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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TROY HOWARDS, an individual, Plaintiff, v. FIFTH THIRD BANK, Defendant.	Case No. CV 18-01963 DDP (PLAx) **ORDER GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE** [JS-6] [Dkt. 13, 21]

Presently before the court is Defendant's Motion to Transfer Venue to the United States District Court for the Southern District of Ohio pursuant to 28 U.S.C. § 1404(a). Having considered the submissions of the parties and heard oral argument, the court grants the motion to transfer and adopts the following Order.

I. Background

Defendant is an Ohio corporation that provides retail-banking services to customers and issues debit cards to its checking-account customers, allowing for electronic payments, purchases, and ATM withdrawals. (FAC ¶ 11.) Plaintiff Troy Howards brings this suit on behalf of a putative nationwide class of checking account holders who were allegedly overcharged Out of Network ATM Fees, Insufficient Funds Fees, and Overdraft Fees by Defendant, allegedly

in breach of the contract governing deposit accounts. (FAC ¶¶ 10, 96.)

All of Defendant's consumer banking accounts are subject to certain "Rules and Regulations."[1] (Motion to Transfer, Ex. A-4.)[2] Under these terms, Plaintiff agreed that the bank could debit his checking account when he used his debit card as a form of payment (R&R at 3, 13; Debit Card Agt. § 17.) When an account-holder opts in to Overdraft Coverage, a fee is charged when a debit is presented and there are insufficient funds in the customer's account to honor the debit. (R&R at 15.) The Rules and Regulations Fee Schedule defines the insufficient funds/overdraft fee as "$37/item for each occurrence." (FAC at ¶ 57.) Plaintiff alleges that under his Debit Card Disclosure and Card Agreement, Defendant agreed not to "assert a per item overdraft fee for . . . one-time debit card items unless [Plaintiff] accepted Overdraft Coverage[,]" and that Defendant also greed not to charge fees for "automatic debits," or "everyday debit card transactions" unless the account-holder opted in to Overdraft Coverage. (Id. at ¶¶ 85-87.) Plaintiff alleges he did not opt-in to Defendant's optional Overdraft Coverage for his account, but was nevertheless charged fees. (Id. at ¶ 91.)

Specifically, Plaintiff alleges Defendant improperly charged multiple non-sufficient funds fees for the same transactions. In

[1] Courts may consider facts outside the pleadings when ruling on motions to transfer brought under 28 U.S.C. § 1404. See Morgan Tire of Sacramento, Inc. v. Goodyear Tire & Rubber Co., 60 F. Supp. 3d 1109, 1113 (E.D. Cal. 2014)

[2] Defendant attaches several different versions of the Rules and Regulations applicable at different times. There is no dispute that the relevant choice of law and forum selection provisions do not differ between versions.

June 2017, for example, Plaintiff took an Uber ride and was charged $13.16, but had insufficient funds in his account to satisfy the charge. (Id. at ¶ 39.) Defendant rejected Uber's request for payment and charged Plaintiff a $37 Fee. (*Id.* at ¶ 40.) A week later, Uber again submitted the same transaction for payment. Defendant again rejected the transaction due to insufficient funds, and again charged Plaintiff's account a $37 fee. (*Id.* ¶ 41.) After Uber's third attempt to submit for payment, Defendant paid the transaction and charged a third $37 fee to Plaintiff's account. (*Id.* at ¶ 43.) In 2017, Defendant charged Plaintiff overdraft fees in connection with three other Uber rides. (*Id.* at ¶ 91-94.) Defendant labeled these resubmitted payment transactions as "Retry Payment[s]" on Plaintiff's bank statement. (*Id.* at ¶¶ 39-47.) Plaintiff alleges that these charges were "non-automatic," and that he should not have been charged overdraft fees without Overdraft Coverage. (*Id.* at ¶ 87-94.)

Plaintiff also alleges that he agreed that Out-of-Network ATM machines would be subject to a usage fee of $2.75, but that any ATMs inside Defendant's "network" would be fee-free. (Id. at ¶¶ 16-17.) Plaintiff alleges that he used a 7-Eleven ATM in Santa Monica, California that was part of Defendant's network, but was then charged an out-of-network fee for the cash withdrawal. (*Id.* at ¶¶ 17-18.)

Defendant now moves to transfer this case to the United States District Court for the Southern District of Ohio. The Rules and Regulations applicable to Plaintiff's checking account include, in addition to the provisions described above, several provisions pertaining to Electronic Banking. Among these provisions are a

forum selection clause and choice of law provision. (Mot. Ex. A-4 at 20.) The latter provides that Ohio laws "govern [the] Agreement regardless of the Customer or User's place of residence." The former states that the banking customer consents to personal jurisdiction and venue in Ohio, and that Ohio courts are "the exclusive forum with respect to any action or proceeding brought to enforce any liability or obligation under these Rules & Regulations . . . ." (Id.) Defendant now moves to transfer this matter to Ohio pursuant to the forum-selection clause.

II. Legal Standard

A court may transfer a case "for the convenience of parties and witnesses, in the interest of justice . . . to any other district or division where it might have been brought." 28 U.S.C § 1404(a). Transfer is appropriate when the moving party shows: (1) venue is proper in the transferor district court; (2) the transferee district court has personal jurisdiction over the defendants and subject matter jurisdiction over the claims; and (3) transfer will serve the convenience of the parties and witnesses, and will promote the interests of justice. Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F.Supp. 503, 506 (C.D.Cal. 1992). Courts conduct an individualized analysis of "convenience and fairness" when determining whether to exercise discretion to transfer a case. Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000).

The presence of a forum selection clause is a "significant factor" in a § 1404(a) analysis. Jones, 211 F.3d at 499. Generally, a valid forum-selection clause should be given "controlling weight in all but the most exceptional cases." Atl.

Marine Const. Co., Inc. V. U.S. Dist. Court for Western Dist. Of Texas, 571 U.S. 49, 62 (2013). A forum-selection clause is "presumptively valid and should not be set aside unless the party challenging the clause 'clearly show[s] that enforcement would be unreasonable and unjust.'" Jones, 211 F.3d at 497. To make the requisite showing, a party opposing a transfer must demonstrate that relevant public interest factors weigh against transfer. Atlantic Marine, 571 U.S. at 62. Relevant public interest factors include "the administrative difficulties flowing from court congestion, the local interest in having localized controversies decided at home, and the interest in having the trial of a diversity case in a forum that is at home with the law." Id. at 581 n.6.

III. Discussion

Defendant argues that the forum selection clause in the Rules and Regulations requires that this litigation proceed in Ohio. (Mot. at 3.) Because the plain language of the forum selection clause would so suggest, it is Plaintiff's burden to show that enforcement of the forum selection cause would be unreasonable and unjust. Jones, 211 F.3d at 497. District courts recognize three grounds for declining to enforce a forum-selection clause: "(1) if the inclusion of the clause in the contract was the result of 'fraud or overreaching'; (2) if the party seeking to avoid the clause would be effectively deprived of its day in court in the forum specified in the clause; or (3) if enforcement would contravene a strong public policy of the forum in which the suit is brought." Murphy v. Shneider Nat'l, Inc., 362 F.3d 1133, 1140 (9th

Cir. 2004) (citing Richards v. Lloyd's of London, 135 F.3d 1289, 1294 (9th Cir. 1998)).

Plaintiff's argument centers on the public policy rationale for finding a forum selection clause unenforceable. Plaintiff contends that the forum selection clause, when considered in conjunction with the choice of law provision, would necessarily result in the dismissal of Plaintiff's claim under California's Consumer Legal Remedies Act ("CLRA") if this case were transferred to the Southern District of Ohio, and that such transfer would therefore be tantamount to a waiver of the CLRA claim contrary to public policy.[3] See Cal. Civ. Code § 1751 ("Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void."); see also Doe 1 v. AOL, LLC, 552 F.3d 1077, 1084 (9th Cir. 2009).

Plaintiff's argument is predicated on the assertion that an Ohio court, applying Ohio choice of law rules, would automatically conclude that California law does not apply and apply Ohio substantive law instead, thus depriving him of his rights under the CLRA. Plaintiff's contention, however, is not persuasive. Plaintiff relies largely upon WIS-Bay City, LLC v. Bay City Parners, LLC, No. 3:08 CV 1730, 2009 WL 1661649 at *1 (N.D. Ohio June 12, 2009), and specifically the WIS-Bay court's observation that "Ohio courts will honor a choice-of-law clause selected by the parties to a contract." WIS-Bay, 2009 WL 1661649 at *3. Even if true, however, that statement does not stand for the proposition

[3] Some courts within this circuit have indeed considered choice of law provisions alongside forum selection clauses where the two would, in tandem, result in the waiver of an unwaivable right. See, e.g., Bayol v. Zipcar, *Inc.*, No. 14-cv-02483, 2014 WL 4793935, at *1-2 (N.D. Cal. Sept. 25, 2014).

that an Ohio court would necessarily refuse to apply California substantive law. Indeed, the WIS-Bay City court cited to the Supreme Court of Ohio's decision in Schulke Radio Prods., Ltd. v. Midwestern Broad. Co., 6 Ohio St. 3d 436, 438 (1983). In Schulke, when faced with a novel conflict of laws question, the Ohio Supreme Court did not reflexively apply Ohio substantive law, but instead invoked the Restatement (Second) of Law of Conflict of Laws approach, including the prescription that a choice of law provision in a contract should not be applied if such application "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state . . . and which . . would be the state of the applicable law in the absence of an effective choice of law by the parties." Schulke, 6 Ohio St. 3d at 438 (quoting Restatement (Second) Conflict of Laws § 187(2)(1971)).

