IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICKY R. FRANKLIN,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION NO. 1:15-CV-00655-LMM
FACEBOOK, INC.,	:	
Defendant.	:	

ORDER

This matter comes before the Court on Defendant Facebook, Inc.'s Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a), Dkt. No. [15]. For the reasons set forth below, Defendant's motion is **GRANTED.**

I. Factual Background

Plaintiff Ricky Franklin initiated this action on April 29, 2015, as a *pro se* litigant. According to Plaintiff's Complaint, his claims arise out of a series of text messages Defendant sent to Plaintiff's cell phone without Plaintiff's consent. Dkt. No. [3] at ¶¶ 1-2 & 20-25. Plaintiff alleges that Defendant's delivery of said unsolicited text messages is a violation of both the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, as well as O.C.G.A. § 46-5-27. Id.

Defendant filed its Motion to Transfer Venue on July 21, 2015. Dkt. No. [15]. Defendant concurrently filed a 12(b)(6) motion to dismiss. Dkt. No. [16]. In

its memorandum in support of its motion to transfer, Defendant argues that because Plaintiff is a Facebook user, he is contractually bound by Facebook's Statement of Rights and Responsibilities ("SRR"), which outlines the terms of use for all Facebook account holders. [15-1] at 6-7. Defendant asserts that in order to sign up for his Facebook account in 2009, Plaintiff was required to indicate that he agreed to Defendant's SRR. Id. at 6; [15-2] at 2-3. Specifically, the Facebook registration process in place at the time Plaintiff registered for an account informed people signing up for the service: "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Use." Id. at 3. The phrase "Terms of Use" was an underlined hyperlink directing users to the SRR. Id. Defendant further contends that Plaintiff is presently a Facebook user and has been given notice that his "continued use" of the service constitutes "acceptance" of any amendments to the SRR. Id. at 2, 3-4. The SRR contains a forum selection clause requiring that "any claim, cause of action or dispute (claim)" that an agreeing user may have with Defendant "arising out of or relating to this Statement or Facebook" be brought exclusively in either "the U.S. District Court for the Northern District of California or a state court located in San Mateo County." [15-3] at 4. Defendant thus asks that the Court transfer venue under § 1404(a) to the Northern District of California in accordance with the forum selection clause.

Plaintiff responded to Defendant's motion to transfer on July 31, 2015. Dkt. No. [17]. In his response, Plaintiff argues that transfer is improper because (1) a

plaintiff's choice of forum is entitled to great weight, id. at 2-3; (2) the majority of the factors relevant to a § 1404(a) transfer decision, as enumerated by the Eleventh Circuit in Manuel v. Convergys Corp., 430 F.3d 1132, 1135 n.1 (11th Cir. 2005), weigh in Plaintiff's favor, id. at 3-4; (3) Plaintiff's claims are unrelated to Plaintiff's own use of Facebook, and the Court should accordingly treat Plaintiff's claims as an "exceptional case" not within the scope of the forum selection clause, id. at 4-6; and (4) public interest factors weigh against transfer. Id. at 6-7.[1]

II. Discussion

Although a forum selection clause "does not render venue in a court 'wrong' or 'improper' within the meaning of § 1406(a) or Rule 12(b)(3), the clause may be enforced through a motion to transfer under § 1404(a)." Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 579 (2013). 28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought *or to any district or division to which all parties have consented*." (emphasis added). Thus, if a forum selection clause is found to be valid and enforceable, the Court must enforce it by granting a motion to transfer to the forum agreed upon therein. A valid forum

[1] *Pro se* pleadings "are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

selection clause "should be given controlling weight in all but the most exceptional cases." Atl. Marine, 134 S. Ct. at 581.

A. Validity of the Forum Selection Clause

Forum selection clauses "are presumptively valid and enforceable unless the plaintiff makes a 'strong showing' that enforcement would be unfair or unreasonable under the circumstances." Krenkel v. Kerzner Int'l Hotels Ltd., 579 F.3d 1279, 1281 (11th Cir. 2009) (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-595 (1991)). The Eleventh Circuit further explained:

> A forum-selection clause will be invalidated when (1) its formation was induced by fraud or overreaching; (2) the plaintiff would be deprived of its day in court because of inconvenience or unfairness; (3) the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of the clause would contravene public policy. In determining whether there was fraud or overreaching in a non-negotiated forum-selection clause, we look to whether the clause was reasonably communicated to the consumer. A useful two-part test of "reasonable communicativeness" takes into account the clause's physical characteristics and whether the plaintiffs had the ability to become meaningfully informed of the clause and to reject its terms.

