UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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MOHIT RANDHAWA aka HARPAL SINGH and SHANNON CALLNET PVT LTD,

Plaintiffs,

v.

SKYLUX INC., INTERACTIVE INTELLIGENCE, INC., MUJEEB PUZHAKKARAILLATH, SKYLUX TELELINK PVT LTD, and DOES 1 through 20, inclusive,

Defendants.
_____/

NO. CIV. 2:09-2304 WBS KJN

MEMORANDUM AND ORDER RE: MOTIONS TO DISMISS, TO COMPEL ARBITRATION, AND TO TRANSFER VENUE

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Plaintiffs Mohit Randhawa aka Harpal Singh ("Randhawa") and Shannon Callnet PVT LTD ("Shannon Callnet") filed this action against defendants Skylux Inc. ("Skylux"), Skulux Telelink Pvt Ltd. ("STPL"), Interactive Intelligence, Inc. ("Interactive"), and Mujeeb Puzhakkaraillath alleging various state claims relating to a contract for calling center software. Defendant Interactive moves to dismiss Randhawa's claims against it

pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and moves the court for an order compelling arbitration of the remaining claims against them. In the alternative, Interactive moves for a transfer of venue to the Southern District of Indiana pursuant to 28 U.S.C. § 1404(a). Defendants Skylux, STPL, and Puzhakkaraillath move to dismiss plaintiffs' third cause of action for misrepresentation pursuant to Rule 12(b)(6) and for a transfer of venue to the Southern District of Indiana pursuant to 28 U.S.C. § 1404(a).

A. Interactive's Motion To Dismiss Claims by Randhawa

The court previously granted Interactive's motion to dismiss Randhawa's claims against Interactive for lack of standing in the court's November 3, 2009 Order. (Docket No. 26.) Plaintiffs' Second Amended Complaint ("SAC") remedied the standing problem by adding Shannon Callnet as plaintiff, and now both Randhawa and Shannon Callnet complain against Interactive. Interactive moves again to dismiss Randhawa's claims against it for lack of standing, leaving Shannon Callnet as the sole plaintiff complaining against it. (Interactive's Mot. to Dismiss, Docket No. 50.) Plaintiffs' Opposition to Interactive's motion does not address this argument. (See Opp'n to Interactive's Mot. to Dismiss, Docket No. 56.) For the same reasons expressed in the court's November 3, 2009 Order, Randhawa's claims against Interactive will be dismissed.

B. Interactive's Motion To Compel Arbitration

Interactive also moves for an order compelling arbitration of Shannon Callnet's claims against it, or, in the alternative, to transfer the action to the Southern District of

Indiana. Both parties agree that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, applies to the instant motion if the arbitration clause is found to be valid. (See Interactive's Mot. to Dismiss at 5; Opp'n to Interactive's Mot. to Dismiss at 2.) Because the License Agreement stipulates that Indiana law governs all disputes, Interactive asserts that Indiana's Uniform Arbitration Act also applies. See Uniform Arbitration Act, Ind. Code §§ 34-57-2-1 to 34-57-2-22. The FAA provides that contracts to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; see also Ind. Code § 34-37-2-1(a) (stating that written agreements to arbitrate are valid and enforceable "except upon such grounds as exist at law or in equity for the revocation of any contract"). A district court must issue an order compelling arbitration if 1) a valid agreement to arbitrate exists; and 2) that agreement encompasses the dispute at issue. See United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 766 (9th Cir. 2002).

Interactive has submitted a copy of a 2005 License Agreement with Shannon Callnet for the use of Interactive call center software which designates Indiana law as governing disputes under the License Agreement and mandates arbitration in cases where the licensee's principal offices are outside the United States. (Supp. Decl. Stephen R. Head Ex. A ¶¶ 8.9-.10.) STPL obtained Interactive licenses on behalf of Shannon Callnet on August 1, 2005, and Interactive mailed Shannon Callnet a copy of the License Agreement on October 6, 2005, which was signed for on October 10, 2005. (Id. Ex. A p.4, B-C.) These exhibits'

validity are unchallenged by Shannon Callnet.

At oral argument counsel for plaintiffs argued for the first time that they believe the entire License Agreement is invalid because they allege Skylux and STPL were engaged in a fraud against them. Yet Shannon Callnet is suing Interactive for, inter alia, breach of that very agreement. The SAC makes it clear that Shannon Callnet is suing Interactive for failing to provide the correct licenses that were purchased on its behalf by STPL. Those licenses were purchased under the terms of the License Agreement and not, as the court has previously noted, under the Memorandum of Understanding ("MOU") signed by Randhawa. (November 3, 2009 Order, (Docket No. 26), at 5.) Simply put, Shannon Callnet wants to enforce those parts of the contract it likes and ignore those parts it dislikes. Shannon Callnet cannot have it both ways.

Indeed, it is clear from the terms of the MOU between Randhawa and STPL and from the allegations contained in plaintiffs' SAC that STPL had the authority and was contractually obliged to obtain all of the required licenses for operating Shannon Callnet's call center. (SAC Ex. A; SAC ¶ 10); see Heritage Dev. of Ind., Inc. v. Opportunity Options, Inc., 773 N.E. 2d 881, 888 (Ind. App. 2002) ("Actual authority exists when the principal has, by words or conduct, authorized the agent to enter into a contract for the principal.").

