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United States District Court,
C.D. California.
CHANG WEI LEE
v.
XO COMMUNICATIONS, LLC, et al.

No. CV 11–8677–JFW (VBKx).
Jan. 13, 2012.

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PROCEEDINGS (IN CHAMBERS): ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT XO'S MOTION TO DISMISS AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(3) AND 12(B)(6) [filed 12/19/11; Docket No. 23]

Honorable JOHN F. WALTER, District Judge.
***1** S. Eagle, Courtroom Deputy.

On December 19, 2011, Defendants XO Communications, LLC and XO Holdings, LLC (collectively, "Defendants") filed a Motion to Dismiss Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(3) and 12(b)(6) ("Motion"). On January 3, 2012, Plaintiffs Chang Wei Lee ("Lee") and CLT Computers, LLC ("CLT") (collectively, "Plaintiffs") filed their Opposition. On January 9, 2012, Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7–15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for January 23, 2012 is hereby vacated and the matter taken off calendar. After considering the moving, opposing, and reply papers and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

On September 2, 2011, Lee filed his Complaint against Defendants in Los Angeles Superior Court. On October 19, 2011, Defendants filed their Notice of Removal, alleging this Court had jurisdiction pursuant to 28 U.S.C. § 1332. On November 17, 2011, this Court granted Defendants' motion to dismiss Lee's Complaint pursuant to Rules 9(b) and 12(b)(6), and granted Lee leave to file a First Amended Complaint.

On November 28, 2011, Lee and CLT filed a First Amended Complaint against Defendants, alleging claims of relief for: (1) unfair business practices; (2) intentional fraud; and (3) negligent misrepresentation. In the First Amended Complaint, Plaintiffs allege that CLT purchased services from Defendants and that the invoices for those services contained improper Access Recovery Charges ("ARC").

On July 9, 2007, CLT and Defendants entered into a Service Order Agreement ("SOA") for the purchase of direct internet access services for a three year term. The 2007 SOA was executed on behalf of CLT by Simon Li, who identified himself as CLT's MIS Manager. The 2007 SOA contains a paragraph entitled "Jurisdiction and Venue," which provides:

> This Agreement shall be governed by the substantive law of the Commonwealth of Virginia without reference to its principles of conflict of laws. Customers consent to the exclusive jurisdiction and venue of the Federal District Court for the Eastern District of Virginia or the State courts in Fairfax County, Virginia.

In addition, the "General Terms and Conditions" applicable to the 2007 SOA also contains a paragraph entitled "Choice of Law and Venue," which provides:

> Except as expressly provided otherwise in the SOA or MSOA, the Agreement is made pursuant to, and shall be construed and enforced in accordance with, the substantive law of the Commonwealth of Virginia, without reference to its principles of conflict of laws, and Customer explicitly consents to the exclusive jurisdiction and venue of either the Federal District Court for the Eastern District of Vir-

ginia or the State courts in Fairfax County, Virginia.

On January 9, 2009, CLT and Defendants entered into another SOA for the purchase of integrated digital network services for a three year term. The 2009 SOA was executed on behalf of CLT by Sam Gomez, who identified himself as CLT's Comptroller. The 2009 SOA contains a paragraph entitled "Jurisdiction and Venue," which provides:

> ***2** This Agreement shall be governed by the substantive law of the Commonwealth of Virginia without reference to its principles of conflict of laws. Customers consent to the exclusive jurisdiction and venue of the Federal District Court for the Eastern District of Virginia or the State courts in Fairfax County, Virginia.

Defendants now move to dismiss Plaintiffs' First Amended Complaint. With respect to Lee, Defendants argue that Lee does not have standing to sue. With respect to CLT, Defendants seek to enforce the forum selection clauses contained in the contracts CLT executed. Alternatively, Defendants argue that CLT has failed to state a claim for relief.

II. Legal Standard

A. Rule 12(b)(3)

Federal Rule of Civil Procedure 12(b)(3) permits a motion to dismiss a case for improper venue, pursuant to a forum selection clause. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir.1996). The burden is on the plaintiff to show that venue is proper. *See Nissan Motor Co. v. Nissan Computer Corp.*, 89 F.Supp.2d 1154, 1161 (C.D.Cal.2000). The Court need not accept the pleadings as true, and may look to facts outside of the pleadings. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir.2004). If the forum in which the case is brought is deemed improper, the court shall either dismiss the case, or in the interest of justice, transfer the case to any district in which it could have been brought. 28 U.S.C. § 1406(a).

B. Rule 12(b)(6)

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. "A Rule 12(b)(6) dismissal is proper only where there is either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.' " *Summit Technology, Inc. v. High–Line Medical Instruments Co., Inc.*, 922 F.Supp. 299, 304 (C.D.Cal.1996) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1988)). However, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal citations and alterations omitted). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir.1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations ." *Summit Technology*, 922 F.Supp. at 304 (citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981) *cert. denied*, 454 U.S. 1031, 102 S.Ct. 567, 70 L.Ed.2d 474 (1981)).

***3** "Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the motion to dismiss into a motion for summary judgment. *See, e.g., id.; Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir.1994). Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *See Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir.1996).

III. Discussion

A. Lee Does Not Have Standing.

To satisfy the Article III standing requirement, a plaintiff must demonstrate the following:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of .... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujuan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations and quotations omitted). As the party invoking federal jurisdiction, Plaintiff has the burden of establishing that he has Article III standing. *See D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir.2008).

