1360, and would therefore be futile. *See* Fed.R.Civ.P. 15(a); *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Even if plaintiffs *had* alleged a violation of § 394–c, such allegation would be insufficient to void the forum selection clause here. *Roby,* 996 F.2d at 1360. (Furthermore, although the following observation is not necessary to our futility analysis, given the dispositive issue of the forum selection clause, we note that defendants dispute plaintiffs' claimed violation of the New York Dating Services Law—asserting that Match does in fact provide the required dating “Bill of Rights” to their New York users. (Reply at 8 n. 7.))

Plaintiffs' additional anticipated amendment, alleging that defendants violated the privacy of former lead plaintiff Sean McGinn, in violation of Section 394–c(5), likewise cannot overcome the forum selection clause and therefore leave to amend is denied for similar reasons. In addition, we note that McGinn is no longer a plaintiff here and new lead plaintiff Brodsky would presumably lack standing to assert this privacy claim on McGinn's behalf.

8 In this connection, we also note that, in arguing for the importance of New York's consumer protection law and policy, plaintiffs seem to have ignore the fact that many of its purported class members are from states *other than* New York—including California, Connecticut, Michigan, and Florida.

ORDER

AND NOW, this *9th* day of *March*, 2007, after trial by judge sitting without a jury, and in accordance with the Findings Of Fact And Conclusions Of Law attached hereto, the Court finds that Plaintiff has not demonstrated that he has a disability as defined under the Americans With Disabilities Act, 42 U.S.C. 12101 *et seq.*, and is not entitled to an accommodation to take the Law School Admissions Test. Accordingly, Plaintiff's request for injunctive and other relief is DENIED. Judgment is entered in favor of Defendant Law School Admissions Council, Inc., and against Plaintiff Jonathan Love.

IT IS SO ORDERED.

Lawrence FELDMAN, Plaintiff,

v.

GOOGLE, INC., Defendant.

Civil Action No. 06–2540.

United States District Court,
E.D. Pennsylvania.

March 29, 2007.

Background: Advertiser on Internet website sued operator, in state court, claiming overbilling. Operator removed and moved for summary judgment or transfer.

Holdings: The District Court, Giles, J., held that:

(1) advertiser had notice of and had accepted terms of advertising contract, including forum selection clause;

(2) contract was binding, even though there was mechanism for determining advertising fee, rather than specified fee;

(3) contract was not procedurally or substantively unconscionable;

(4) forum selection clause was valid and reasonable, allowing for venue transfer; and

(5) private and public factors favored transfer.

Case transferred.

1. Federal Courts ⚿412.1

Federal law governed question of whether forum selection clause in agreement covering Internet advertising would be given effect.

2. Telecommunications ⚿1340

An Internet "clickwrap agreement" involves an entry on an internet webpage, requiring that a user consent to any terms or conditions of a proposed agreement by clicking on a dialog box on the screen in order to proceed with the internet transaction, and the user clicking on the box.

See publication Words and Phrases for other judicial constructions and definitions.

3. Contracts ⚿127(4)

Internet advertiser had notice of and assented to forum selection provision, in advertising agreement proposed by search engine operator, when initial screen urged advertiser to read short full text of proposed agreement, which operator made available through scrolling or print copy, prior to making assent commitment through clicking on approval box.

4. Telecommunications ⚿1340

There was binding contract, under California and Pennsylvania law, under which operator of Internet website provided advertising opportunity, despite absence of any specified price to be paid by advertiser; contract provided mechanism

for determining price, under which prospective advertisers bid for preferential placement on website.

5. Telecommunications ⚿1340

Presence of an enforceable express contract, covering advertising on Internet website, precluded implied in fact contract under California and Pennsylvania law.

6. Contracts ⚿1

A contract of adhesion, under California or Pennsylvania law, is a form or standardized contract prepared by a party of superior bargaining power, to be signed by the party in the weaker position, who only has the opportunity to agree to the contract or reject it, without an opportunity to negotiate or bargain.

7. Telecommunications ⚿1340

Agreement covering advertising on Internet website was not procedurally unconscionable, under California and Pennsylvania law, even though prospective advertisers were required to assent to all terms and conditions before being allowed to advertise; there were number of alternate websites which advertisers could utilize.

8. Compromise and Settlement ⚿67
Federal Civil Procedure ⚿177.1

Plaintiff in class action, which had opted out of settlement agreement, could not challenge adequacy of notice provision of class action settlement in its individual action against class action defendant. Fed. Rules Civ.Proc.Rule 23(e), 18 U.S.C.A.

9. Telecommunications ⚿1340

Agreement covering advertising on Internet website was not substantively unconscionable, under California law, by requiring that suit against web operator be brought in California, providing for disclaimer of all warranties, and requiring that alleged billing errors be called to operator's attention within 60 days.

10. Contracts ⚿127(4)

Forum selection clause of agreement covering Internet advertising, providing that litigation against website operator must be conducted in specified California county, was valid and reasonable; there was no fraud or overreaching involved, provision had valid purpose of protecting operator from lawsuits in numerous jurisdictions, enforcement did not violate any public policies in present case, and difficulties of litigating in California could be minimized so as to not deprive plaintiff of day in court. 28 U.S.C.A. § 1404(a).

11. Federal Courts ⚿109

Private factors favored transfer of suit claiming that Internet website operator overcharged advertiser, from Pennsylvania where advertiser's office was located, to California where operator was located; key witnesses and documents regarding overcharge were located in California. 28 U.S.C.A. § 1404(a).

12. Federal Courts ⚿109

Public factors favored transfer of suit claiming that Internet website operator overcharged advertiser, from Pennsylvania where advertiser's office was located, to California where operator was located; dispute was governed by California law, and California courts had expertise in commercial litigation involving web-based technology. 28 U.S.C.A. § 1404(a).

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David J. Berney, Law Offices of David J. Berney, Jeffrey M. Lindy, Law Offices of Jeffrey M. Lindy, Philadelphia, PA, for Defendant.

MEMORANDUM

GILES, District Judge.

I. Introduction

Before the court is Defendant Google, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint, or in the alternative, to Transfer, which motion the court converted to a Motion for Summary Judgment. Also before the court is Plaintiff Lawrence E. Feldman's Cross–Motion for Summary Judgment. The ultimate issues raised by the motions and determined by the court are whether a forum selection clause in an internet "clickwrap" agreement is enforceable under the facts of the case and, if so, whether transfer of this case to the Northern District of California is warranted. The court finds in the affirmative as to both issues and, therefore, denies Plaintiff's Motion for Summary Judgment, grants Defendant's Motion to Transfer, and transfers this case to the Northern District of California, San Jose Division. The reasons follow.

Defendant's motion seeks to enforce the forum selection clause in an online "clickwrap" agreement, which provides for venue in Santa Clara County, California, which is within the San Jose Division. In his original complaint, Plaintiff based his claims on a theory of express contract. In his Amended Complaint, however, Plaintiff offers a wholly new legal theory. He argues that no express contract existed because the agreement was not valid. Withdrawing his express contract allegations, Plaintiff advanced the theory of implied contract because he argues he did not have notice of and did not assent to the terms of the agreement and therefore there was no "meeting of the minds." Plaintiff also argues that, even if the agreement were controlling, it is a contract of adhesion and unconscionable, and that the forum selection clause is unenforceable.

The court will address these arguments in turn. First, the court will examine what law governs this action, Pennsylvania or California law, state or federal law. Turning to the question of whether the forum selection clause is enforceable, the court will determine whether an express or implied contract exists and whether there was reasonable notice of the contract's terms. The court next will examine whether the contract and its terms are unconscionable.

If the forum selection clause is enforceable, the court will address whether dismissal or transfer is the appropriate remedy, and, if transfer is appropriate, whether 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406 applies. If § 1404(a) controls, the court will determine whether the language of the forum selection clause is permissive or mandatory in order to ascertain what weight to give it. Then, the court will examine the validity or reasonableness of the forum selection clause through application of the test in *M/S Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 12–13, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Finally, the court will weigh the private and public factors under § 1404(a) to determine whether transfer is warranted.

II. Factual Background

A. General Background

On or about January 2003, Plaintiff, a lawyer with his own law firm, Lawrence E. Feldman & Associates, purchased advertising from Defendant Google, Inc.'s "AdWords" Program, to attract potential clients who may have been harmed by drugs under scrutiny by the U.S. Food and Drug Administration.

In the AdWords program, whenever an internet user searched on the internet search engine, Google.com, for keywords or "Adwords" purchased by Plaintiff, such as "Vioxx," "Bextra," and "Celebrex," Plaintiff's ad would appear. If the searcher clicked on Plaintiff's ad, Defendant would charge Plaintiff for each click made on the ad.

This procedure is known as "pay per click" advertising. The price per keyword is determined by a bidding process, wherein the highest bidder for a keyword would have its ad placed at the top of the list of results from a Google.com search by an internet user.

Plaintiff claims that he was the victim of "click fraud." Click fraud occurs when entities or persons, such as competitors or pranksters, without any interest in Plaintiff's services, click repeatedly on Plaintiff's ad, the result of which drives up his advertising cost and discourages him from advertising. Click fraud also may be referred to as "improper clicks" or, to coin a phrase, "trick clicks." Plaintiff alleges that twenty to thirty percent of all clicks for which he was charged were fraudulent. He claims that Google required him to pay for all clicks on his ads, including those which were fraudulent.

Plaintiff does not contend that Google actually knew that there were fraudulent clicks, but alleges that click fraud can be tracked and prevented by computer programs, which can count the number of clicks originating from a single source and whether a sale results, and can be tracked by mechanisms on websites. Plaintiff alleges, therefore, that Google had the capacity to determine which clicks were fraudulent, but did nothing to prevent the click fraud, and did not adequately warn him about click fraud or investigate his complaints about click fraud. Plaintiff alleges that Google informed him that it did not keep records on an advertiser's account and click history for more than the most recent three months, and that Google disclaimed liability for clicks older than sixty days.

The issue of click fraud with respect to the AdWords program led to a class action suit in Arkansas, which was settled and court approval was given on or about July 26, 2006. (Pl. Opp. to Mot. to Dismiss, Ex. A.) Plaintiff alleges that he was a member of that class but timely opted out in order to pursue an individual action.

Plaintiff alleges Google charged him over $100,000 for AdWords from about January 2003 to December 31, 2005. Plaintiff seeks damages, disgorgement of any profits Defendant obtained as a result of any unlawful conduct, and restitution of money Plaintiff paid for fraudulent clicks.

B. The Online Agreement and Forum Selection Clause

This cross-summary judgment battle turns entirely on a forum selection clause in the AdWords online agreement. It is undisputed that the forum selection clause provides: *"The Agreement must be* construed as if both parties jointly wrote it, governed by California law except for its conflicts of laws principles and *adjudicated in Santa Clara County, California."* (Def. Mot. to Dismiss, Ex. A, at ¶ 7 (emphasis added).)

Annie Hsu, an AdWords Associate for Google, Inc., testified by affidavit that the following procedures were in place at the time that Plaintiff activated his AdWords account in about January 2003. (Hsu Decl. ¶ 7). Although Plaintiff claims that the AdWords Agreement "was neither signed nor seen and negotiated by Feldman & Associates or anyone at his firm" (Pl. Opp. to Mot. to Dismiss at 2) and that he never "personally signed a contract

with Google to litigate disputes in Santa Clara County, California" (Pl. Reply at 1), Plaintiff does not dispute that he followed the process outlined by Hsu.

It is undisputed that advertisers, including Plaintiff, were required to enter into an AdWords contract before placing any ads or incurring any charges. (Hsu Decl. ¶ 2.) To open an AdWords account, an advertiser had to have gone through a series of steps in an online sign-up process. (Hsu Decl. ¶ 3.) To activate the AdWords account, the advertiser had to have visited his account page, where he was shown the AdWords contract. (Hsu Decl. ¶ 4.)

Toward the top of the page displaying the AdWords contract, a notice in bold print appeared and stated, **"Carefully read the following terms and conditions.** If you agree with these terms, indicate your assent below." (Hsu Decl. ¶ 4.) The terms and conditions were offered in a window, with a scroll bar that allowed the advertiser to scroll down and read the entire contract. The contract itself included the pre-amble and seven paragraphs, in twelve-point font. The contract's pre-amble, the first paragraph, and part of the second paragraph were clearly visible before scrolling down to read the rest of the contract. The preamble, visible at first impression, stated that consent to the terms listed in the Agreement constituted a binding agreement with Google. A link to a printer-friendly version of the contract was offered at the top of the contract window for the advertiser who would rather read the contract printed on paper or view it on a full-screen instead of scrolling down the window. (Hsu Decl. ¶ 5.)

At the bottom of the webpage, viewable without scrolling down, was a box and the words, **"Yes,** I agree to the above terms and conditions." (Hsu Decl. ¶ 4.) The advertiser had to have clicked on this box in order to proceed to the next step. (Hsu Decl. ¶ 6.) If the advertiser did not click on **"Yes,** I agree . . ." and instead tried to click the "Continue" button at the bottom of the webpage, the advertiser would have been returned to the same page and could not advance to the next step. If the advertiser did not agree to the AdWords contract, he could not activate his account, place any ads, or incur any charges. Plaintiff had an account activated. He placed ads and charges were incurred.

III. Procedural History

This matter commenced by writ of summons in the Common Pleas Court of Philadelphia County on March 9, 2006. Plaintiff filed his original Complaint on June 5, 2006. The matter was removed to federal district court on June 14, 2006 pursuant to diversity jurisdiction under 28 U.S.C. § 1332. On July 10, 2006, Defendant filed its first Motion to Dismiss the original complaint.

On August 9, 2006, without leave of court, Plaintiff filed an Amended Complaint, which eliminated the express contract claim and asserted instead claims styled as (1) breach of implied contract, (2) breach of implied covenant of good faith and fair dealing, (3) fraudulent inducement, (4) negligence, (5) unjust enrichment, and (6) violation of California's Business and Professions Code, § 17200, *et. seq.* Plaintiff reduced his demand for damages from $100,000 to $50,000. This court has jurisdiction based on diversity under 28 U.S.C. § 1332 because the amount in controversy measured as of the date of removal exceeded the jurisdictional threshold. *See Angus v. Shiley, Inc.*, 989 F.2d 142, 145 (3d Cir.1993).