Krenkel, 579 F.3d at 1281 (internal citations omitted).

Defendant's SRR governs the legal relationship between Defendant and millions of users of its website and related services. Because of this, the forum selection clause contained in the SRR has been addressed by numerous courts in actions involving Defendant. The Court cannot identify a single instance where any federal court has struck down Defendant's SRR as an impermissible contract of adhesion induced by fraud or overreaching or held the forum selection clause now at issue to be otherwise unenforceable due to public policy considerations.

See, e.g., Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 838-39 (S.D.N.Y. 2012) (likening Facebook's SRR to the fine print on the back of a cruise ticket containing a forum selection clause that was enforced against the plaintiffs in Carnival Cruise Lines); E.K.D. ex rel. Dawes v. Facebook, Inc., 885 F. Supp. 2d 894, 900-903 (S.D. Ill. 2012) (imputing "constructive knowledge" of the terms of the SRR to the plaintiffs and finding Facebook's forum selection clause to be mandatory, reasonable, not in contravention of public policy, and enforceable); Miller v. Facebook, Inc., No. 1:09-CV-2810-RLV, 2010 WL 9525523, at *1 (N.D. Ga. Jan. 15, 2010) (also likening the SRR's forum selection clause to the one at issue in Carnival Cruise Lines and additionally noting the public policy concern that "[e]ven if the court were to assume without deciding that the [SRR] was a contract of adhesion, striking the forum selection clause could wreak havoc on the entire social-networking internet industry."). The Court finds the reasoning of these cases persuasive, declines to depart from the great weight of persuasive authority on this question, and accordingly finds that Plaintiff has failed to overcome the presumptive validity of the forum selection clause on the basis of fraud, overreaching, or contravention of public policy.

B. Scope of the Forum Selection Clause

The Court also finds that Plaintiff's claims are indeed contemplated by the SRR and are therefore subject to the forum selection clause. The clause states that "any claim . . . arising out of or relating to . . . Facebook" must be brought in either the Northern District of California or a state court located in San Mateo

County. Dkt. No. [15-3] at 4. The SRR defines "Facebook" as "the features and services we make available, including through (a) our website at www.facebook.com . . . and (d) other media, brands, products, services, software (such as a toolbar), devices, or networks now existing or later developed." Id. The language of the forum selection clause is therefore broad enough to include Plaintiff's claims, which "relat[e] to Facebook" because they relate to a "service[]" Defendant "make[s] available." Specifically, they relate to the service of providing Facebook account notifications to a user's cell phone number via text message, a service that was apparently sought out by some prior owner of Defendant's cell phone number.[2] Plaintiff's claims therefore do not constitute an "exceptional case" falling outside of the forum selection clause. See Miller, 2010 WL 9525523, at *2 (granting a similar motion to transfer and holding that the use of the term "any dispute" in SRR's forum selection clause was "broad enough to include" the plaintiff's patent infringement claims where the alleged infringement "occurred

[2] Plaintiff describes the content of only one text message he allegedly received from Defendant, which read: "Today is Sara Glenn's birthday. Reply to post on her Timeline or reply 1 to post 'Happy Birthday!'" Dkt. No. [3] at 6. Given that Plaintiff states that he was "[c]onfused and baffled" by this message and "that he was receiving text messages from someone or a Corporation that he does not know," id., the messages at issue in this action were apparently intended for some prior owner of Plaintiff's cell phone number. The SRR contemplates such a scenario: "In the event you change or deactivate your mobile telephone number, you will update your account information on Facebook within 48 hours to ensure that your messages are not sent to the person who acquires your old number." Dkt. No. [15-3] at 3. While neither party explicitly articulates how or why the messages were sent or received, the record at hand supports the finding that they were sent pursuant to a service made available by Defendant to its users generally.

either on Facebook's website or in the use of Facebook's site," even though—as in the present case—the alleged infringement did not arise from the plaintiff's own use of the site but rather from a third party's use). The Court therefore rejects Plaintiff's third argument against transfer.

C. Private Interest Factors

Plaintiff also raises two other potential avenues to invalidating the forum selection clause. As outlined above, a forum selection clause may also be invalidated if Plaintiff can show that he would be "deprived of [his] day in court because of inconvenience or unfairness" or that "the chosen law would deprive [him] of a remedy." Krenkel, 579 F.3d at 1281 (internal citations omitted). However, the Supreme Court has clarified since the Eleventh Circuit issued its *per curiam* opinion in Krenkel that private interest factors such as inconvenience or unfairness are not relevant where a motion to transfer is based on a valid forum selection clause. Atl. Marine, 134 S. Ct. at 581-82. While a typical § 1404(a) analysis would take into account the convenience of the parties and various other factors that Plaintiff now urges the Court to consider, the Supreme Court has explained that where the parties are bound by a valid forum selection clause, "the [§ 1404(a)] calculus changes" in three ways:

> First, the plaintiff's choice of forum merits no weight. Rather, as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted. . . .
>
> Second, a court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments

> about the parties' private interests. When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum. . . .
>
> As a consequence, a district court may consider arguments about public-interest factors only. Because those factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases. . . .
>
> Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public-interest considerations.