In this case, Lee fails to allege any facts that demonstrate that he has suffered an actual or imminent injury. In fact, Lee is not and was not Defendants' customer, and, thus, he did not pay the allegedly improper ARCs that are the subject of the First Amended Complaint. In addition, neither the 2007 SOA nor the 2009 SOA was signed by Lee, and Lee's name does not appear on either SOA. Moreover, even if Lee is an owner, officer, or otherwise affiliated with CLT, he still does not have standing to sue. *Edwards v. Reynolds*, 2009 WL 743992, *1 (N.D.Cal. Mar.18, 2009) (holding that officers or others affiliated with business entity could not sue on its behalf); *U.S. Fiduciary & Guaranty Co. v. Lee Investment, LLC*, 2008 WL 5157712, *5–6 (E.D.Cal. Dec.8, 2008) (holding that even when an individual is the alter ego of a corporation, the corporation cannot pierce the corporate veil for its own benefit). Furthermore, in their Opposition, Plaintiffs do not dispute that Lee does not have standing.[FN1] Accordingly, Lee lacks standing to sue, and Defendants' motion to dismiss Lee is **GRANTED.**

> FN1. Instead, Plaintiffs discuss the facts supporting CLT's standing, which is not an issue raised by Defendants in their Motion.

B. With Respect to CLT, the Forum Selection Clauses are Enforceable.

Forum selection clauses are presumptively valid, and a party seeking to invalidate such a clause bears a heavy burden of proof. *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 10, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); *Murphy v. Schneider Nat'l Inc.*, 362 F.3d 1133, 1140 (9th Cir.2004); *see, also, E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 2006 WL 1133385, *7 (9th Cir.2006) (recognizing that "the Supreme Court has established a strong policy in favor of the enforcement of forum selection clauses"). Because forum selection clauses are presumptively valid, they must be honored "unless the party challenging enforcement of such a provision can show it is 'unreasonable' under the circumstances." *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir.1996) (quoting *Bremen v. Zapata Off–Shore Co.*, 407 U.S. at 10). A forum selection clause is unreasonable if: "(1) its incorporation into the contract was the result of fraud, undue influence, or overwhelming 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." *Id.* (citations omitted) (quoting *Bremen v. Zapata Off–Shore Co.*, 407 U.S. at 18).

***4** In this case, the Court concludes that the forum selection clauses contained in the 2007 SOA and the 2009 SOA are enforceable and are applicable to the claims and defenses that will be raised by the parties in this action. CLT argues that the choice of law provisions contained in the first sentence of the "Jurisdiction and Venue" paragraph in the 2007 SOA and the 2009 SOA apply only to contract disputes under the SOAs, not to torts. However, CLT ignores the fact that it is the forum selection clause, which is contained in the second sentence of the "Jurisdiction and Venue" paragraph in the 2007 SOA and the 2009 SOA, and not the choice of law provision that is at issue, and that the forum selection clause is not limited to only contract disputes. In addition, even if the forum selection clause was interpreted as only applying to contract claims, CLT's tort claims would still fall within the clause because "resolution of the [tort] claims relate[s] to interpretation of the contract" and each of the claims alleged against Defendants is dependent upon first deciding whether the SOAs allow Defendants to charge the ARC. *Manetti–Farrow, Inc. v. Gucci American, Inc.*, 858 F.2d 509, 514 (9th Cir.1988)

(holding that each tort claim "relates in some way to rights and duties enumerated in the exclusive dealership contract. The claims cannot be adjudicated without analyzing whether the parties were in compliance with the contract."); *Mosier v. HSBC Bank USA, N.A.*, 2010 WL 5422550, *2–3 (C.D.Cal. Dec.28, 2010) (holding that the tort claims alleged fell within the scope of the forum selection clause because each "relate in some way" to defendant's "rights and duties" under the parties' contract).[FN2]

> FN2. CLT also argues that the forum selection clause is unreasonable, unfair, and unjust because it would effectively deprive CLT of its day in court in light of CLT's contention that the costs of litigating in Virginia would exceed the amounts at issue in this case. However, this argument is unpersuasive. *See, e.g.*, *Gamayo v. Match.com LLC*, 2011 WL 3739542, *5 (N.D.Cal. Aug.24, 2011) (enforcing Texas forum selection clause even though the amounts in dispute were "$20 to $40 per month").

Therefore, the Court concludes that the forum selection clauses contained in the 2007 SOA and the 2009 SOA are enforceable. In addition, the Court concludes that dismissal, rather than transfer to a Virginia court, is appropriate. *Tolentino v. Mossman*, 2007 WL 4404447, *7 n. 9 (E.D.Cal. Dec.13, 2007) (dismissing action rather than transferring it to federal court where forum selection clause permitted filing in either federal or state court). Accordingly, Defendants' motion to dismiss CLT pursuant to Rule 12(b)(3) is **GRANTED.**

IV. Conclusion

For all the foregoing reasons, Defendants' Motion is **GRANTED in part and DENIED in part.** Defendants' motion to dismiss Lee is **GRANTED.** The First Amended Complaint is **DISMISSED without leave to amend** as to Lee, and this action is **DISMISSED with prejudice** as to Lee. Defendants' motion to dismiss CLT pursuant to Rule 12(b)(3) is **GRANTED.** The First Amended Complaint is **DISMISSED without leave to amend** as to CLT, and this action is **DISMISSED without prejudice** to re-filing in the proper venue as to CLT. Defendants' motion to dismiss CLT pursuant to Rule 12(b)(6) is **DENIED without prejudice** to Defendants renewing their motion if the case is re-filed in Virginia.

***5** IT IS SO ORDERED.

C.D.Cal.,2012.
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