The court notes that Plaintiff did not seek leave of court or written consent of the adverse party in filing its Amended Complaint after a responsive pleading had been served. *See* Fed.R.Civ.P. 15(a). De-

fendant, however, did not object to or move to strike the Amended Complaint. Instead, on August 28, 2006, Defendant filed a Motion to Dismiss the Amended Complaint under Fed.R.Civ.P. 12(b) (6) or, in the alternative, to transfer the case pursuant to 28 U.S.C. § 1404(a) to the Northern District of California, whose San Jose Division is located within Santa Clara County (Def. Mot. to Dismiss at 4 n. 3). The court deems any objections waived and considers the claims in the Amended Complaint to have amended those in the original complaint. Furthermore, the court considered the Amended Complaint at oral argument. (*See, e.g.,* Hrg. Tr. 14–15.) Consequently, the court deems the Amended Complaint to have legal effect.

When the briefing was complete, the court held oral argument on the motion to dismiss on November 1, 2006. At oral argument, the court converted the motion to dismiss into one for summary judgment under Fed.R.Civ.P. 56 pursuant to Fed. R.Civ.P. 12(b). Matters outside the pleadings had to be considered to address the motion adequately. The court ordered the parties to submit information regarding the clickwrap agreement and the manner into which it was entered. In response, Defendant submitted a Supplemental Memorandum on November 16, 2006, to which Plaintiff responded on December 26, 2006. On December 6, 2006, Plaintiff filed a Motion for Summary Judgment. Defendant filed a response to Plaintiff's summary judgment motion on January 8, 2007, to which Plaintiff replied on January 26, 2007.

IV. Legal Standard for Summary Judgment

Under Fed.R.Civ.P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(c). In order to defeat a motion for summary judgment, disputes must be both 1) material, meaning concerning facts that will affect the outcome of the issue under substantive law, and 2) genuine, meaning the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322–23, 106 S.Ct. 2548. In reviewing a motion for summary judgment, the court "does not make credibility determinations and must view facts and inferences in the light most favorable to the party opposing the motion." *Siegel Transfer, Inc. v. Carrier Express, Inc.,* 54 F.3d 1125, 1127 (3d Cir.1995).

IV. Discussion

A. Choice of Law

[1] Defendant argues that the court must apply California law. The AdWords Agreement contains a choice of law clause, specifying that the Agreement must be governed by California law. (Def. Mot. to Dismiss, Ex. A, at ¶ 7.) Defendant and Plaintiff both rely upon Pennsylvania and California substantive law in their briefs and arguments.

In a diversity case, a federal court must apply the conflict of laws principles of the state in which it sits. *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U.S. 487, 496–97,

61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Under Pennsylvania law, conflict of laws principles generally are not offended by the application of a contractual choice of law provision in a valid contract. *Boase v. Lee Rubber & Tire Corp.,* 437 F.2d 527, 529 (3d Cir.1970); *cf.* Restatement (Second) of Conflict of Laws § 187 (1989). As discussed in detail below, the court finds that the AdWords Agreement is enforceable. California law therefore would govern this dispute. *Cf. DeJohn v. TV Corp. Int'l,* 245 F.Supp.2d 913, 918 (N.D.Ill.2003) (applying New York substantive law to claims involving an online agreement and its forum selection clause because the agreement at issue was valid and required New York law in its choice of law clause).

Most circuit courts, however, have found that federal, and not state law, applies in the determination of the effect given to a forum selection clause in diversity cases. *See, e.g., Rainforest Café v. EklecCo, L.L.C.,* 340 F.3d 544, 546 (8th Cir.2003); *Jones v. Weibrecht,* 901 F.2d 17, 19 (2d Cir.1990); *Manetti–Farrow, Inc. v. Gucci Am., Inc.,* 858 F.2d 509, 512–13 (9th Cir. 1988); *Stewart Org., Inc. v. Ricoh Corp.,* 810 F.2d 1066, 1067–69 (11th Cir.1987) (en banc), *aff'd on other grounds,* 487 U.S. 22, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988); *see also Stewart Org., Inc. v. Ricoh Corp.,* 487 U.S. 22, 31–32, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) (holding that in diversity cases, federal law governs determination of what effect to give forum selection clause in contract). The Third Circuit has held that federal law controls because "questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature." *Jumara v. State Farm Ins. Co.,* 55 F.3d 873, 877 (3d Cir.1995) (quoting *Weibrecht,* 901 F.2d at 19); *see Wall Street Aubrey Golf, LLC v. Aubrey,* 189 Fed.Appx. 82, 84 (3d Cir.2006) (following *Jumara* to apply federal law); *AmericanAnglian Envtl. Techs., L.P. v. Doherty,* 461 F.Supp.2d 359 (E.D.Pa.2006) (same). Thus, this court follows the Third Circuit precedent set out in *Jumara* and applies federal law in determining the validity of the forum selection clause at issue here.

B. The Online AdWords Agreement is a Valid Express Contract.

1. The Clickwrap Agreement is Enforceable.

Plaintiff contends that the online AdWords Agreement was not a valid, express contract, and that the law of implied contract applies. In support of this contention, Plaintiff argues that he did not have notice of and did not assent to the terms of the Agreement. Implying that the contract lacked definite essential terms, but failing to brief the issue, Plaintiff argues that the contract did not include fixed price terms for services. He further argues that the AdWords Agreement presented does not set out a date when Plaintiff may have entered into the contract. As to the latter argument, the unrebutted Hsu Declaration states that the AdWords Agreement and online process presented went into effect at the time that Plaintiff activated his AdWords account. (Hsu Decl. ¶ 7.) Plaintiff has not presented any evidence to the contrary, nor does he allege that any agreement he made was different from the one presented through the Hsu Declaration. Thus, there is undisputed evidence that the AdWords Agreement presented is the same that Plaintiff activated with Defendant.

"Contracts are 'express' when the parties state their terms and 'implied' when the parties do not state their terms. The distinction is based not on the contracts' legal effect but on the way the parties manifest their mutual assent." *Baer v. Chase,* 392 F.3d 609, 616 (3d Cir.2004)

(citing *In re Penn. Cent. Transp. Co.*, 831 F.2d 1221, 1228 (3d Cir.1987)). "There cannot be an implied-in-fact contract if there is an express contract that covers the same subject matter." *Id.* at 616–17; *see DeJohn*, 245 F.Supp.2d at 918 (finding that implied contract claims were precluded where an enforceable express contract, an online agreement, governed the parties' relationship); *see also Crescent Int'l, Inc. v. Avatar Cmties.*, 857 F.2d 943, 944 (3d Cir.1988) ("[P]leading alternate non-contractual theories is not alone enough to avoid a forum selection clause if the claims asserted arise out of the contractual relation and implicate the contract's terms.").

[2] The type of contract at issue here is commonly referred to as a "clickwrap" agreement. A clickwrap agreement appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction.[1] *Specht v. Netscape Comms. Corp.*, 306 F.3d 17, 22 (2d Cir. 2002); Kevin W. Grierson, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R. 5th 309, § 1.a n. 3 (2004); 4–GL Computer Contracts C (2006). Even though they are electronic, clickwrap agreements are considered to be writings because they are printable and storable. *See, e.g., In re RealNetworks, Inc., Privacy Litigation*, No. 00–c–1366, 2000 U.S. Dist. LEXIS 6584, at *8–11, 2000 WL 631341, at *3–4 (N.D.Ill. May 11, 2000).

To determine whether a clickwrap agreement is enforceable, courts presented with the issue apply traditional principles of contract law and focus on whether the plaintiffs had reasonable notice of and manifested assent to the clickwrap agreement. *See, e.g., Specht*, 306 F.3d at 28–30; *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1010 (D.C.2002); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200 (Tex.App.2001); *Caspi v. Microsoft Network, L.L.C.*, 323 N.J.Super. 118, 125–26, 732 A.2d 528 (App.Div.1999); John M. Norwood, *A Summary of Statutory and Case Law Associated With Contracting in the Electronic Universe*, 4 DePaul Bus. & Comm. L.J. 415, 439–49 (2006) (discussing clickwrap cases); 1–2 Computer Contracts § 2.07 (2006) (analyzing clickwrap cases). Absent a showing of fraud, failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms. *See, e.g., Specht*, 306 F.3d at 30; *Lazovick v. Sun Life Ins. Co. of Am.*, 586 F.Supp. 918, 922 (E.D.Pa.1984); *Barnett*, 38 S.W.3d at 204.

a. There was Reasonable Notice of and Mutual Assent to the AdWords Agreement.

[3] Plaintiff claims he did not have notice or knowledge of the forum selection clause, and therefore that there was no "meeting of the minds" required for contract formation. In support of this argument, Plaintiff cites *Specht v. Netscape Comms. Corp.*, in which the Second Circuit held that internet users did not have reasonable notice of the terms in an online agreement and therefore did not assent to the agreement under the facts of that case. 306 F.3d at 20, 31.

1. A clickwrap agreement is distinguishable from a "browsewrap" agreement, which "allow[s] the user to view the terms of the agreement, but do[es] not require the user to take any affirmative action before the Web site performs its end of the contract," such as simply providing a link to view the terms and conditions. James J. Tracy, Case Note, *Legal Update: Browsewrap Agreements: Register.com, Inc. v. Verio, Inc.*, 11 B.U. J. Sci. & Tech. L 164, 164–65 (2005).

The facts in *Specht*, however, are easily distinguishable from this case. There, the internet users were urged to click on a button to download free software. *Id.* at 23, 32. There was no visible indication that clicking on the button meant that the user agreed to the terms and conditions of a proposed contract that contained an arbitration clause. *Id.* The only reference to terms was located in text visible if the users scrolled down to the next screen, which was "submerged." *Id.* at 23, 31–32. Even if a user did scroll down, the terms were not immediately displayed. *Id.* at 23. Users would have had to click onto a hyperlink, which would take the user to a separate webpage entitled "License & Support Agreements." *Id.* at 23–24. Only on that webpage was a user informed that the user must agree to the license terms before downloading a product. *Id.* at 24. The user would have to choose from a list of license agreements and again click on yet another hyperlink in order to see the terms and conditions for the downloading of that particular software. *Id.*

The Second Circuit concluded on those facts that there was not sufficient or reasonably conspicuous notice of the terms and that the plaintiffs could not have manifested assent to the terms under these conditions. *Id.* at 32, 35. The Second Circuit was careful to differentiate the method just described from clickwrap agreements which do provide sufficient notice. *Id.* at 22 n. 4, 32–33. Notably, the issue of notice and assent was not at issue with respect to a second agreement addressed in *Specht*. *Id.* at 21–22, 36. In that clickwrap agreement, when users proceeded to initiate installation of a program, "they were automatically shown a scrollable text of that program's license agreement and were not permitted to complete the installation until they had clicked on a 'Yes' button to indicate that they had accepted all the license terms. If a user attempted to install [the program] without clicking 'Yes,' the installation would be aborted." *Id.* at 21–22.

Through a similar process, the AdWords Agreement gave reasonable notice of its terms. In order to activate an AdWords account, the user had to visit a webpage which displayed the Agreement in a scrollable text box. Unlike the impermissible agreement in *Specht*, the user did not have to scroll down to a submerged screen or click on a series of hyperlinks to view the Agreement. Instead, text of the AdWords Agreement was immediately visible to the user, as was a prominent admonition in boldface to read the terms and conditions carefully, and with instruction to indicate assent if the user agreed to the terms.

That the user would have to scroll through the text box of the Agreement to read it in its entirety does not defeat notice because there was sufficient notice of the Agreement itself and clicking "Yes" constituted assent to all of the terms. The preamble, which was immediately visible, also made clear that assent to the terms was binding. The Agreement was presented in readable 12–point font. It was only seven paragraphs long—not so long so as to render scrolling down to view all of the terms inconvenient or impossible. A printer-friendly, full-screen version was made readily available. The user had ample time to review the document.

Unlike the impermissible agreement in *Specht*, the user here had to take affirmative action and click the "Yes, I agree to the above terms and conditions" button in order to proceed to the next step. Clicking "Continue" without clicking the "Yes" button would have returned the user to the same webpage. If the user did not agree to all of the terms, he could not have activated his account, placed ads, or incurred charges.

The AdWords Agreement here is very similar to clickwrap agreements that courts have found to have provided reasonable notice. *See, e.g., Forrest v. Verizon Communications, Inc.,* 805 A.2d 1007, 1010–11 (D.C.2002) (holding that adequate notice was provided of clickwrap agreement terms where users had to click "Accept" to agree to the terms in order to subscribe, an admonition in capital letters was presented at the top of the agreement to read the agreement carefully, the thirteen-page agreement appeared in a scroll box with only portions visible at a time, and the forum selection clause was located in the final section and presented in lower case font); *In re RealNetworks, Inc., Privacy Litigation,* No. 00–c–1366, 2000 U.S. Dist. LEXIS 6584, at *2, 15–17, 2000 WL 631341, at *1, 5–6 (N.D.Ill. May 11, 2000) (finding reasonable notice of clickwrap agreement terms existed where the user had to agree to the terms in order to install software, the agreement came in a small pop-up window, in the same font-size as words in the computer's own display, and with the arbitration clause located at the end of the agreement); *Caspi v. Microsoft Network, L.L.C.,* 323 N.J.Super. 118, 122, 125–27, 732 A.2d 528 (App.Div. 1999) (finding that reasonable notice of the terms of a clickwrap agreement was provided where the user had to click "I agree" before proceeding with registration, the agreement was presented in a scrollable window, and the forum selection clause was presented in lower case letters in the last paragraph of the agreement); *cf. Pollstar v. Gigmania Ltd.,* 170 F.Supp.2d 974, 981 (E.D.Cal.2000) (finding that reasonable notice of the terms of a browsewrap agreement was not provided when a hyperlink to the terms appeared in small gray print on a gray background).

A reasonably prudent internet user would have known of the existence of terms in the AdWords Agreement. Plaintiff had to have had reasonable notice of the terms. By clicking on "Yes, I agree to the above terms and conditions" button, Plaintiff indicated assent to the terms. Therefore, the requirements of an express contract for reasonable notice of terms and mutual assent are satisfied. Plaintiff's failure to read the Agreement, if that were the case, does not excuse him from being bound by his express agreement.

b. The AdWords Agreement is Enforceable Despite Its Lack of a Definite Price Term.