Id. at 581-82. Accordingly, the Court must find that Plaintiff's choice of forum merits no weight, that Plaintiff has waived the right to challenge the preselected forum as inconvenient, and that private interest factors weigh entirely in favor of litigation in the Northern District of California.

D. Public Interest Factors

Having addressed Plaintiff's first three arguments against transfer, the Court now turns to public interest factors, including "whether the chosen law would deprive [Plaintiff] of a remedy." Krenkel, 579 F.3d at 1281. Plaintiff argues that transfer is against the public interest because a change of venue would "eliminate Plaintiff[']s state claims" under O.C.G.A. § 46-5-27 and because the Georgia General Assembly and Georgia courts have an "overwhelming interest" in resolving disputes involving Georgia residents and Georgia law. Dkt. No. [17] at 6-7. The forum selection clause of the SRR does indeed dictate that California

state law will govern any claim Plaintiff has against Defendant. Dkt. No. [15-3] at 4. However, the Court finds that the potential public interest in preserving Plaintiff's Georgia statutory claim is not weighty enough to defeat Defendant's transfer motion, because Plaintiff's claims, as alleged, simply do not fall within the contemplation of any Georgia statute.

Plaintiff's Complaint asserts: "O.C.G.A. § 46-5-27(i) states that any person who has received more than one telephone solicitation within any 12 month period by or on behalf of the same person or entity in violation of subsection (c) or (g) of the code, may bring an action for such violation." Dkt. No. [3] at ¶ 2. Yet O.C.G.A. § 46-5-27(c) and (g) both deal solely with certain prohibitions on "telephone solicitation."[3] Elsewhere, the statute defines "telephone solicitation" as "*voice* communication over a telephone line for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services[.]" Id. at (b)(3) (emphasis added). Plaintiff does not allege that he has received any voice communications from Defendant, and there is no Georgia statute comparable to O.C.G.A. § 46-5-27 prohibiting similar telephone solicitations sent via text message. Moreover, Plaintiff does not allege that the communications were "for

[3] Specifically, O.C.G.A. § 46-5-27(c) prohibits "telephone solicitation to the telephone line of any residential, mobile, or wireless subscriber in this state who has given notice to the [Federal Communications Commission] . . . of such subscriber's objection to receiving telephone solicitations," and O.C.G.A. § 46-5-27(g) requires that anyone making a telephone solicitation "state clearly the identity of the person or entity initiating the call" and prohibits such person or entity from "knowingly utiliz[ing] any method to block or otherwise circumvent such subscriber's use of a caller identification service."

the purpose of encouraging" Plaintiff to make any "purchase or rental of, or investment in, property, goods, or services." Rather, the sole text message described in the Complaint encourages Plaintiff to wish someone a happy birthday—a presumably costless transaction.

The Court is careful to note that its findings with regard to Plaintiff's O.C.G.A. § 46-5-27 claim are not intended to address the merits of Plaintiff's claims, which are best left to the transferee court. Rather, the foregoing analysis is limited to an evaluation of whether any significant public interest is implicated by the fact that enforcement of the forum selection clause will necessarily deprive Plaintiff of a remedy under O.C.G.A. § 46-5-27. The Court answers that question in the negative.

III. Conclusion

For the reasons set forth above, Defendant's Motion to Transfer Venue is **GRANTED**. The Clerk is **DIRECTED** to transfer this case to the United States District Court for the Northern District of California.[4]

[4] As previously mentioned, Defendant filed a Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) on the same day it filed its motion to transfer. Dkt. No. [16]. Defendant argues that the Court should defer that motion to the transferee court in the event the motion to transfer is granted. [15-1] at 6 n.1. The Court agrees. Because Defendant's motion to transfer is granted, the motion to dismiss is properly left for the transferee court to decide. See, e.g., Reginald Martin Agency, Inc. v. Conseco Med. Ins. Co., No. 1:03 CV 3810 RWS, 2004 WL 3576601, at *3 (N.D. Ga. Sept. 10, 2004).

IT IS SO ORDERED this 23rd day of November, 2015.

LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE