IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

DAVID J. BECKMAN,
Plaintiff,

CIVIL DIVISION: "AI"
CASE NO.: 2016CA008330

v.

NIANTIC, INC.,
Defendant.
______________________/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

THIS CAUSE came before the Court on Defendant, Niantic, Inc.'s ("Defendant"), Motion to Dismiss the Complaint ("Motion"). The Court has carefully considered the Motion, the court file, the arguments presented at the April 18, 2017 hearing, and is otherwise fully advised in the premises.

STATEMENT OF THE CASE

On July 26, 2016, Plaintiff, David J. Beckman ("Plaintiff"), filed a Complaint for declaratory and injunctive relief against Defendant, the creator of the mobile game "Pokémon GO."[1] In the Complaint, Plaintiff alleges that Pokémon GO's Terms of Service ("Terms") are "illusory, deceptive, unfair, and/or unconscionable" in violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). Particularly, Plaintiff argues Pokémon GO's Terms constitute an illusory, unenforceable contract which allow Defendant to avoid any legal obligation to Pokémon GO users. The Terms contain a California choice-of-law provision which provides that "any action related thereto will be governed by the laws of the State of California without regard to its conflict of law provisions."

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[1] Pokémon GO is a mobile game in which players catch creatures called "Pokémon." As part of Pokémon GO, players may purchase virtual goods and virtual money with U.S. dollars.

On October 28, 2016, Defendant filed the instant Motion. In the Motion, Defendant argues Plaintiff's claim should be dismissed as a matter of law because (1) Plaintiff lacks standing; (2) the California choice-of-law provision in the Terms bars Plaintiff's FDUTPA claim; and (3) Plaintiff has failed to state a legally sufficient claim for injunctive relief under FDUTPA. On April 18, 2017, the Court held a hearing on the Motion.

LEGAL ANALYSIS AND RULINGS

On a motion to dismiss, a court must consider "whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested." *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 860-61 (Fla. 5th DCA 1996). To state a cause of action, "a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." *MEBA Med. & Benefits Plan v. Lago*, 867 So. 2d 1184, 1186 (Fla. 4th DCA 2004). "[A] trial court's review of a motion to dismiss is limited to the four corners of the challenged complaint." *Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 600 (Fla. 1st DCA 2013).

In the Motion, Defendant argues Plaintiff's Complaint should be dismissed as a matter of law because (1) Plaintiff lacks standing; (2) the California choice-of-law provision in the Terms bars Plaintiff's claim; and (3) Plaintiff has failed to allege a legally sufficient FDUTPA claim. Each claim is addressed in turn below.

A. WHETHER PLAINTIFF HAS STANDING TO BRING THE INSTANT FDUTPA CLAIM

As a preliminary matter, the Court addresses whether Plaintiff has standing to bring the instant FDUTPA claim against Defendant. *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015) ("[S]tanding is a threshold issue which must be resolved before reaching the merits of a case."). Unlike the federal judiciary, Florida courts do not employ a rigid standing test. *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994). Rather, "Florida recognizes

a general standing requirement in the sense that every case must involve a real controversy as to the issue or issues presented." *Id.* Central to determining whether a legal dispute involves a real controversy is whether a plaintiff "has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation." *Weiss v. Johansen*, 898 So. 2d 1009, 1011 (Fla. 4th DCA 2005). Importantly, "[t]he interest cannot be conjectural or merely hypothetical." *Id.*

The basis of Plaintiff's claim is that Pokémon GO's Terms violate FDUTPA because the Terms constitute an illusory contract which allows Defendant to avoid any legal obligation to Pokémon GO users. Plaintiff argues the Terms permit Defendant to "unilaterally [and] materially change the Pokémon GO [Terms] and to make such changes retroactive." Thus, Plaintiff argues he has standing because he continues to use Pokémon GO and he cannot be certain that his account will not be unilaterally terminated or that his virtual money and virtual goods will not be taken without compensation.

Here, Plaintiff has not alleged he suffered any actual injury as a result of Defendant's actions. For instance, Plaintiff has not alleged that Defendant *actually* took Plaintiff's virtual goods or virtual money without compensation or *actually* unilaterally terminated his Pokémon GO account. Instead, Plaintiff argues he is uncertain about whether he will suffer an injury—if ever—at some point in the future. At the April 18, 2017 hearing, Plaintiff conceded he has not suffered any concrete injury. Because Plaintiff's injuries are conjectural and hypothetical, the instant claim does not involve a real controversy. *Kuhnlein*, 646 So. 2d at 720. Plaintiff therefore lacks standing. *Weiss*, 898 So. 2d at 1011.