[4] Plaintiff's argument that the AdWords Agreement is unenforceable because of failure to supply a definite, essential term as to price is without merit. Under California and Pennsylvania law, the price term is an essential term of a contract and must be supplied with sufficient definiteness for a contract to be enforceable. *See, e.g., Levin v. Knight,* 780 F.2d 786, 786 (9th Cir.1986); *Lackner v. Glosser,* 2006 Pa.Super. 14, 22–24, 892 A.2d 21 (2006). If the parties, however, have agreed upon a practicable method of determining the price in the contract with reasonable certainty, such as through a market standard, the contract is enforceable. *See, e.g., Portnoy v. Brown,* 430 Pa. 401, 243 A.2d 444 (1968); 1 Witkin Sum. Cal. Law Contracts § 142 (2006) ("[T]he complete absence of any mention of the price is not necessarily fatal: The contract may be interpreted to mean the market price or a reasonable price.").

The AdWords Agreement does not include a specific price term, but describes with sufficient definiteness a practicable process by which price is determined.[2]

2. Paragraph 5 of the Agreement states in part: "**Payment.** You shall be charged based on

(Def. Mot. to Dismiss, Ex. A, at ¶ 5.) The premise of the AdWords program is that advertisers must bid for keywords or Adwords, and the highest bidder is placed at the top of the advertising hierarchy. Prices are determined by the market, with the keywords higher in demand garnering higher prices. Plaintiff had to have been aware of and understood the pricing process. Each time that he purchased keywords, he engaged in this process. At oral argument, Plaintiff explained the process by which price was determined and conceded that the process was outlined in the Agreement.[3] (Hrg. Tr. at 17–18.) The court concludes that the Adwords Agreement is enforceable because it contained a practicable method of determining the market price with reasonable certainty.

[5] Because there was an express contract covering the same conduct at issue (pay-per-click advertising under the AdWords program) and because the concepts of express and implied contracts are mutually exclusive and cannot co-exist, Plaintiff's argument of an implied contract is precluded as a matter of law. In addition, the AdWords Agreement provides that it constitutes the entire agreement between the parties, with the exception of any modifications in writing and executed by both parties. (Def. Mot. to Dismiss, Ex. A, at ¶ 7.)

2. The Clickwrap Agreement is not Unconscionable.

Plaintiff argues that the AdWords Agreement and in particular the forum selection clause are unconscionable. Unconscionability is a general defense to the enforcement of a contract or its specific terms. *Blake v. Ecker*, 93 Cal.App.4th 728, 741, 113 Cal.Rptr.2d 422 (2001), *overruled on other grounds* by *Le Francois v. Goel*, 35 Cal.4th 1094, 1107, 29 Cal.Rptr.3d 249, 112 P.3d 636 (2005); *cf. Denlinger, Inc. v. Dendler*, 415 Pa.Super. 164, 608 A.2d 1061, 1067 (1992). Unconscionability has procedural and substantive components. *Blake*, 93 Cal.App.4th at 742, 113 Cal.Rptr.2d 422. "The procedural component is satisfied by the existence of unequal bargaining positions and hidden terms common in the context of adhesion contracts. The substantive component is satisfied by overly harsh or one-sided results that 'shock the conscience.' " *Comb v. PayPal, Inc.*, 218 F.Supp.2d 1165, 1172 (N.D.Cal.2002) (citations omitted). The party challenging the contractual provision has the burden to prove unconscionability. *Crippen v. Cent. Valley RV Outlet, Inc.*, 124 Cal.App.4th 1159, 1165, 22 Cal.Rptr.3d 189 (2004).

actual clicks or other billing methods you may choose online (e.g. cost per impression). You shall pay all charges in the currency selected by you via your online AdWords account, or in such other currency as is agreed to in writing by the parties. Charges are exclusive of taxes. You are responsible to paying (y) [sic] all taxes and government charges, and (z) reasonable expenses and attorney fees Google incurs collecting late amounts. You waive all claims relating to charges unless claimed within 60 days after the charge (this does not effect your credit card issuer rights). Charges are solely based on Google's click measurements. Refunds (if any) are at the discretion of Google and only in the form of advertising credit for Google Partners.''

3. Counsel for Plaintiff stated: ''[T]he popularity of the word drives up the price of the click, and so when you go to not enter the contract, but go to figure out what word you want to purchase, you see the going rate, and that can change from hour-to-hour, day-to-day.'' (Hrg. Tr. at 17–18.) When counsel for Defendant commented that this process is described in the contract, Plaintiff's counsel said, ''Yes, they explain that to you. It's the internet your honor, it is the twenty-first century.'' (Hrg. Tr. at 18.)

a. The AdWords Agreement is not Procedurally Unconscionable.

[6] Under California law, a contract or its terms may be procedurally unconscionable if it is an adhesion contract. *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App.4th 846, 853, 113 Cal.Rptr.2d 376 (2001); *cf. Ostroff v. Alterra Healthcare Corp.*, 433 F.Supp.2d 538, 542 (E.D.Pa. 2006) (defining procedural unconscionability under Pennsylvania law as the "absence of meaningful choice on the part of one of the parties"). A contract of adhesion is a form or standardized contract prepared by a party of superior bargaining power, to be signed by the party in the weaker position, who only has the opportunity to agree to the contract or reject it, without an opportunity to negotiate or bargain. *Armendariz v. Found. Health Psychcare Serv.*, 24 Cal.4th 83, 113, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000); *cf. McNulty v. H & R Block, Inc.*, 843 A.2d 1267, 1273 (Pa.Super.2004).

[7, 8] The opportunity to negotiate by itself does not end the inquiry into procedural unconscionability. Courts consider factors such as the buyer's sophistication, the use of high-pressure tactics or external pressure to induce acceptance, and the availability of alternative sources of supply. *See, e.g., Comb*, 218 F.Supp.2d at 1172–73; *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal.App.3d 758, 767–72, 259 Cal.Rptr. 789 (1989); *DeJohn v. TV. Corp. Int'l*, 245 F.Supp.2d 913, 919 (N.D.Ill.2003).

Plaintiff argues the AdWords Agreement was a contract of adhesion because it was not negotiated at arms length and was offered on a "take it or leave it" basis, without an opportunity to bargain. Internet users had to agree to the terms in order to activate an AdWords account and purchase AdWords. Defendant counters that Plaintiff is a sophisticated purchaser, an attorney, who had full notice of the terms, who was capable of understanding them, and who assented to them. Plaintiff has not alleged high-pressure tactics or external pressure to accept the Agreement.

Defendant also argues that other internet providers offer similar advertising services, including MSN Search, AOL Search, Ask.com, Yahoo!, Excite, Infospace, and HotBot, and thus Plaintiff could have chosen to take his business elsewhere.[4] Plaintiff counters that the availability of other internet service providers does not undercut the existence of an adhesion contract. *See Comb*, 218 F.Supp.2d at 1173 (citing *Armendariz*, 24 Cal.4th at 113, 99 Cal. Rptr.2d 745, 6 P.3d 669, for the proposition that a contract may be adhesive even though alternative sources of employment not conditioned on acceptance of an arbitration clause exist). Plaintiff also asserts that only Yahoo offers comparable advertising and that Yahoo's sign up system is similar to Google's.

Plaintiff, however, has not offered any evidence in support of his assertion.[5] As such, he has not met his affirmative burden on his summary judgment motion to make a sufficient showing that other online companies did not offer similar, competing advertising services, which lacked forum selection clauses. *See Crippen*, 124 Cal. App.4th at 1165, 22 Cal.Rptr.3d 189 (hold-

4. Defendant has not presented evidence as to this assertion.

5. The court observes that, as one court has noted, "[t]he on-line computer industry is not one without competition, and therefore consumers are left with choices as to which service they select for Internet access, e-mail and other information services." *Caspi v. Microsoft Network, L.L.C.*, 323 N.J.Super. 118, 122–24, 732 A.2d 528 (App.Div.1999) (citations and quotations omitted).

ing that the burden to prove unconscionability rests with the party challenging the contractual provision). On this factor in the analysis, the agreement stands up as not being procedurally unconscionable.

Plaintiff also argues that the AdWords Agreement is procedurally unconscionable because the Agreement violates Fed. R.Civ.P. 23(e), which requires adequate notice of opt-out rights. *See Amchem Prods. v. Windsor,* 521 U.S. 591, 628, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Plaintiff contends that Google violated Rule 23(e) and Plaintiff's due process rights in that the settlement notice in the Arkansas class action did not state that any individual litigation would require bringing suit in Santa Clara, California. Plaintiff's argument is flawed for several reasons. First, Plaintiff received adequate notice of the forum selection clause requiring litigation in Santa Clara when he assented to the AdWords Agreement. Second, only the settlement notice, and not the AdWords Agreement and its terms, could violate Rule 23(e), and violation of Rule 23(e) is not part of the procedural unconscionability inquiry. Finally, the court-approved Arkansas class action settlement cannot be collaterally attacked even if Plaintiff continued as a member of the class. *See In re Diet Drugs,* 431 F.3d 141, 145 (3d Cir. 2005) (holding that under federal law, an absent class member may only collaterally attack notice of a prior settlement if there is a lack of due process, and that, once the issue of notice is decided by a court, it may not be relitigated). As an opt-out, he has no standing in this action to challenge the adequacy of the class action notice approved by the Arkansas court.

A contract is not necessarily one of adhesion simply because it is a form contract. Courts have recognized the prevalence and importance of standardized contracts in people's everyday lives. *ProCD, Inc. v. Zeidenberg,* 86 F.3d 1447, 1451 (7th Cir.1996) (quoting Restatement (2d) of Contracts § 211 cmt a (1981)) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions."); *Neal v. State Farm Ins. Cos.,* 188 Cal.App.2d 690, 694, 10 Cal.Rptr. 781 (1961). Because Plaintiff was a sophisticated purchaser, was not in any way pressured to agree to the AdWords Agreement, was capable of understanding the Agreement's terms, consented to them, and could have rejected the Agreement with impunity, this court finds that the AdWords Agreement was not procedurally unconscionable.

b. The AdWords Agreement is not Substantively Unconscionable.

[9] Even if the AdWords Agreement were procedurally unconscionable, it is not substantively unconscionable. Under California law, a contract found to be procedurally unconscionable may still be enforceable if its substantive terms are reasonable. *Craig v. Brown & Root, Inc.,* 84 Cal.App.4th 416, 422, 100 Cal.Rptr.2d 818 (2000); *cf. Ostroff v. Alterra Healthcare Corp.,* 433 F.Supp.2d 538, 542 (E.D.Pa. 2006) (finding substantive unconscionability under Pennsylvania law where contract terms unreasonably favor the party with greater bargaining power). California courts focus on whether there was a lack of mutuality in contract formation and on the practical effects of the challenged provisions. *Comb,* 218 F.Supp.2d at 1173; *Armendariz,* 24 Cal.4th at 116–17, 99 Cal. Rptr.2d 745, 6 P.3d 669 (noting that substantive unconscionability is satisfied if the agreement lacks a "modicum on bilaterality"); *Ellis v. McKinnon Broad. Co.,*

18 Cal.App.4th 1796, 1803–04, 23 Cal. Rptr.2d 80 (1993).

Plaintiff argues that the forum selection clause and other provisions lacked consideration and assent from the Plaintiff, and therefore the Agreement was lacking a modicum of bilaterality. As the court has found that the AdWords Agreement provided reasonable notice of its terms, had mutual assent, and was in other respects a valid express contract, the court rejects this argument.

Plaintiff next argues that the AdWords Agreement contains several unilateral clauses, including the forum selection clause, which make it substantively unconscionable. He argues that the forum selection clause unreasonably favors Google because it requires billing disputes to be adjudicated in California.[6] Plaintiff characterizes as unreasonable provisions disclaiming all warranties, limiting liabilities, and requiring that claims relating to charges be brought within sixty days of the charges.[7] Plaintiff contends that the effect of these provisions, in combination with the forum selection clause, is to discourage meritorious litigation regarding billing disputes.

First, the court is not persuaded that the forum selection clause, or any other provision cited by Plaintiff, is unreasonable or shocks the conscience. As the United States Supreme Court has found, a forum selection clause in a standardized, nonnegotiable contract may be permissible for several reasons, reasons which apply here. *See Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 593–94, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). Just as a cruise line has a special interest in limiting fora because it could be subject to suit where its passengers come from many locales, Defendant has the same interest where its internet users are located across the United States and the world. *See id.* at 593, 111 S.Ct. 1522. Another benefit of such a forum selection clause is that it dispels confusion over where suits are to be brought, conserving both litigant and judicial resources. *Id.* at 593–94, 111 S.Ct. 1522. Finally, just as for the passengers in *Carnival Cruise Lines*, the benefits of such a forum selection clause may be passed to internet users in the form of reduced rates for services, because of savings enjoyed by internet service providers

6. Plaintiff's assertion of undue burden due to health-related travel restrictions are irrelevant to the unconscionability inquiry, which focuses on the unfairness of the terms at the time of entry into the Agreement. *See Aron v. U–Haul Co. of California,* 143 Cal.App.4th 796, 808, 49 Cal.Rptr.3d 555 (2006). The court addresses this assertion in the context of transfer under 28 U.S.C. § 1404(a) below.

7. The provisions cited by Plaintiff are:
(1) "GOOGLE DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION FOR NONINFRINGEMENT, MERCHANTABILITY AND FITNESS FOR ANY PURPOSE." (Def. Mot. to Dismiss, Ex. A, at ¶ 4);
(2) "EXCEPT FOR INDEMNIFICATION AMOUNTS PAYABLE TO THIRD PARTIES HEREUNDER AND YOUR BREACHES OF SECTION 1, TO THE FULLEST EXTENT PERMITTED BY LAW: (a) NEITHER PARTY WILL BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY, PUNITIVE, OR OTHER DAMAGES WHETHER IN CONTRACT, TORT OR ANY OTHER LEGAL THEORY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY; AND (b) EACH PARTY'S AGGREGATE LIABILITY TO THE OTHER IS LIMITED TO AMOUNTS PAID OR PAYABLE TO GOOGLE BY YOU FOR THE AD GIVING RISE TO THE CLAIM." (Def. Mot. to Dismiss, Ex. A, at ¶ 4); and
(3) "You waive all claims relating to charges unless claimed within 60 days after the charge (this does not effect your credit card issuer rights)." (Def. Mot. to Dismiss, Ex. A, at ¶ 5).

by limiting the fora for suit. *See id.* at 594, 111 S.Ct. 1522. Plaintiff's argument that the terms discourage litigation of billing disputes thus is not persuasive, especially where Defendant's principal place of business is in California. *See Barnett v. Network Solutions, Inc.,* 38 S.W.3d 200, 204 (Tex.App.2001) (citing *Carnival Cruise Lines,* 499 U.S. at 594, 111 S.Ct. 1522).

Further, the provision requiring that claims relating to charges be brought within sixty days of the charges is not unconscionable. Contractual limitations periods are valid and can be shorter than limitations periods prescribed by statute so long as the period for bringing claims is reasonable. *Han v. Mobil Oil Corp.,* 73 F.3d 872, 877 (9th Cir.1995); *see Harris Methodist Fort Worth v. Sales Support Servs. Inc. Employee Health Care Plan,* 426 F.3d 330, 337 (5th Cir.2005); *Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan,* 160 F.3d 1301, 1302–03 (11th Cir. 1998); *Doe v. Blue Cross & Blue Shield United of Wis.,* 112 F.3d 869, 874 (7th Cir.1997). California courts have upheld contractual limitations periods similar to the one here. *See, e.g., Levitsky v. Farmers Ins. Group of Cos.,* No. A096220, 2002 Cal.App. Unpub. LEXIS 2004, at *13–15, 2002 WL 1278071, at *4 (Cal.Ct.App. June 10, 2002) (finding that a 60–day limitations period in which to file billing claims is not unreasonable); *Capehart v. Heady,* 206 Cal.App.2d 386, 388–91, 23 Cal.Rptr. 851 (1962) (holding that a three-month limitations period in a lease was not unreasonable).

Cases cited by Plaintiff in support of his position are distinguishable because the AdWords Agreement effects only billing disputes and does not inhibit any judicially-created doctrines or prevent litigants from enforcing constitutionally-protected rights. *See Alexander v. Anthony Int'l, L.P.,* 341 F.3d 256, 266 (3d Cir.2003) (finding unreasonable a 30–day limitations period for any claim arising out of an employment agreement); *Circuit City Stores, Inc. v. Adams,* 279 F.3d 889, 894 (9th Cir.2002) (concluding that a one-year limitations period to state Fair Employment and Housing Act Claims was unreasonable because it would deprive plaintiffs of the judicially-created continuing violation doctrine in discrimination cases). In the present case, Plaintiff is an attorney and sophisticated purchaser capable of understanding the limitations provision. The 60–day limitations period affords sufficient time to identify, investigate, and report billing errors.

Finally, as to the other provisions, including those disclaiming all warranties and limiting liabilities, Plaintiff has not met his burden of persuasion as to unconscionability and does not present case law to support his position. No basis has been presented for the court to conclude that these commonplace terms are unreasonable.

In addition, even if any of the provisions of the contract were unenforceable, these provisions could be modified or severed under the AdWords Agreement's severability clause.[8] (Def. Mot. to Dismiss, Ex. A, at ¶ 7.) The court finds that neither the AdWords Agreement nor its terms, including the forum selection clause, are unconscionable, and that the AdWords Agreement and its forum selection clause are enforceable.

C. Analysis under 28 U.S.C. § 1404(a)

1. Transfer of Venue

Defendant moves for this court to dismiss Plaintiff's complaint or in the alter-

8. The clause provides: "Unenforceable provisions will be modified to reflect the parties' intention, and remaining provisions of the Agreement will remain in full effect." (Def. Mot. to Dismiss, Ex. A, at ¶ 7.)

native, transfer this case to the federal district court in Santa Clara County, pursuant to 28 U.S.C. § 1404(a). As discussed above, federal law controls when deciding whether to give effect to a forum selection clause and transfer a case. *Stewart Org., Inc. v. Ricoh Corp.,* 487 U.S. 22, 29, 32, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988); *Jumara v. State Farm Ins. Co.,* 55 F.3d 873, 877 (3d Cir.1995). Although dismissal under Rule 12(b)(6) is a "permissible means of enforcing a forum selection clause that allows suit to be filed in another federal forum," the Third Circuit cautions that "as a general matter, it makes better sense, when venue is proper but the parties have agreed upon a not-unreasonable forum selection clause that points to another federal venue, to transfer rather than dismiss." *Salovaara v. Jackson Nat'l Life Ins. Co.,* 246 F.3d 289, 298–99 (3d Cir.2001); *see Stewart,* 487 U.S. at 28–29, 32, 108 S.Ct. 2239 (holding that a federal court sitting in diversity jurisdiction should treat a request to enforce a forum selection clause in a contract as a motion to transfer venue under applicable federal law, 28 U.S.C. § 1404(a)); 14D Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3803.1 (2d ed. 1986 & Supp.2006).

Transfer, however, is not available when a forum selection clause specifies a non-federal forum. *Salovaara,* 246 F.3d at 298. Plaintiff contends that the forum selection clause contemplated jurisdiction in state, not federal court. However, the forum selection clause, which states "[t]he Agreement must be ... adjudicated in Santa Clara County, California," on its face does not limit jurisdiction to state court. The forum selection clause provides for proper venue in both federal and state courts, so long as those courts are located in Santa Clara County, California, because the provision's plain language is construed to cover any court in that county. *See Jumara,* 55 F.3d at 881 (construing an arbitration provision requiring the action to transpire within a particular county to mean that the action would be permitted in any court, state or federal, in that county).

The federal courthouse for the San Jose Division of the Northern District of California is located in the city of San Jose. San Jose is the county seat of government for Santa Clara County. The federal courthouse therefore is located undisputably in Santa Clara County. Transfer is an available remedy because the forum selection clause includes a federal forum. *See id.* at 881–83 (applying the § 1404(a) analysis for transfer where a forum selection clause permitted any state or federal forum within a particular county).

If transfer is the appropriate remedy, the court must then consider whether 28 U.S.C. § 1404(a) or § 1406 applies. "Section 1404(a) provides for the transfer of a case where both the original venue and the requested venue are proper. Section 1406, on the other hand, applies where the original venue is improper and provides for either transfer or dismissal of the case." *Id.* at 878. Whether venue is proper in this district is governed by the federal venue statute, 28 U.S.C. § 1391. *Id.*

Without considering the forum selection clause, venue is proper in the Eastern District of Pennsylvania. Neither party disputes that Defendant is subject to personal jurisdiction in this district because Defendant transacts business here. *See* 28 U.S.C. § 1391(c); *Jumara,* 55 F.3d at 878–79; *Stewart,* 487 U.S. at 29 n. 8, 108 S.Ct. 2239 ("The parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business [there]."). Defendant itself raised transfer under

1404(a), conceding that venue is proper here.

Thus, the venue here is proper but the parties are subject to an enforceable forum selection clause, which, as discussed below, is not unreasonable and specifies a federal forum. *See Salovaara*, 246 F.3d at 298–99. This court therefore concludes that the appropriate analysis is whether the case should be transferred under § 1404(a). *See id.*

2. Section 1404(a) Factors

Section 1404(a) controls the inquiry of whether to give effect to a forum selection clause and to transfer a case. *Stewart*, 487 U.S. at 29, 32, 108 S.Ct. 2239. Section 1404(a) provides that "a district court may transfer any civil action to any other district or division where it might have been brought" for "the convenience of parties and witnesses" and "in the interest of justice." 28 U.S.C. § 1404(a); *see Stewart*, 487 U.S. at 29, 108 S.Ct. 2239. Courts must adjudicate motions to transfer based on an "individualized, case-by-case consideration of convenience and fairness," weighing a number of factors. *Id.* (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964)). A court's review is not limited to the three enumerated factors in § 1404(a)—convenience of the parties, convenience of witnesses, or interests of justice—and courts may consider various private and public interests. *Jumara*, 55 F.3d at 879–80.

The parties' agreement as to the proper forum, although not dispositive, receives "substantial consideration" in the weighing of relevant factors. *Id.* at 880; *see Stewart*, 487 U.S. at 29–30, 108 S.Ct. 2239 ("The presence of a forum selection clause . . . will be a significant factor that figures centrally in the district court's calculus. . . . The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences."). The deference generally given to a plaintiff's choice of forum is "inappropriate where the plaintiff has already freely chosen an appropriate venue." *Jumara*, 55 F.3d at 880. Although the moving party carries the burden to show the need for a transfer, if "the forum selection clause is valid, which requires that there have been no 'fraud, influence, or overweening bargaining power,' the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum." *Id.* at 879–80 (quoting *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 12–13, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)).

Having determined that § 1404(a) controls, the court now examines whether the language of the forum selection clause is permissive or mandatory in order to ascertain what weight to give it. Next, the court examines the validity or reasonableness of the forum selection clause through application of the test in *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. at 12–13, 92 S.Ct. 1907, and determines whether Plaintiff has met his burden of demonstrating why he should not be bound by the forum selection clause. Finally, the court weighs the private and public factors under § 1404(a).

a. The Language of the Forum Selection Clause is Mandatory.

Plaintiff argues that even if the forum selection clause is valid, this court still retains jurisdiction because the forum selection clause contains language that is permissive, not mandatory. Where a forum selection clause is permissive, the parties are not exclusively limited to litigating their disputes in only one forum and courts accord the clause less weight. *See Hunt Wesson Foods, Inc. v. Supreme Oil Com-*

pany, 817 F.2d 75, 77 (9th Cir.1987); *E'Cal Corp. v. Office Max Inc.,* No. 01–3281, 2001 U.S. Dist. LEXIS 15868, at *6, 2001 WL 1167534, at *2 (E.D.Pa. Sept.10, 2001). The forum selection clause does not have to contain language such as "exclusive" or "sole" to be mandatory. *Wall Street Aubrey Golf, LLC v. Aubrey,* 189 Fed.Appx. 82, 85–86 (3d Cir.2006) (upholding a forum selection clause, which stated "[t]his Lease shall be construed in accordance with the laws of the Commonwealth of Pennsylvania, with venue laid in Butler County, Pennsylvania," and finding it unambiguous "[d]espite the provision's failure to use words like 'exclusive' or 'sole' with respect to venue").

The forum selection clause states, "[t]he Agreement must be ... adjudicated in Santa Clara County, California." By its plain language, the forum selection clause unambiguously provides that disputes must be brought in Santa Clara County. *Cf. Person v. Google, Inc.,* 456 F.Supp.2d 488, 493–94 (S.D.N.Y.2006) (finding similar language to be mandatory where the forum selection clause provided that "[any] dispute or claim arising out of or in connection with this Agreement shall be adjudicated in Santa Clara County, California"). "This mandatory language makes clear that venue, the place of suit, lies exclusively in the designated county. Thus, whether or not several states might otherwise have jurisdiction over actions stemming from the agreement, all actions must be filed and prosecuted in [the designated county]." *Docksider, Ltd. v. Sea Tech., Ltd.,* 875 F.2d 762, 764 (9th Cir. 1989) (construing a forum selection clause's language that "venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia" to be mandatory). The court finds that the forum selection clause's clear and explicit language in this case is mandatory and enforceable.

b. The Forum Selection Clause is Valid and Reasonable.

[10] "Where the forum selection clause is valid, which requires that there have been no 'fraud, influence, or overweening bargaining power,' the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum." *Jumara,* 55 F.3d at 880 (quoting *Bremen,* 407 U.S. at 12–13, 92 S.Ct. 1907). The objecting party must show that (1) the forum selection clause is the result of fraud or overreaching, (2) its enforcement would violate a strong public policy of the forum, or (3) its enforcement would result in litigation so seriously inconvenient and unreasonable that it would deprive a litigant of his or her day in court. *Bremen,* 407 U.S. at 15–17, 92 S.Ct. 1907; *In re Diaz Contracting, Inc.,* 817 F.2d 1047, 1051–52 (3d Cir.1987).

i. No Fraud or Overreaching.

Plaintiff presents arguments that the AdWords Agreement was an adhesion contract and that the Agreement and its forum selection clause are unconscionable. The court has already rejected these arguments and does not find any evidence of fraud, coercion, or overreaching in this case with respect to the contract as a whole and the forum selection clause in particular. A non-negotiated forum selection clause in a form contract may be enforceable even if it is not the subject of bargaining. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 593–94, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

Although forum selection clauses are subject to judicial scrutiny for fundamental fairness, there is no evidence of bad faith by the Defendant. *See id.* at 595, 111 S.Ct. 1522. There is no indication that Defendant included the forum selection

clause "as a means of discouraging [customers] from pursuing legitimate claims," especially where Defendant has its principal place of business in Santa Clara and has a legitimate interest in protecting itself from suit in all fifty states. *See id.* Furthermore, Plaintiff had notice of the forum selection clause and retained the option of rejecting the contract with impunity. *See id.*

ii. No Violation of a Strong Public Policy of the Forum.

The forum selection clause at issue does not violate a strong public policy of this forum. Indeed, it would be consistent with the public policy of this forum to enforce the forum selection clause in order to give force to the parties' agreement. *See Jumara,* 55 F.3d at 880 (holding that valid forum selection clauses are entitled to substantial consideration). In addition, a California forum would be more appropriate because California law applies to disputes under the Agreement.

iii. Enforcement Will Not Deprive Plaintiff of his Day in Court.

Plaintiff argues that litigating this dispute in California would be prohibitively difficult, so as to deprive him of his day in court, because his heart condition requires that he restrict his travel (Pl. Mot. for Summ. J., Ex. A) and because the cost of hiring a lawyer in California would be prohibitively expensive. "Mere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideration for these things. If the agreed upon forum is available to plaintiff and said forum can do substantial justice to the cause of action then plaintiff should be bound by his agreement." *Cent. Contracting Co. v. Maryland Casualty Co.,* 367 F.2d 341, 344 (3d Cir.1966) (quoting *Cent. Contracting Co. v. C.E. Youngdahl & Co.,* 418 Pa. 122, 133–34, 209 A.2d 810 (1965)).

Plaintiff's arguments regarding additional expense are not sufficient to show he would be deprived of his day in court. Furthermore, Plaintiff or any of the attorneys he employs in his law firm, such as those who have appeared on his behalf in this matter, may apply for admission *pro hac vice* to represent Plaintiff in any litigation in California, thus relieving Plaintiff of hiring a lawyer in California. Although the court is sympathetic to Plaintiff's health concerns, the restriction on his travel does not have the effect of depriving him of his day in court. As Defendant has proposed, accommodations can be made, such as arranging for his continued representation by attorneys in his firm in California court, possible telephonic or video appearances, and, where possible, the scheduling of depositions to occur near Plaintiff's home.

California is not a "remote alien forum." *See Carnival Cruise Lines,* 499 U.S. at 594, 111 S.Ct. 1522 (quoting *Bremen,* 407 U.S. at 17, 92 S.Ct. 1907). Nor is this dispute an inherently local one more suited to resolution in Pennsylvania than in California. *See id.* Although Plaintiff argues that its witnesses and key documents are located in this judicial district, the alleged wrongful acts, including the failure to prevent or investigate click-fraud and the overcharging for fraudulent clicks, occurred in substantial part in California, where Defendant is headquartered. Thus, relevant documents and witnesses are located in California. Finally, this dispute is better suited for resolution in a California court because California law governs this dispute and the amended complaint includes a count under California law.

Transfer to the appropriate venue ensures that Plaintiff will have his day in

court. There is no evidence that litigation in California would prevent Plaintiff from bringing any of his claims. Enforcement of the forum selection clause therefore will not result in litigation so seriously inconvenient and unreasonable so as to deprive Plaintiff of his day in court. Because the forum selection clause is valid, Plaintiff must demonstrate why he should not be bound by it. *See Jumara*, 55 F.3d at 880.

c. Private Factors under § 1404(a)

[11] The court accordingly turns to the private factors under § 1404(a). The private interests a court may consider in a § 1404(a) analysis include: "plaintiff's forum preference as manifested in the original choice; the defendant's preference; whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of the witnesses—but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum)." *Jumara*, 55 F.3d at 879 (citations omitted).

Because the forum selection clause is valid and reasonable, the choice of forum of Santa Clara County in the AdWords Agreement is accorded substantial consideration and Plaintiff's choice of forum is not given deference. Again, although Plaintiff argues that his witnesses and key documents are located in this judicial district, any documents or witnesses needed to prove the heart of Plaintiff's claims—that Google had the capacity to determine which clicks are fraudulent, did nothing to prevent click fraud, charged Plaintiff for fraudulent clicks, and failed to investigate Plaintiff's complaints regarding click fraud—may be found in California, where Google is headquartered and where a significant part of the alleged wrongs occurred. For the reasons discussed previously, Plaintiff's health condition and expense concerns do not outweigh factors militating in favor of transfer. The private factors thus weigh in favor of transfer.

d. Public Factors under § 1404(a)

[12] The public interests a court may consider in a § 1404(a) analysis include: "the enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; the public policies of the fora; and the familiarity of the trial judge with the applicable state law in diversity cases." *Jumara*, 55 F.3d at 879–80 (citations omitted).

The public factors under § 1404(a) also weigh in favor of transfer to Santa Clara County, California. As previously stated, this dispute is better suited for resolution in a California court because California law governs this dispute and the amended complaint includes a count under California law. Additionally, California courts have expertise in commercial litigation involving web-based technology. This dispute is not inherently local, and the public policy of this forum would support enforcement of the valid forum selection clause.

Plaintiff has not met his burden as to why he should not be bound by the valid forum selection clause. *See id.*, 55 F.3d at 880. After according the parties' original choice of forum, as expressed in the forum selection clause, substantial weight, and balancing the convenience of the parties, the convenience of the witnesses, and the interests of justice, the court finds that this matter should be transferred to the

Northern District of California, San Jose Division.

D. Unjust Enrichment Claim

Defendant argues, in the alternative, that Plaintiff's unjust enrichment claim should be dismissed. As this matter was not brought in the proper forum and is being transferred, this court does not have jurisdiction to decide this issue.

V. Conclusion

For the foregoing reasons, Defendant's motion to transfer is granted and Plaintiff's motion for summary judgment is denied. An appropriate Order follows.

Luz D. RAMOS, Plaintiff,

v.

Jo Anne B. BARNHART, Commissioner of Social Security, Defendant.

Civil Action No. 06–1457.

United States District Court, E.D. Pennsylvania.

March 30, 2007.

Background: Claimant appealed decision of Commissioner of Social Security Administration (SSA) denying her claim for supplemental security income (SSI) under Title XVI of Social Security Act. Parties cross-moved for summary judgment.

Holdings: Adopting report and recommendation of Thomas J. Rueter, United States Magistrate Judge, the District Court, Yohn, J., held that:

(1) substantial evidence supported ALJ's assessment that claimant's mental impairments did not meet or equal listing requirements, and

(2) substantial evidence supported ALJ's determination of light level residual functional capacity, with limitation to avoid reaching overhead.

Commissioner's motion granted; claimant's motion denied.

1. United States Magistrates ⚿26, 27

In social security disability case, district court would review de novo parts of magistrate judge's report and recommendation to which claimant objected and could accept, reject, or modify, in whole or in part, magistrate judge's findings or recommendations. 28 U.S.C.A. § 636(b)(1), (c).

2. Social Security and Public Welfare ⚿147.5, 148.15

District court may not review Commissioner's decision in social security disability case de novo; court may only review Commissioner's final decision to determine whether that decision is supported by substantial evidence. Social Security Act, § 205(g), 42 U.S.C.A. § 405(g).

3. Administrative Law and Procedure ⚿791

"Substantial evidence" is more than a mere scintilla; it does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

See publication Words and Phrases for other judicial constructions and definitions.

4. Administrative Law and Procedure ⚿791

In making substantial evidence determination, court must consider evidentiary

540 Fed.Appx. 412
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007. See
also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4.
(Find CTA5 Rule 28 and Find CTA5 Rule 47)
United States Court of Appeals,
Fifth Circuit.

Nancy MALSOM; Claire Kilcoyne; Mary Anne Burgan; Mike Cipriani; Jesse Kaposi; Mark H. Harken; Kristy Gamayo, Individuallly and on behalf of all others simiarly situated, Plaintiffs–Appellants
v.
MATCH.COM, L.L.C., Defendant–Appellee.
Guy Barlow, Jr., on behalf of themselves and all similarly situated persons; Mark H. Harken, on behalf of themselves and all similarly situated persons; Jesse Kaposi, Plaintiffs
v.
Match.Com, L.L.C., Defendant.
Jesse Kaposi, Plaintiff
v.
Match.Com, L.L.C., Defendant.
Kristy Gamayo, Individually and on behalf of all others similarly situated, Plaintiff
v.
Match.Com, L.L.C., Defendant.
Nancy Melucci, Individually and on behalf of all others similarly situated, Plaintiff
v.
Match.Com, L.L.C., Defendant.
Gail Fitzpatrick; et al, Plaintiffs
v.
Match.Com, L.L.C., Defendant.

No. 12–11123
|
Oct. 3, 2013.

Synopsis

Background: Dating website members brought putative class action against website operator, alleging breach of contract, breach of the duty of good faith and fair dealing, and unconscionable conduct. The United States District Court for the Northern District of Texas, Sam A. Lindsay, J., dismissed the first two claims, 2012 WL 3263992, and, subsequently, dismissed the unconscionability claim with prejudice, 2012 WL 5007777. Members appealed.

Holdings: The Court of Appeals, Edward C. Prado, Circuit Judge, held that:

[1] members failed to state an unconscionable conduct claim under the Texas Deceptive Trade Practices Act (DTPA), and

[2] district court did not abuse its discretion in dismissing the claim with prejudice.

Affirmed.

West Headnotes (2)

[1] Antitrust and Trade Regulation
Social-referral and dating services

Dating website members' allegations that website operator left inactive profiles visible on the site, falsely labeled inactive profiles as recently active, notified members of romantic matches that were in fact inactive profiles, failed to vet new profiles for authenticity, and failed to remove fake or duplicate profiles were insufficient to allege an act or practice which took advantage of the members' lack of knowledge, ability, experience, or capacity to a grossly unfair degree, as required to state an unconscionable conduct claim under the Texas Deceptive Trade Practices Act (DTPA); conduct alleged amounted to a breach of contract claim because the duties allegedly

violated by the website operator arose solely out of the parties' contract. V.T.C.A., Bus. & C. § 17.45(5).

5 Cases that cite this headnote

[2] Federal Civil Procedure

Effect

District court did not abuse its discretion when it dismissed with prejudice dating website members' claim against website operator for unconscionable conduct under the Texas Deceptive Trade Practices Act (DTPA), given the length of time claims against website operator had persisted and the multiple opportunities at amendment that had passed. V.T.C.A., Bus. & C. § 17.45(5).

5 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:10–CV–2651.

Before HIGGINBOTHAM, CLEMENT, and PRADO, Circuit Judges.

Opinion

EDWARD C. PRADO, Circuit Judge: *

A putative class of plaintiffs filed suit against Match.com, L.L.C., the operator of a dating website, alleging breach of contract, breach of the duty of good faith and fair dealing, and unconscionable conduct. After dismissing the first two claims, the district court dismissed with prejudice the unconscionability claim. This appeal, challenging the dismissal of the unconscionability claim, followed. For the reasons that follow, we affirm the district court's dismissal and the decision to dismiss with prejudice.

I

This case is a consolidated putative class action suit brought by Nancy Malsom, Claire Kilcoyne, Mary Anne Burgan, Mike Cipriani, Jesse Kaposi, Mark H. Harken, and Kristy Gamayo on behalf of all similarly situated individuals ("Appellants") against Match.com, L.L.C. ("Match"), the owner of a dating website. Appellants allege that Match uses a variety of misleading tactics to give prospective and paying users of the website an inflated sense of the number of active users on the website. The allegations include, but are not limited to, the following claims: Match does not vet new profiles, allowing fake profiles to proliferate; Match does not remove inactive or duplicate profiles; Match does not accurately disclose the size of the reachable membership base; and Match does not block profiles known to be connected with scams. After the district court consolidated six putative class action suits, Appellants filed a consolidated amended complaint that alleged causes of action for breach of contract, breach of the duty of good faith and fair dealing, and unconscionable conduct under the Texas Deceptive Trade Practices Act ("DTPA"), Tex. Bus. & Com.Code § 17.50(a)(3). Appellants sought compensatory damages in the amount of fees paid for subscriptions to Match.com, injunctive relief, and costs and fees. With regard to the unconscionable conduct claim, Appellants alleged that Match "took advantage of their lack of knowledge, ability, experience and/or capacity to a grossly unfair degree."

Match moved to dismiss Appellants' claims for breach of contract and breach of the duty of good faith and fair dealing, and the district court granted the motion on August 10, 2012. In addition to granting Match's motion, the district court initiated proceedings to dismiss the remaining unconscionability claim *sua sponte*. After further briefing by the parties, the district court dismissed

the unconscionability claim with prejudice in an order dated October 17, 2012. This appeal followed.

II

This Court reviews de novo a district court's dismissal under Rule 12(b)(6), "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." ***415** *Toy v. Holder,* 714 F.3d 881, 883 (5th Cir.2013) (quoting *Bustos v. Martini Club Inc.,* 599 F.3d 458, 461 (5th Cir.2010)). However, "[t]his court ... 'will not strain to find inferences favorable to the plaintiff.' " *Dorsey v. Portfolio Equities, Inc.,* 540 F.3d 333, 338 (5th Cir.2008) (quoting *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.,* 365 F.3d 353, 361 (5th Cir.2004)). "Because the district court is best situated to determine when plaintiffs have had sufficient opportunity to state their best case, we review the district court's decision to grant a motion to dismiss with or without prejudice only for abuse of discretion." *Club Retro L.L.C. v. Hilton,* 568 F.3d 181, 215 n. 34 (5th Cir.2009).

III

A

The district court dismissed Appellants' unconscionable conduct claim for failure to state a claim under the DTPA. "[I]t has long been the rule in Texas that mere nonfeasance under a contract creates liability only for breach of contract." *Crawford v. Ace Sign, Inc.,* 917 S.W.2d 12, 13 (Tex.1996); *accord Tony Gullo Motors I, L.P. v. Chapa,* 212 S.W.3d 299, 304 (Tex.2006). However, courts "have struggled to clarify the boundary between contract claims and other causes of action." *Crawford,* 917 S.W.2d at 13. To that end, the Texas Supreme Court has reiterated that the relevant inquiry involves an examination of "both the source of the defendant's duty to act (whether it arose solely out of the contract or from some common law duty) and the nature of the remedy sought by the plaintiff." *Id.*

In *Crawford,* a business owner sued a phonebook company for breach of contract, negligence, and unconscionable conduct under the DTPA when the phonebook company failed to run an advertisement for which the business owner had paid. *Id.* at 12–13. The Texas Supreme Court held that the plaintiff could not maintain an unconscionability claim under the DTPA because the facts of the claim involved "nothing more than representations that the defendants would fulfill their contractual duty to publish, and the breach of that duty sounds only in contract." *Id.* at 14. The allegedly unconscionable statements themselves did not cause harm; it was the failure to print the advertisement promised, i.e., the breach of contract, that caused the damages claimed. *Id.* at 14–15. An allegation of a breach of contract, without more, does not amount to a false, misleading, or deceptive act under the DTPA. *Id.* at 14.

By contrast, the Texas Supreme Court has held that an individual may maintain claims for both breach of contract and a violation of the DTPA when the plaintiff alleges not only a breach of contract, but also that the other party "never intended" to fulfill the contract in the first place. *Chapa,* 212 S.W.3d at 304. In *Chapa,* plaintiff claimed that a car dealership represented that she would receive one model of car "when in fact she was going to get another." [1] *Id.* at 305. Recognizing that "[a] contractual promise made with no intention of performing may give rise to an action for fraudulent inducement," *id.* at 304, the Court allowed both claims to proceed, holding that "[w]hile failure to comply would violate only the contract, the initial misrepresentation violates the DTPA." *Id.* at 305.