To be sure, not all states, or federal courts sitting in diversity, follow such an approach. In Sessions v. Prospect Funding Holdings LLC, CV 16-02620 SJO (DTBx), 2017 WL 7156283 at *4 (C.D. Cal. July 13, 2017), for example, the court denied the defendant's motion to transfer from this district to New York because the plaintiff's complaint included unwaivable California claims and because "a court sitting in New York would apply New York substantive law and need not engage in a conflict-of-laws analysis" in the first instance. Sessions, 2017 WL 7156283 at *4 (emphasis added) (citing IRB Brasil Resseguros, S.A. v. Inepar Investments, S.A., 982 N.E.2d 609 (2012) ("The plain language of General Obligations Law § 5-1401 dictates that New York substantive law applies when parties include an ordinary New York choice-of-law provision . . . in their contracts. . . . To find here that

courts must engage in a conflict-of-laws analysis despite the parties' plainly expressed desire to apply New York law would frustrate the Legislature's purpose of encouraging a predictable contractual choice of New York commercial law and, crucially, of eliminating uncertainty regarding the governing law."). Because such application of New York law would necessarily have resulted in the effective waiver of the un-waivable California claims, the court concluded that transfer would contravene public policy and declined to enforce a forum selection clause. Id. Similarly, in Bayol, a defendant sought to transfer a case involving unwaivable CLRA claims to Massachusetts. 2014 WL 4793935 at *1. The Bayol court observed, however, that "[f]ederal courts in the First Circuit are free to enforce contractual choice of law clauses without independent analysis." Id. at *3 (citing Borden v. Paul Revere Life Ins. Co., 935 F.2d 370, 375 (1st Cir. 1991). In light of that First Circuit law, the Bayol court concluded that it was unlikely that a federal court in the District of Massachusetts would apply California law, and that the application of Massachusetts law would result in the waiver of CLRA protections and remedies. Id. at *4. Because such waiver would contravene public policy, the Bayol court denied the defendant's motion to transfer. Id. at *5.

Here, however, the circumstances here differ from those presented in cases such as Sessions and Bayol. As discussed above, Ohio courts, like California courts, engage in a choice of law analysis patterned on the Restatement. See Schulke, 6 Ohio St. 3d at 438; Restatement(Second) Conflict of Laws § 187(2)(1971). Thus, to the extent Plaintiff contends that transfer to Ohio would

necessarily result in a waiver of statutory rights contrary to public policy, Plaintiff is mistaken. Rather, the Ohio district court would engage in the same Restatement-based choice of law analysis that this Court would be required to perform were the case to remain here. In other words, if the application of Ohio law rather than California law would contravene California's fundamental public policy, with no greater or equivalent countervailing Ohio interest at stake, California law must apply, whether in this Court or in the Southern District of Ohio. Under such circumstances, transfer does not implicate public policy concerns. As the court explained when granting a motion to transfer brought under similar circumstances in Kabbash v. Jewelry Channel, Inc. USA, No. 15-4007DMG (MRWx), 2016 WL 9132930, (C.D. Cal. Feb. 22, 2016),

> Because Texas choice-of-law rules state that contractual choice-of-law provisions will not be enforced if doing so would contravene California's fundamental public policy, enforcement of the Forum Selection Clause and choice-of-law clause would not foreclose Plaintiffs' non-waivable rights under the CLRA. Texas courts could very well find that California law should apply. Therefore, in considering the Terms and Conditions' Forum Selection Clause and choice-of-law clause in tandem, the Court finds that enforcement of the clauses would not effectuate a waiver of Plaintiffs' rights under the CLRA.

Kabbash, 2016 WL 9132930 at *4.

Because the forum-selection clause at issue here is valid, Plaintiff's choice of forum is afforded no weight, and this court cannot consider any of the parties' private interests. Atlantic Marine, 571 U.S. at 63. Although this Court may still consider public interest factors, "those factors will rarely defeat a

transfer motion." Id. It is Plaintiff's burden to demonstrate that those factors render this case "exceptional." See id.; Kabbash, 2016 WL 9132930 at *5. Plaintiff, citing to cases that predate Atlantic Marine, has not met that burden here. Although Plaintiff points to some evidence that, at times, the median case in the Southern District of Ohio takes longer to reach disposition at trial than the median case in this district, that lone statistic does not render this case sufficiently unusual to warrant denial of transfer, particularly in light of Defendant's evidence that new case filings in this court outnumber those in the Southern District of Ohio by more than six to one. Nor is this Court persuaded by Plaintiff's unsupported assertion that it is "more appropriate to burden the citizens of California than those of Ohio concerning a controversy involving a California resident[] injured in California." (Opposition at 11:5-6.) Plaintiff's contention is somewhat at odds with his attempt to bring claims on behalf of a nationwide class, and even less compelling in light of the undisputed fact that Defendant is an Ohio corporation with no branches or retail presence within California. See Kabbash, 2016 WL 9132930 at *6.

Because the forum-selection clause contained within the Rules and Regulations does not contravene public policy, and because public interest factors do not render this case exceptional, the forum-selection clause should be enforced.

IV. Conclusion

For the reasons stated above, Defendant's Motion to Transfer to the Southern District of Ohio is GRANTED.[4]

IT IS SO ORDERED.

Dated: December 7, 2018

DEAN D. PREGERSON
United States District Judge

[4] Defendant's Motion to Dismiss is hereby VACATED.