Plaintiff argues FDUTPA claims are subject to a unique and broad standing analysis in which a plaintiff merely must establish they are an "aggrieved" party as a result of unfair

business practices. Plaintiff contends an "aggrieved" party is one that is "angry" or "sad" because of a perceived FDUTPA violation. Plaintiff, however, has mistaken the elements of a FDUTPA claim for the Court's threshold standing inquiry. Plaintiff is correct in that a party must be "aggrieved" in order to bring a claim under FDUTPA. *Caribbean Cruise Line, Inc. v. Better Bus. Bureau of Palm Beach Cty., Inc.*, 169 So. 3d 164, 167 (Fla. 4th DCA 2015). However, before assessing the merits of a plaintiff's FDUTPA claim, the Court must first find the plaintiff has standing. *Solares*, 166 So. 3d at 888 (noting that "standing . . . must be resolved before reaching the merits of a case"). Thus, whether Plaintiff is an "aggrieved" party under FDUTPA is distinct from whether he has standing to bring the instant claim.

In sum, because Plaintiff has not alleged he suffered any actual injury, Plaintiff lacks standing to bring the instant FDUTPA claim. Notwithstanding Plaintiff's lack of standing, the Court addresses the merits of Defendant's Motion *infra*.

B. WHETHER THE CALIFORNIA CHOICE-OF-LAW PROVISION IN THE TERMS BARS PLAINTIFF'S FDUTPA CLAIM.

Defendant argues Plaintiff's Complaint must be dismissed because the Terms contain a California choice-of-law provision which bars the instant FDUTPA claim. In response, Plaintiff argues the California choice-of-law provision does not apply because the Terms constitute an illusory, unenforceable contract. In relevant part, the Terms provide that "any action related thereto will be governed by the laws of the State of California without regard to its conflict of law provisions."

In general, "Florida enforces choice-of-law provisions unless the law of the chosen forum contravenes strong public policy." *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000). In determining whether a foreign law contravenes public policy, courts should exercise "extreme caution" and refuse to invalidate a choice-of-law provision

unless the provision creates "some great prejudice to the dominant public interest sufficient to overthrow the fundamental policy of the right to freedom of contract between parties *sui juris*." *Pizza U.S.A. of Pompano Inc. v. R/S Assocs. of Fla.*, 665 So. 2d 237, 239 (Fla. 4th DCA 1995) (quoting *Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101-02 (Fla. 1944)). "The party seeking to avoid enforcement of the choice-of-law provision has the burden of demonstrating that the foreign law contravenes public policy." *Lamb v. Lamb*, 154 So. 3d 465, 467 (Fla. 5th DCA 2015). Moreover, "a choice-of-law provision that provides for the application of non-Florida law precludes a claim under . . . FDUTPA"). *Herssein Law Grp. v. Reed Elsevier, Inc.*, No. 13-23010-CIV, 2014 WL 11370411, at *9 (S.D. Fla. Mar. 5, 2014)

A plaintiff's claim that a contract is unenforceable does not negate the choice-of-law provision therein. *Mazzoni*, 761 So. 2d at 313. For instance, in *Mazzoni*, the Florida Supreme Court held that a Delaware choice-of-law provision applied despite the plaintiffs' claims that they were fraudulently induced into entering into the contract. *Id.* Similarly, in *Gilman + Ciocia, Inc. v. Wetherald*, 885 So. 2d 900, 902 (Fla. 4th DCA 2004), the Fourth District Court of Appeal held that a New York choice-of-law provision applied, despite the plaintiff's claim of fraudulent inducement, because the plaintiff failed to establish that New York law contravened public policy. *See also Briceno v. Sprint Spectrum, L.P.*, 911 So. 2d 176, 179 (Fla. 3d DCA 2005) (holding that a Kansas choice-of-law provision applied despite the plaintiff's claim the contract was unconscionable).

Here, Plaintiff has submitted no evidence that applying California law as provided in the Terms contravenes public policy. Instead, without citing any legal authority for his proposition, Plaintiff argues that the contract's illusory provisions render the choice-of-law provision unenforceable. Plaintiff's argument, however, is without merit. Because Plaintiff has not

established that applying California law contravenes public policy, the instant choice-of-law provision governs this dispute. *Mazzoni*, 761 So. 2d at 313; *Gilman*, 885 So. 2d at 902; *Briceno*, 911 So. 2d at 179. Accordingly, because the California choice-of-law provision applies here, Plaintiff is barred from asserting his FDUTPA claim. *Herssein Law Grp*, 2014 WL 11370411, at *9.

Notwithstanding the applicable California choice-of-law provision, Plaintiff argues he is still not precluded from asserting the instant FDUTPA claim because it is a claim for injunctive relief independent from claims arising out of the Terms. Thus, Plaintiff argues the California choice-of-law provision is not relevant to the instant FDUTPA claim.

In *Fairbanks Contracting & Remodeling, Inc. v. Hopcroft*, 169 So. 3d 282, 283 (Fla. 4th DCA 2015), the Fourth District Court of Appeal analyzed whether a contract's forum selection clause applied in a FDUTPA action. The court noted that "[s]everal allegations in the complaint correspond[ed] directly to express contractual provisions [and] . . . expressly reference[d] the contract . . . ." *Id.* Thus, the court held that the forum selection clause applied to the FDUTPA action because there was a "clear nexus . . . between the FDUTPA claim and the contract . . . ." *Id.*

The instant facts are analogous to those in *Fairbanks*. Like the complaint in *Fairbanks*, Plaintiff's Complaint directly corresponds to the Terms. In fact, the entire FDUTPA claim solely arises out of the provisions in the Terms. Thus, because there is a clear nexus between the Terms and the instant FDUTPA claim, Plaintiff's claim for injunctive relief under FDUTPA is not independent from a claim arising out of the Terms. *Fairbanks*, 169 So. 3d at 283.

Plaintiff relies on inapposite case law in arguing that the FDUTPA claim for injunctive relief is independent from any claims arising out of the Terms. For instance, relying on

Democratic Republic of the Congo v. Air Capital Grp., LLC, No. 12-20607-CIV, 2014 WL 11429051, at *1 (S.D. Fla. Mar. 19, 2014), Plaintiff argues the FDUTPA claim is severable from any contractual claim arising out of the Terms. Plaintiff additionally relies on *Premix-Marbletite Manufacturing Corp. v. SKW Chemicals, Inc.*, 145 F. Supp. 2d 1348 (S.D. Fla. 2001) for the same proposition. However, in *Democratic Republic of the Congo*, the court denied a motion to reduce damages because FDUTPA damages and breach-of-contract damages were not duplicative. *Democratic Republic of the Congo*, 2014 WL 11429051, at *3-*4. The court did not rule that a FDUTPA claim cannot be governed by terms in the contract underlying the dispute. *Id.* Similarly, in *Premix*, the court ruled that the economic loss rule—which precludes tort recovery for purely economic loss—does not bar tort claims independent from claims arising out of a contractual relationship. *Premix*, 145 F. Supp. 2d at 1358-59. The court did not rule that FDUTPA claims are independent from claims arising out of a contract. *Id.*

In sum, Plaintiff has failed to establish that applying California law pursuant to the choice-of-law provision in the Terms contravenes public policy. Moreover, Plaintiff's contention that the California choice-of-law provision is irrelevant to the instant FDUTPA claim because it is a claim for injunctive relief independent from claims arising out of the Terms is without merit. The California choice-of-law provision therefore governs the instant dispute. Accordingly, "the application of [California] law precludes [Plaintiff's] claim under . . . FDUTPA." *Herssein Law Grp.*, 2014 WL 11370411, at *9.

C. WHETHER PLAINTIFF HAS STATED A LEGALLY SUFFICIENT FDUTPA CLAIM

Plaintiff's claim for injunctive relief under FDUTPA is governed by section 501.211(1), Florida Statutes which provides that:

Without regard to any other remedy or relief to which a person is entitled, anyone

> **aggrieved** by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.

(emphasis added). In order to state a FDUTPA claim pursuant to section 501.211(1), a plaintiff must plead that he is an "aggrieved" party. "[F]or someone to be aggrieved, the injury claimed to have been suffered cannot be merely speculative." *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 173 (Fla. 1st DCA 2015); *see also Macias v. HBC of Fla., Inc.*, 694 So. 2d 88, 90 (Fla. 3d DCA 1997).

In *Macias*, a plaintiff appealed the trial court's dismissal of her FDUTPA claim with prejudice. *Macias*, 694 So.2d at 89. In the FDUTPA claim, the plaintiff alleged she was denied the opportunity to compete for prize money in a contest organized by a radio station because the radio station prematurely canceled the contest. *Id.* Because the plaintiff's FDUTPA claim was based upon a speculative loss—that she *may* have earned a money prize had she participated in the contest—the court upheld the order dismissing her FDUTPA claim with prejudice. *Id.* at 90. The court reasoned that "such speculative losses . . . are not recoverable under FDUTPA." *Id.*

Here, as in *Macias*, Plaintiff alleges he suffered injuries that are wholly speculative. Plaintiff contends he is uncertain about whether Defendant will take Plaintiff's virtual items in Pokémon GO without compensation or whether Defendant will unilaterally terminate Plaintiff's Pokémon GO account. In fact, at the April 18, 2017 hearing, Plaintiff conceded he has suffered no actual injury. Instead, the basis of Plaintiff's Complaint is speculation about whether he will suffer an injury—if ever—at some point in the future. Accordingly, because Plaintiff's FDUTPA claim is based upon speculative injuries, Plaintiff has failed to state a legally sufficient FDUTPA claim.

Ahearn, 180 So. 3d at 173; *Macias*, 694 So. 2d at 90.

In sum, Defendant's Motion is granted because (1) Plaintiff lacks standing; (2) the California choice-of-law provision in the Terms bars Plaintiff's FDUTPA claim; and (3) Plaintiff has failed to state a legally sufficient FDUTPA claim.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss the Complaint is **GRANTED** and Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE.** Plaintiff shall file an Amended Complaint within ten (10) days.

DONE AND ORDERED, in Chambers at West Palm Beach, Palm Beach County, Florida this 1 day of May, 2017.

MEENU SASSER
Circuit Judge

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