[1] Here, Appellants' claims amount to allegations of breach of contract alone, ***416** thereby rendering the DTPA inapplicable. Appellants' complaint alleges a variety of improper conduct, but none of the conduct alleged would constitute separate unconscionable conduct under the DTPA. Appellants' complaint alleges conduct that suggests Match did an insufficient job of fulfilling its contract with members by: leaving inactive profiles visible on the site; falsely labeling inactive profiles as recently active; notifying users of romantic matches that were in fact inactive profiles; failing to vet new profiles for authenticity; and failing to remove fake or duplicate profiles. Appellants have not alleged "an act or practice which [took] advantage of [their] lack of knowledge, ability, experience, or capacity ... to a grossly unfair

degree," Tex. Bus. & Com.Code § 17.45(5), that "could have resulted in liability even in the absence of a contract between the parties," *Crawford,* 917 S.W.2d at 13. Their allegations are essentially, as in *Crawford,* that (1) Match represented that it would perform under the contract, and (2) nonperformance means they misrepresented that they would perform under the contract. *See id.* at 14. Thus, the conduct alleged amounts to a breach of contract claim because the duties allegedly violated by Match arose solely out of the parties' contracts. *See id.* at 13. To hold Appellants' claims actionable under the DTPA "would convert every breach of contract into a DTPA claim." *Id.* at 14. Nothing in the complaint suggests that Match had no intention of fulfilling its contract; the complaint instead alleges various ways in which Match has violated the parties' contract. *See Chapa,* 212 S.W.3d at 304–05.

B

Appellants also challenge the district court's decision to dismiss their unconscionable conduct claim with prejudice. The district court dismissed Appellants' claim with prejudice on two alternative grounds: (1) Appellants, by steadfastly asserting that their allegations were sufficient, demonstrated that further amendments to the complaint would be futile; and (2) further attempts at amendment would unnecessarily delay resolution of the case.

[2] This Court has consistently held that, "at some point, a court must decide that a plaintiff has had fair opportunity to make his case; if, after that time, a cause of action has not been established, the court should finally dismiss the suit." *Schiller v. Physicians Res. Grp., Inc.,* 342 F.3d 563, 567 (5th Cir.2003). Here, various related actions against Match have been pending since December 2008. Match has filed numerous motions to dismiss in these suits, and the various plaintiffs, including Appellants, have filed amended complaints, the consolidated amended complaint here being the latest iteration. Multiple rounds of briefing occurred regarding the motions to dismiss in this consolidated action, giving ample opportunity for Appellants to present their case, and yet Appellants did not request leave to amend until after the district court's dismissal with prejudice on October 17, 2012. Given the length of time these claims have persisted and the multiple opportunities at amendment that have passed, the district court did not abuse its discretion when it dismissed Appellants' unconscionability claim with prejudice. Appellants have had a "fair opportunity" to make their case. *See id.* Therefore, we affirm the district court's dismissal with prejudice.

IV

For the foregoing reasons, the judgment of the district court is AFFIRMED.

All Citations

540 Fed.Appx. 412

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1 The plaintiff in *Chapa* alleged a variety of other facts in support of her DTPA claim as well. *See* 212 S.W.3d at 305–06.

2010 WL 685009
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Christine RODRIGUEZ, et al., Plaintiffs,
v.
IT'S JUST LUNCH, INT'L, et al., Defendants.

No. 07 Civ. 9227(SHS)(KNF).
|
Feb. 23, 2010.

West KeySummary

1 Antitrust and Trade Regulation
Social-Referral and Dating Services

Consumers who signed contracts with a dating service established a prima facie case under a New York statute which prohibited deceptive acts or practices in the conduct of any business. The deceptive acts committed by the dating service were directed at consumers as evidenced by misrepresentations made on the dating service's website and misrepresentations in the scripts spoken by staff members. Further, the oral representations made by staff members were misleading since they stated dates would only be with professionals and claimed they already had specific dates in mind at the initial interview, both of which were false statements. Finally, the consumers suffered actual injury since they would not have paid such a high price for the dating service if the false representations were not made. McKinney's General Business Law § 349(a).

Cases that cite this headnote

REPORT & RECOMMENDATION

KEVIN NATHANIEL FOX, United States Magistrate Judge.

***1** TO THE HONORABLE SIDNEY H. STEIN, UNITED STATES DISTRICT JUDGE

INTRODUCTION

The plaintiffs, Christine Rodriguez ("Rodriguez"), Sandra Burga ("Burga"), Karen Malak ("Malak"), James Tortora ("Tortora"), Lisa Bruno ("Bruno"), Janeen Cameron ("Cameron"), Karen McBride ("McBride"), and Andrew Woolf ("Woolf")[1], initiated this action, on October 15, 2007, against It's Just Lunch International ("IJLI"), It's Just Lunch, Inc. ("IJL, Inc."), Harry and Sally, Inc. ("H & S"), Riverside Company, Loren Schlachet, and seven IJLI franchises. In an order, dated March 11, 2009, your Honor adopted the undersigned's report and recommendation and dismissed the plaintiffs' First Amended Complaint, as to all claims, save for unjust enrichment. With leave of the court, the plaintiffs filed their Second Amended Complaint on April 1, 2009.

Before the Court are: (1) the defendants'[2] motion to dismiss, in its entirety, the Second Amended Complaint, pursuant to Fed.R.Civ.P. 12(b)(6) and 9(b)[3]; and (2) the defendants' request that sanctions be imposed on the plaintiffs' counsel, pursuant to Fed.R.Civ.P. 11. The plaintiffs oppose both motions.

BACKGROUND

A. Facts

The following facts are taken from the Second Amended Complaint and are taken to be true for the purpose of resolving the instant motion.

1. Generally

IJLI, a Nevada limited liability company with its principal place of business in California, is a franchisor that grants

franchisees the right to operate under its trade name—It's Just Lunch—and to "provide dating services to busy single professionals." IJL Inc., a New York corporation, owned the IJL New York City franchise from "about April 1993 until on or about February 2002." H & S, a New York corporation, has owned IJL New York City since "on or about February 2002 to the present time." IJL Orange County is an IJLI franchise "located in" California. IJL Denver is an IJLI franchise "located in" Colorado. IJL Austin is an IJLI franchise "located in" Texas.

Although IJLI "claims that each of its franchises is independently owned and operated, [it][ ], in fact, exercises complete dominion and control over" them. For example, IJLI requires franchise owners and directors to attend a five-day, "rigid and highly structure training program." Further, IJLI requires franchise staff to memorize sales and other scripts that "must be followed during all phone calls and in-person interviews," lest the franchise be "subject to penalties and/or termination of [ ] franchise rights."

IJLI advertises "heavily in business and airline magazines" and on its Web site. On its Web site, IJLI claims it selects dates for its members, in part, based on their "desires"; however, IJLI franchises "almost completely ignore" member preferences. IJLI further claims, on its Web site, that its staff members are experienced matchmakers, when, in fact, it "routinely hires staff members who have no experience, training, or background whatsoever in the field of matchmaking." In 2007, IJLI placed advertisements in "prominent New York publications," describing its business as "[d]ating for busy professionals" and directing prospective clients to speak with "first-date specialists."

***2** Before joining the dating service, prospective clients must be interviewed at an IJLI franchise, by a franchise staff member. During these interviews, franchise staff members "routinely": (1) claim they have several " 'perfect' matches" in the franchise database for the prospective client, when none exists; (2) overstate the number of clients in the franchise database; (3) overstate the percentage of male clients in the database; (4) claim to match clients carefully, when matches are actually made at random; and (5) claim to have professionals only in their database, though some clients are not professionals.

2. The Plaintiffs

The plaintiffs are " 'busy professional[s],' " who signed contracts at various IJLI franchises nationwide. The plaintiffs "were induced" to enter these contracts because of representations made by IJLI, on its Web site and in advertisements, and owing to representations by franchise staff members during their initial client interviews. The representations of franchise staff members were made in accordance with "the mandatory IJL[I] script" franchises are required to follow.

Rodriguez, a New York resident, signed two six-month contracts at the IJL New York City office in June 2004, paying $1,300 for dating services. During Rodriguez's initial client interview, an "IJL representative" promised Rodriguez "she would be matched strictly with other professionals" and "would be set up on at least six dates." Ultimately, Rodriguez was "set up" with four dates only, at least one of whom was not a "professional."

Bruno, a New York resident, "signed up at" the IJL New York City office on August 9, 2007. During Bruno's initial client interview, a franchise staff member told Bruno falsely "she could already think of two men that would fit what [Bruno] was looking for ." All the dates Bruno procured through IJL New York City went "poorly." Bruno was "set up" with at least two men who were outside the "age parameters" she set during her initial client interview.

In 2004, Burga, a California resident, enrolled, for dating services, at the IJL Orange County office. At Burga's initial client interview, a "[f]ranchise representative" claimed falsely she had "a few people in the database" who would be perfect matches for Burga. While an IJL Orange County client, Burga went on more than a dozen unsuccessful dates; none of Burga's dates "matched the in-depth criteria that [she] laid out" in her initial client interview.

On an unspecified date, Malak, an Illinois resident, enrolled, for dating services, at the IJL Chicago office. At Malak's initial client interview, a franchise staff member stated falsely "she had two or three people ... in mind for Malak already." None of Malak's first few dates

"matched the express criteria she has set out during her initial interview." When Malak moved from Chicago, she wrote to IJLI, seeking a partial refund, pursuant to a clause in her contract. However, IJLI refused to accept Malak's "numerous letters" and has not, to date, refunded her money.

***3** On an unspecified date, Tortora, a Florida resident, enrolled, for dating services, at the IJL Palm Beach office. At Tortora's initial client interview, a franchise representative told Tortora "there were two or three people that perfectly matched his criteria," when, in fact, the franchise "did not have any suitable matches for Tortora at the time this representation was made." While an IJL Palm Beach client, Tortora was "set up with women with whom he had little to nothing in common," which led him to believe "his initial criteria had been neglected completely."

On September 4, 2007, Cameron, a Colorado resident, signed up for dating services at the IJL Denver office. At Cameron's initial client interview, the franchise's director told Cameron falsely "she already had two men in mind that she wanted to set Cameron up with." Cameron went on a total of five dates; none of the men she dated enjoyed hiking, despite Cameron's explanation, at her initial client interview, "that any potential dates must [ ] have an strong interest in hiking."

On an unspecified date, McBride, a Texas resident, signed up for dating services at the IJL Austin office. A franchise representative told McBride, at her initial client interview, that "there were two or three people that perfectly matched her criteria" for dates; however, the franchise "did not have any suitable matches for McBride at the time this representation was made." Ultimately, McBride "was set up with men with whom she had little to nothing in common with," and came to believe "her initial criteria had been neglected completely."

B. Procedural History

In their Second Amended Complaint, the plaintiffs assert sixteen claims for relief. However, in their opposition brief to the defendants' motion to dismiss, the plaintiffs "voluntarily dismiss" nine of their claims. Accordingly, only the following claims remain subjects of the motion to dismiss: (1) promissory fraud; (2) fraudulent inducement and misrepresentation; (3) violation of New York General Business Law ("NYGBL") § 349; (4) violation of NYGBL § 350; (5) breach of contract; (6) unjust enrichment; and (7) civil conspiracy.

DISCUSSION

A. Standard for Rule 12(b)(6) Motion to Dismiss

Fed.R.Civ.P. 8(a)(2) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Allegations of fraud or mistake are subject to a heightened pleading standard. *See* Fed.R.Civ.P. 9(b). Under Fed.R.Civ.P. 12(b)(6), a party may move to dismiss a pleading for "failure to state a claim upon which relief can be granted."

When considering a Rule 12(b)(6) motion to dismiss, a court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the non-moving party. *Warney v. Monroe County,* 587 F.3d 113, 116 (2d Cir.2009); *see Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. 1937, 1949–50, 173 L.Ed.2d 868 (2009) (clarifying that a court is not bound to accept the veracity of "legal conclusions"). Factual allegations are limited, generally, to those asserted in the complaint, exhibits attached to the complaint and documents incorporated, in the complaint, by reference. *See McCarthy v. Dun & Bradstreet Corp.,* 482 F.3d 184, 191 (2d Cir.2007); *see also* Fed.R.Civ.P. 10(c). A party must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007); *see Iqbal,* 129 S.Ct. at 1949 (finding "[t]he plausibility standard" implies more than "sheer possibility," but less than probability).

***4** "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949. "Determining whether a complaint states a plausible claim for relief ... [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

B. Application

1. Promissory Fraud & Fraudulent Inducement

To state a claim for promissory fraud in New York[4], a claimant must allege "the promisor, at the time of making certain representations, lacked any intention to perform them." *Junk v. Aon Corp.,* No. 07 Civ. 4640, 2007 WL 4292034, at *7 (S.D.N.Y. Dec. 3, 2007) (internal quotation marks and citation omitted). To state a claim for fraudulent inducement, a plaintiff must allege: (1) the defendant made a false representation, knowingly or recklessly; (2) the representation concerned a material fact; (3) the defendant made the misrepresentation with intent to deceive or to induce the plaintiff to act; (4) the plaintiff relied reasonably on the misrepresentation; and (5) the plaintiff suffered damages. *See Aetna Cas. and Sur. Co. v. Aniero Concrete,* 404 F.3d 566, 580 (2d Cir.2005).

The defendants contend the plaintiffs' fraud claims fail because: (1) they are duplicative of the breach of contract claim; and (2) the allegations set forth in the complaint do not meet the heightened pleading requirements of Fed.R.Civ.P. 9(b).

a. Duplication of Contract Claim

The Second Circuit has noted that, under New York law, where a fraud claim hinges on the same factual allegations as a breach of contract claim, with the additional allegation that the defendant intended to breach, "the fraud claim is redundant and plaintiff's sole remedy is for breach of contract." *See Telecom Int'l Am., Ltd. v. AT & T Corp.,* 280 F.3d 175, 196 (2d Cir.2001) (internal quotation marks and citation omitted); *see also New York Univ. v. Continental Ins. Co.,* 87 N.Y.2d 308, 318–19, 639 N.Y.S.2d 283, 288–89, 662 N.E.2d 763 (1995). "To maintain a claim of fraud in such a situation, a plaintiff must either: (i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages." *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.,* 98 F.3d 13, 20 (2d Cir.1996) (internal citations omitted).

For their claim of promissory fraud, the plaintiffs allege that the defendants "had no intention of performing any of the terms of their agreement [s]" with each plaintiff. The plaintiffs' promissory fraud claim fails, as a matter of law, "because it is simply a breach of contract claim in [ ] tort clothing[.]" *See Telecom Int'l,* 280 F.3d at 196. However, "a claim based on fraudulent inducement of a contract is separate and distinct from a breach of contract claim under New York law." *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.,* 500 F.3d 171, 184 (2d Cir.2007); *see Stewart v. Jackson & Nash,* 976 F.2d 86, 88–89 (2d Cir.1992). Accordingly, the plaintiffs' fraudulent inducement claim satisfies the second *Bridgestone* exception and is not barred as duplicative of the breach of contract claim.

b. Rule 9(b)

***5** Nevertheless, the plaintiffs' fraudulent inducement claim fails to meet the heightened pleading standard set forth in Fed.R.Civ.P. 9(b) and cannot be maintained. Fed.R.Civ.P. 9(b) requires allegations of fraud to be pled "with particularity," but permits "conditions of a person's mind" to be "alleged generally." In order to plead with the requisite specificity, "the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1175 (2d Cir.1993).

In their complaint, the plaintiffs list various "false statements" allegedly made by the "IJL Franchises" and IJLI. Attributing fraudulent statements to a group, such as the franchise defendants, does not satisfy the Rule 9(b) standard, as allegations of false representations must be attributed to specific defendants. *See id.* Therefore, the generic list of "false statements" cannot, as a matter of law, support the plaintiffs' fraudulent inducement claim. The false statements allegedly made directly by IJLI are also insufficiently pleaded. Simply averring that certain misrepresentations have been made, through a Web site and a "nationwide marketing campaign," since 1993, does not provide the requisite specificity to satisfy Rule 9(b). *See Cohen v. Koenig,* 25 F.3d 1168, 1173 (2d Cir.1994) (plaintiffs pleaded with particularity where they specified who made misrepresentations and alleged the "precise

dates and places at which" the defendants made false statements). Permitting the plaintiffs' laundry list of "false statements" to support a claim for fraudulent inducement would not only defeat the purpose of the heightened pleading standard, *see generally O'Brien v. Nat'l Prop. Analysts Partners,* 936 F.2d 674, 676 (2d Cir.1991), but it would also be imprudent, as the advertisements and Web site pages annexed as exhibits to the complaint show none of the alleged false representations. [5]

The plaintiffs supplement their general contentions with plaintiff-specific allegations. Save for Rodriguez [6], each plaintiff alleges, in detail, that, at his or her initial client interview, at an IJLI franchise's office, a franchise staff member told him or her that the dating service had, already, at least two clients matching the qualities each plaintiff said he or she sought in a date. The plaintiffs allege the franchise staff members they interviewed with, knew, at the time they made the representations, that their statements were false. The plaintiffs claim they relied reasonably on these statements, given IJLI's reputed expertise in matchmaking. Relying on the statements, the plaintiffs "entered in to [*sic*] a contract with IJL Corporate, through the IJL Franchises," suffering "monetary damages and other losses."

Although Rule 9(b) excuses a party from pleading scienter under an elevated standard, a claimant must "allege facts that give rise to a strong inference of fraudulent intent." *Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1128 (2d Cir.1994); *see Ross v. A.H. Robins Co.,* 607 F.2d 545, 558 (2d Cir.1979) (noting allegations must give rise to a "strong inference" the defendants acted recklessly or with knowledge). "The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Shields,* 25 F.3d at 1128. "In a case involving multiple defendants, plaintiffs must plead circumstances providing a factual basis for scienter for each defendant; guilt by association is impermissible." *In re DDAVP Direct Purchaser Antitrust Litig.,* 585 F.3d 677, 695 (2d Cir.2009).

***6** The plaintiffs have failed to allege facts sufficient to demonstrate knowledge or scienter. The plaintiffs need not demonstrate actual knowledge, at this stage, but they are "required to supply a factual basis for their conclusory allegations regarding [ ] knowledge." *Ross,* 607 F.2d at 558. Two plaintiffs—Tortora and McBride—have failed even to posit that the franchise representatives, who they allege made misrepresentations, had knowledge of the falsity of their statements. Of the remaining plaintiffs, only Bruno attempts to allege facts supporting her contention that the defendants acted recklessly or with knowledge. Specifically, Bruno contends that, despite being told, at her initial client interview, that IJL New York City had two male clients who "fit what she was looking for," she "was not set up on a single date in the first month." This fact does not give rise to a strong inference that the franchise representative, with whom Bruno interviewed, knew she did not have any good matches for Bruno, when she represented she did. Eventually, Bruno went on at least four dates, albeit none to her pleasing, suggesting the first-month lag was likely due to IJL New York City's difficulty coordinating a mutually convenient date and time for Bruno to meet the men it deemed good matches for her. The delay does not give rise to an inference—let alone a strong inference—sufficient to support general allegations of knowledge in claims governed by Rule 9(b).

With respect to scienter, "no inference of fraudulent intent can be drawn ... from the mere compilation of the experiences of [ ] dissatisfied" consumers. *New York Univ.,* 87 N.Y.2d at 319, 639 N.Y.S.2d at 289, 662 N.E.2d 763; *see Mills,* 12 F.3d at 1176 (declining to infer fraudulent intent from the fact the defendant breached a number of contracts). The plaintiffs contend the defendants had motive and opportunity to commit fraud and "consciously engaged in fraud." The plaintiffs explain that the defendants' motive was to make "more money" and the opportunity was afforded by virtue of the fact that the plaintiffs "could not" know the defendants were lying. In assessing purported motives to commit fraud, a court "assume[s] that [a] defendant is acting in his or her informed economic self-interest." *Shields,* 25 F.3d at 1130. In other words, a desire to increase company profits cannot, standing alone, be a sufficient basis on which to predicate a fraud claim, lest every company be vulnerable to allegations of fraud. *See id.*

In the plaintiffs' attempt to plead "conscious misbehavior," they have undermined their allegations of fraudulent intent. The plaintiffs have annexed, as exhibits to the complaint, pages from a manual IJLI uses to train "franchise owners and directors." The training manual provides several "control points that are [to be] said in verbatim in an interview" by franchise staff members. Following the first control point, an interviewer says, to a prospective client, "if I have what you're looking for, I'll get you started today! If I don't, then we just hold off[.]" Following the second control point, an interviewer says to a prospective client, "I have 3–4 ideas for your first date." Given the plaintiffs' allegations that IJLI monitors its franchises to ensure strict adherence to the scripts it provides, it is unlikely franchise staff members veered from the control points during initial client interviews. The control points suggest IJLI advises its franchises against enrolling prospective clients, unless the franchise has matches suiting the prospective client's preferences. In fact, the training manual's "second step" for following up with a prospective client, who declines to enroll with an IJLI franchise at an initial client interview, is to "call [the prospective client] the next day with two people who fit their profile and are excellent matches" to entice the client to join. Here, contrary to the plaintiffs' assertions, the training manual instructs a franchise explicitly to find matches for prospective clients before representing such matches exists. If franchise staff members deviated from their script and represented to each plaintiff that the respective franchise had good matches for each plaintiff, this fact may be "sufficient to allege that the defendants were wrong; but misguided optimism is not a cause of action, and does not support an inference of fraud." *Shields,* 25 F.3d at 1129. As the plaintiffs' allegations "stop[ ] short of the line between possibility and plausibility[,]" *see Twombly,* 550 U.S. at 557, 127 S.Ct. at 1966, their fraudulent inducement claim fails.

2. Violation of NYGBL § 349

***7** NYGBL § 349(a) prohibits "[d]eceptive acts or practices in the conduct of any business" in New York. The statute creates a private cause of action for any person injured by a violation of the law. *See* NYGBL § 349(h). To establish a *prima facie* case under NYGBL § 349, a plaintiff must show: (1) the defendant directed deceptive acts at consumers; (2) the defendant's acts mislead in a material way; and (3) an injury, as a result of the defendant's acts. *See City of New York v. Smokes–Spirits.com, Inc.,* 541 F.3d 425, 455 (2d Cir.2008), *rev'd on other grounds sub nom. Hemi Group, LLC v. City of New York,* —— U.S. – – – – , —— S.Ct. ——, —— L.Ed.2d – – – – , 2010 WL 246151 (2010). A plaintiff is not subject to the heightened pleading requirements of Fed.R.Civ.P. 9(b) and need not prove actual reliance to state a claim under NYGBL § 349. *See Pelman v. McDonald's Corp.,* 396 F.3d 508, 511 (2d Cir.2005). However, "the transaction in which the consumer is deceived must occur in New York ." *Goshen v. Mutual Life Ins. Co. of New York,* 98 N.Y.2d 314, 324, 746 N.Y.S.2d 858, 863, 774 N.E.2d 1190 (2002).

Plaintiffs Rodriguez and Bruno assert claims under NYGBL § 349 against IJLI, IJL, Inc., and H & S. In their motion to dismiss, the defendants contend the plaintiffs have not pleaded claims under NYGBL § 349 sufficiently, because they have failed to allege that deceptive acts were consumer-oriented, occurred in New York or were materially misleading.

a. Consumer–Oriented Acts

The threshold inquiry under NYGBL § 349 is whether the plaintiffs have pleaded facts demonstrating the alleged deceptive "acts or practices have a broad[ ] impact on consumers at large." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank,* 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 532, 647 N.E.2d 741 (1995). This may be shown by allegations that the acts complained of "potentially affect similarly situated consumers." *See id.,* 85 N.Y.2d at 27, 623 N.Y.S.2d at 533, 647 N.E.2d 741.

The plaintiffs allege IJLI and IJL New York City deceived consumers through three mechanisms: (1) misrepresentations made on IJLI's Web site and printed in magazine advertisements; (2) misrepresentations in the "scripts" spoken by franchise staff members during interviews with prospective clients; and (3) contract-signing appointments, where prospective clients were encouraged to execute two six-month contracts for $1,500.00, "to circumvent state laws which prohibit dating services from charging a client more than $1,000.00 per year."

IJLI's Web site and its magazine advertisements were clearly intended to reach the public at-large in order to increase franchise membership. Similarly, insofar as the complaint alleges the oral misrepresentations made by franchise staff members were "routine[ ]" and made "according to the mandatory IJL[I] [ ] script" all staff members were "required to follow," the statements made to Rodriguez and Bruno cannot be considered "unique to these two parties ... or 'single shot transaction[s].' " *See id.,* 85 N.Y.2d at 26, 623 N.Y.S.2d at 533, 647 N.E.2d 741 (internal quotation marks and citation omitted). Furthermore, with respect to the overcharging allegation, the New York attorney general's determination to conduct his own investigation into this charge [7], itself, signals the conduct was consumer-oriented. *See Vitolo v. Mentor H/S, Inc.,* 213 Fed. Appx. 16, 18 (2d Cir.2007), *cert. denied,* 552 U.S. 815, 128 S.Ct. 77, 169 L.Ed.2d 19 (2007).

***8** The Court is convinced that "the gravamen of the complaint" is injury to the public interest. *See Securitron Magnalock Corp. v. Schnabolk,* 65 F.3d 256, 264 (2d Cir.1995) (internal quotations and citation omitted), *cert. denied,* 516 U.S. 1114, 116 S.Ct. 916, 133 L.Ed.2d 846 (1996). Additionally, the plaintiffs have satisfied the geographic restriction of NYGBL § 349, insofar as they allege IJLI ran advertisements in New York and that IJL New York City staff members made oral misrepresentations, during initial client interviews, at their office.

b. Material Misrepresentations

"The New York Court of Appeals has adopted an objective definition of 'misleading,' under which the alleged act must be 'likely to mislead a reasonable consumer acting reasonably under the circumstances.' " *Cohen v. JP Morgan Chase & Co.,* 498 F.3d 111, 126 (2d Cir.2007) (citing *Oswego,* 85 N.Y.2d at 26, 623 N.Y.S.2d at 533, 647 N.E.2d 741). NYBGL § 349 "contemplates actionable conduct that does not necessarily rise to the level of fraud." *Gaidon v. Guardian Life Ins. Co. of Am.,* 94 N.Y.2d 330, 343, 704 N.Y.S.2d 177, 182, 725 N.E.2d 598 (1999).

The plaintiffs attach, to their complaint, information posted to IJLI's Web site and three IJLI advertisements run in New York publications. On its Web site, IJLI claims its staff members have "years of experience," and that they match clients based on information discussed in a prospective client's initial interview. In its advertisements, IJLI describes its service as "[d]ating for busy professionals." The plaintiffs contend that IJLI routinely hires staff members with no "experience, training, or background" in matchmaking, IJLI franchises "almost completely ignore" client preferences when making matches, and IJLI franchises have persons who are not professionals in their databases.

As described by the plaintiffs, the representations made on IJLI's Web site and in its advertisements are not materially misleading. The representations are descriptions of the defendants' business, not express promises, which the defendants cannot fulfill. *See, e.g., Smokes–Spirits.com, Inc.,* 541 F.3d at 456 (finding material misrepresentation where company "affirmatively assure[d]" consumers no taxes needed to be paid on a product, when they did). The claim that IJLI's "staff members have years of experience" appears, based on allegations in the complaint, to be true. IJLI began operating in 1991 and has arranged over two million first dates. Though an individual starting a new franchise may not have experience in matchmaking, IJLI provides training to all franchise owners and directors, passing on its institutional knowledge gained over the years. As to the claim that franchise clients are matched based on information discussed in their initial interview, a reasonable consumer would not interpret this to mean only qualities outlined in the initial client interview controlled the selection of dates. Matchmaking is an inherently subjective service; part of what IJLI offers is the ability to have a trained matchmaker use his or her "instincts" to determine client compatibility. Finally, IJLI's description of its business as "dating for busy professionals" is subjective. IJLI does not, in its advertisements, define who it considers to be a professional; it does not claim to be a dating service exclusively for lawyers or other white-collar professionals. A reasonable consumer would not be acting reasonably to assume otherwise, based solely on IJLI's advertisements. In sum, the plaintiffs have failed to allege representations on IJLI's Web site and in its advertisements that were materially misleading.

***9** Rodriguez avers an "IJL representative," at the New York City office, promised her at least six dates, "strictly

with other professionals," but Rodriguez was only "set up" with four dates, at least one of whom was not a "professional." Further, Bruno alleges that, at her initial client interview with IJL New York City, a franchise staff member told her falsely there were already two IJL members who "fit what [Bruno] was looking for." For the reasonable consumer considering membership with a dating service, oral assurances about the quantity and quality of potential dates would weigh heavily in deciding whether to join. Thus, the oral representations made allegedly by IJL New York City staff members may be deemed materially misleading.

"New York courts have held that collecting fees in violation of other federal or state laws may satisfy the misleading element of § 349." *Cohen,* 498 F.3d at 126. A reasonable consumer may assume that fees charged by a long-standing, established business are legal. *See id.* at 126–27. Given the New York attorney general's own conclusion, that IJLI and IJL New York City's practices violated NYGBL § 394–c(2), the plaintiffs' allegation, that IJLI and IJL New York City overcharged clients in violation of state law, satisfies the materially misleading element of the NYGBL § 349 claim. *See generally Broder v. Cablevision Sys. Corp.,* 418 F.3d 187, 199–200 (2d Cir.2005) (upholding dismissal of NYGBL § 349 claim premised on violation of state law that did not provide its own private right of action); *Cohen,* 498 F.3d at 127 (holding allegation that defendant charged a fee in violation of federal law, that created its own private right of action, as sufficient to constitute a deceptive practice under NYGBL § 349); NYGBL § 394–c(9)(b) (creating private right of action).

c. Actual Injury

A plaintiff seeking redress through NYGBL § 349 "must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm." *Oswego,* 85 N.Y.2d at 26, 623 N.Y.S.2d at 533, 647 N.E.2d 741. "Although a monetary loss is a sufficient injury to satisfy the requirement under [NYGBL] § 349, that loss must be independent of the loss caused by the alleged breach of contract." *Spagnola v. Chubb Corp.,* 574 F.3d 64, 74 (2d Cir.2009). The plaintiffs allege they have "suffered monetary damages and other losses" owing to the IJLI and IJL New York City's violations of NYGBL § 349. Rodriguez and Bruno appear to be seeking only refunds of their respective membership fees.

"[C]onsumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices," have not suffered an injury cognizable under NYGBL § 349. *Small v. Lorillard Tobacco Co., Inc.,* 94 N.Y.2d 43, 56, 698 N.Y.S.2d 615, 620–21, 720 N.E.2d 892 (1999). As deception cannot be "both act and injury," *id .,* 94 N.Y.2d at 56, 698 N.Y.S.2d at 621, 720 N.E.2d 892, Rodriguez and Bruno's allegations of registering for dating services, based on misleading representations by IJL New York City staff members, may not constitute injury, under NYGBL § 349. However, to the extent Rodriguez also alleges she paid a higher price for the dating service, than she otherwise would have, absent deceptive acts, she has suffered an actual injury and has stated a claim for relief under NYGBL § 349. *See Jernow v. Wendy's Int'l, Inc.,* No. 07 Civ. 3971, 2007 WL 4116241, at *3 (S.D.N.Y. Nov. 15, 2007) (holding payment of a premium to constitute sufficient pleading of actual injury).

3. Violation of NYGBL § 350

***10** NYGBL § 350 proscribes "[f]alse advertising in the conduct of any business ... or in the furnishing of any service" in New York. Any person injured by a violation of the statute may bring an action to recover damages. *See* NYGBL § 350–e(3). "The standard for recovery under [NYGBL] § 350, while specific to false advertising, is otherwise identical to [NYGBL] § 349." *Goshen,* 98 N.Y.2d at 324 n. 1, 746 N.Y.S.2d at 863 n. 1, 774 N.E.2d 1190. In other words, to establish a *prima facie* case under NYGBL § 350, a plaintiff must show: (1) the defendant directed advertisements at consumers; (2) the advertisements mislead in a material way; and (3) an injury, as a result of the advertisements. *See Maurizio v. Goldsmith,* 230 F.3d 518, 522 (2d Cir.2000) (applying "same interpretation" to NYGBL § 350, as to NYGBL § 349); *see also* NYGBL § 350–a(1) (defining "false advertising" as that which is "misleading in a material respect"). Additionally, unlike a claim brought under NYGBL § 349, a claim brought pursuant to NYGBL § 350 requires proof of actual reliance. *See Pelman,* 396 F.3d at 511.

For the reasons detailed in the analysis of the Rodriguez and Bruno NYGBL § 349 claims, the plaintiffs have not stated a claim for relief, under NYGBL § 350, adequately.

4. Breach of Contract

To state a claim for breach of contract under New York law, a claimant must allege: (1) the formation of an agreement; (2) performance of the agreement by one party; (3) breach by the other party; and (4) damages. *Berman v. Sugo LLC,* 580 F.Supp.2d 191, 202 (S.D.N.Y.2008) "Stating in a conclusory manner that an agreement was breached does not sustain a claim of breach of contract." *Id.* Rather, a claimant must demonstrate the existence of an enforceable contract, through specific allegations about the parties to the agreement, the date of the contract's formation, and the contract's "major terms." *See id.* (dismissing breach of contract claim where pleading contained no facts relating to the formation of the contract). "[A] claim that fails 'to allege facts sufficient to show that an enforceable contract existed' between the parties is subject to dismissal." *Id.* (citation omitted). Moreover, a pleading must contain allegations about "the specific provisions of the contract upon which liability is predicated." *Sud v. Sud,* 211 A.D.2d 423, 424, 621 N.Y.S.2d 37, 38 (App. Div. 1st Dep't 1995); *see Kramer v. Lockwood Pension Servs., Inc.,* 653 F.Supp.2d 354, 386 (S.D.N.Y.2009) (noting that a claimant must plead "what provisions of the agreement were breached").

In their complaint, the plaintiffs allege they enrolled for IJLI's services, at various franchise offices, at different times. They contend the defendants breached their contracts by not providing "expert" matchmaking, "based upon clients' preferences," as promised.

The plaintiffs have failed to plead facts sufficient to prove they entered into enforceable contracts. Though some plaintiffs allege when they signed their contracts, most do not. The plaintiffs have failed to specify the parties to alleged contracts, insofar as their allegations muddle the distinction between IJLI and its franchises.[8] Most importantly, the plaintiffs have failed to set forth the terms of their alleged contracts. As the plaintiffs have failed to allege the essential terms of their contracts, they have, consequently, not pointed to the specific provisions they contend the defendants violated. Accordingly, the plaintiffs have failed to plead sufficiently a breach of contract claim against any of the defendants.

5. Unjust Enrichment

***11** To state a claim for unjust enrichment under New York law, a claimant must allege facts establishing that: (1) the defendant benefitted; (2) the benefit came at the plaintiff's expense; and (3) "equity and good conscience require restitution." *Beth Israel Med. Ctr. v. Horizon Blue Cross and Blue Shield of New Jersey, Inc.,* 448 F.3d 573, 586 (2d Cir.2006). The theory of unjust enrichment sounds in quasi-contract. *Id.* Therefore, although proof of an enforceable contract, either oral or written, precludes recovery under the theory of unjust enrichment, Fed.R.Civ.P. 8(d) permits parties to plead alternative, even inconsistent, claims. *See Orange County Choppers, Inc. v. Olaes Enters., Inc.,* 497 F.Supp.2d 541, 557 (S.D.N.Y.2007).

Since the plaintiffs have not, as of yet, demonstrated the existence of an enforceable contract(s), their unjust enrichment claim is not precluded, as a matter of law. The plaintiffs' allegations that they paid the defendants for dating services, but received service of an inferior quality to what they had been promised, are sufficient to state a claim of unjust enrichment.

6. Civil Conspiracy

The plaintiffs allege that the defendants "entered into a conspiracy to engage in [ ] wrongful conduct." The plaintiffs did not address the defendants' motion to dismiss with regard to this claim. Therefore, "it is deemed abandoned" and need not be entertained by the court. *Hanig v. Yorktown Cent. Sch. Dist.,* 384 F.Supp.2d 710, 723 (S.D.N.Y.2005); *see Abbatiello v. Monsanto Co.,* 522 F.Supp.2d 524, 530 (S.D.N.Y.2007).

Even if the plaintiffs had opposed the motion with respect to this claim, they would be unable to obtain relief on the claim as "New York does not recognize an independent tort of conspiracy." *Kirch v. Liberty Media Corp.,* 449 F.3d 388, 401 (2d Cir.2006).

B. Standard for Rule 11 Sanctions

Under Fed.R.Civ.P. 11(c)(2), a party may move for sanctions against an attorney or party, but "[a] motion for sanctions must be made separately from any other motion[.]" The moving party must wait at least 21 days after effectuating service of its motion to file it with the court, in order to permit the nonmoving party to "withdraw[ ] or appropriately correct[ ]" the challenged submission. *See* Fed.R.Civ.P. 11(c)(2).

The defendants' request that the court impose sanctions on the plaintiffs' counsel appears as the final point in the defendants' memorandum of law, submitted in support of the motion to dismiss. The defendants failed to submit either a separate Rule 11 sanctions motion or a memorandum of law in connection with their request for sanctions.[9] Additionally, there is no evidence the defendants served the plaintiffs' counsel with their request at least 21 days prior to presenting it to the court.

The defendants have failed to comply with the procedural requirements of Rule 11; consequently, no basis exists for granting their motion for sanctions. *See Perpetual Sec., Inc. v. Tang,* 290 F.3d 132, 142 (2d Cir.2002) (holding an award of sanctions despite "contravention of the explicit procedural requirements of Rule 11" to be an abuse of discretion); *Hadges v. Yonkers Racing Corp.,* 48 F.3d 1320, 1328 (2d Cir.1995).

RECOMMENDATION

***12** For the reasons set forth above, I recommend that the defendants' motion to dismiss the Second Amended Complaint, Docket Entry No. 59, be granted as to all claims except: (1) Rodriguez's claim for a violation of NYGBL § 349; and (2) unjust enrichment. I recommend further that the defendants' motion for sanctions be denied.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed.R.Civ.P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Sidney H. Stein, 500 Pearl Street, Room 1010, New York, New York 10007, and to the chambers of the undersigned, 40 Centre Street, Room 540, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Stein. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See Thomas v. Arn,* 474 U.S. 140, 470, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *IUE AFL–CIO Pension Fund v. Herrmann,* 9 F.3d 1049, 1054 (2d Cir.1993); *Frank v. Johnson,* 968 F.2d 298, 300 (2d Cir.1992); *Wesolek v. Canadair Ltd.,* 838 F.2d 55, 58–59 (2d Cir.1988); *McCarthy v. Manson,* 714 F.2d 234, 237–38 (2d Cir.1983).

All Citations

Not Reported in F.Supp.2d, 2010 WL 685009

Footnotes

1 Woolf has since withdrawn as a plaintiff in this action. *See* Pls.' Opp'n Br., p. 1, n. 1.

2 By stipulation, the parties agreed to dismiss voluntarily, from this action, defendants Riverside Company and Loren Schlachet. *See* Docket Entry No. 64. Additionally, by stipulation, the parties agreed that "the arguments urged in support of and in opposition to the pending motion to dismiss" be extended to the three IJLI franchises, on which service was effectuated after the defendants filed their motion. *See* Docket Entry No. 70. In light of the stipulations, "the defendants," for the purpose of this Report, are: (1) IJLI; (2) IJL, Inc.; (3) H & S; (4) IJL Orange County; (5) IJL Denver; and (6) IJL Austin. The plaintiffs have failed to serve a copy of the summons and complaint on three franchises listed in the Second Amended Complaint: IJL Chicago, IJL Palm Beach, and IJL Los Angeles–Century City. *See generally* Fed.R.Civ.P. 4(m) & 41(b).

3 As Rule 9(b) "does not explicitly provide for a dismissal motion[,]" *Patel v. Contemporary Classics of Beverly Hills,* 259 F.3d 123, 125 n. 4 (2d Cir.2001), the defendants' motion to dismiss is being made solely under Rule 12(b)(6). The Court will consider failure to comply with Rule 9(b), when necessary, as a ground warranting dismissal of affected claims.

4 "A federal court sitting in diversity ... must apply the choice of law rules of the forum state." *Rogers v. Grimaldi,* 875 F.2d 994, 1002 (2d Cir.1989). "However, where the parties have agreed to the application of the forum law, their consent concludes the choice of law inquiry." *American Fuel Corp. v. Utah Energy Dev. Co.,* 122 F.3d 130, 134 (2d Cir.1997) (applying New York law where the "parties' briefs rely primarily on New York law"). In the instant action, the plaintiffs and defendants, in their briefs, rely exclusively on New York law. Therefore, the Court will apply New York law to all the common-law claims that remain subjects of the motion to dismiss.

5 When considering a motion to dismiss, a court must accept the veracity of all factual allegations, even those which are "doubtful in fact." *See Twombly,* 550 U.S. at 555, 127 S.Ct. at 1965. However, "a court need not feel constrained to accept as truth conflicting pleadings ... or that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely ...." *In re Livent, Inc. Noteholders Sec. Litig.,* 151 F.Supp.2d 371, 405–06 (S.D.N.Y.2001).

6 Accepting Rodriguez's allegations as true, she has failed, as a matter of law, to state a claim for fraudulent inducement. Rodriguez contends she was falsely assured, by an "IJL representative," that "she would be matched strictly with other professionals" and "she would be set up on at least six dates." The misrepresentations actionable under a claim for fraudulent inducement must be "representations of present fact," not "future promises." *See Jackson & Nash,* 976 F.2d at 89. As her allegations pertain to misrepresentations of future events, they cannot support her fraudulent inducement claim.

7 In 2007, the New York attorney general determined that "[b]y having consumers sign two contracts simultaneously, for an aggregate amount in excess of $1,000.00, IJLI's New York State franchisees" violated NYGBL § 394–c(2). *See* Compl. Ex. D, ¶ 8. By violating this section, the attorney general found IJLI "therefore also violate[d] GBL Art. 22–A," under which NYGBL § 349 is codified. *See id.* ¶ 11. IJLI entered into an Assurance of Discontinuance with the attorney general's office to avoid litigation, though it did "not admit [to] the Findings." *Id.* ¶ 12. The Assurance expressly provides that it shall not be construed to "deprive any person ... any private right under law." *Id.* ¶ VI.

8 The plaintiffs allege they entered into contracts with IJLI, "through the IJL Franchises." However, insofar as IJLI is alleged to be a franchisor, albeit one that exercises "complete dominion" over its franchises, it is unclear why it would be entering into thousands of individual contracts with its franchisees' clients, rather than simply negotiating franchise agreements.

9 In doing so, the defendants violate Local Civil Rule 7.1(a) of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, which provides, in pertinent part, that "all motions ... shall be supported by a memorandum of law[.]" That, alone, provides sufficient ground to deny their motion. *See* Local Rule 7.1(a).

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