Shannon Callnet also argues that it should not be bound by the arbitration clause because it did not know that STPL entered into the License Agreement on its behalf in order to obtain the Interactive software for its calling center. (Opp'n

to Interactive's Mot. to Dismiss at 2 (arguing that Randhawa was never aware of the License Agreement or its terms, and that Shannon Callnet never signed the License Agreement).) The relevant inquiry, however, is whether the terms of STPL's agency authorized it to assent to the License Agreement on Shannon Callnet's behalf. See Heritage Development of Indiana, 773 N.E. 2d at 888 ("In general, a principal will be bound by a contract entered into by the principal's agent on his behalf only if the agent had authority to bind him."). As explained supra, the answer to this inquiry is clearly "yes."

Even if STPL lacked the authority to assent to the arbitration clause on Shannon Callnet's behalf, Shannon Callnet subsequently ratified the License Agreement when it continued to use Interactive's software after it had actual notice of the terms of the License Agreement. See id. at 889 ("Ratification means the adoption of that which was done for and in the name of another without authority. . . . Corporations act only by and through their officers and agents, and ratification may be inferred from . . . passive acquiescence or from the receipt of benefits with knowledge.") (quoting State ex rel. Guaranty Bldg. & Loan Co. v. Wiley, 100 Ind. App. 438 (1935)) (internal quotation marks omitted). Interactive mailed a copy of the License Agreement to Shannon Callnet–-specifically to Rana Ravinder, Randhawa's brother-in-law and one of Shannon Callnet's directors--at their listed company headquarters in India two months after STPL obtained the licenses on Shannon Callnet's behalf. (Interactive Mot. to Dismiss at 6; Supp. Decl. Stephen R. Head Ex. B-C.) Shannon Callnet continued to use the

Interactive software governed by the License Agreement through May of 2009. (SAC ¶ 18.) Shannon Callnet therefore ratified the terms of the License Agreement including the arbitration clause.

The License Agreement states that where the "Customer's principal office is outside the United States . . . . any controversy or claim arising out of or relating to this Agreement or the existence, validity, breach or termination thereof . . . will be finally settled by compulsory arbitration . . . ." (Supp. Decl. Stephen R. Head Ex. A ¶ 8.10.1.) It is uncontested that Shannon Callnet's principal office is in Ludhiana, India (SAC ¶ 2) and that Shannon Callnet's claims against Interactive stem from its purchase and use of Interactive software. (See SAC ¶¶ 9-23.) Shannon Callnet's claims against Interactive, therefore, are subject to the arbitration clause of the License Agreement. The court will accordingly grant Interactive's motion to compel arbitration of Shannon Callnet's claims against it.

C. Skylux, STPL, and Puzhakkaraillath's Motion To Dismiss

Skylux, STPL, and Puzhakkaraillath move to dismiss plaintiffs' third cause of action for misrepresentation against them pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. In addition to arguing that the third cause of action fails to meet the heightened pleading standard of Rule 9(b), defendants also argue that none of the alleged misrepresentations are actionable in fraud as a matter of law. Plaintiffs' one-page Opposition to defendants' motion to dismiss does not address this latter argument.

On a motion to dismiss, the court must accept the

allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). To survive a motion to dismiss, a plaintiff needs to plead "only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," and where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 556-57).

The plaintiff must plead each element of fraud, which are: (1) misrepresentation; (2) scienter; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damages. In re Estate of Young, 160 Cal. App. 4th 62, 79 (2008). Plaintiff's third cause of action for misrepresentation is also subject to the heightened pleading standards of Federal Rule of Civil Procedure 9(b). Under Rule 9(b), "a party must state with particularity the circumstances constituting the fraud." Fed. R. Civ. P. 9(b). The plaintiffs must include the "who, what, when, where, and how" of the fraud. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1006 (9th Cir. 2003) (citation omitted). "The plaintiff must set forth what is false or misleading about a statement, and why it is false." Decker v. Glenfed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994). Additionally, "[w]here multiple

defendants are asked to respond to allegations of fraud, the complaint must inform each defendant of his alleged participation in the fraud." Ricon v. Reconstrust Co., No. 09cv937, 2009 WL 2407396, at *3 (S.D. Cal. Aug. 4, 2009) (quoting DiVittorio v. Equidyne Extractive Indus., 822 F.2d 1242, 1247 (2d Cir. 1987)).

Plaintiffs' SAC alleges six material misrepresentations by Skylux, STPL, and Puzhakkaraillath: that 1) STPL would be responsible for the entire implementation of the calling center software and the calling system; 2) Puzhakkaraillath, Skylux, and STPL would provide customers to the call center; 3) the call center would generate at least one million dollars in profits per year; 4) the call center would have enough business to stay open twenty-four hours a day, seven days a week; 5) besides the initial investment, Randhawa would not have to invest any more money in the business; and 6) Puzhakkaraillath, Skylux, and STPL would immediately obtain all licenses and permits necessary for the operation of the call center. (SAC ¶¶ 10, 32.)

Plaintiffs have remedied many of the defects present in the First Amended Complaint, yet how STPL is involved in the alleged misrepresentations remains unclear. Plaintiffs allege that Skylux contacted them and that they spoke with Puzhakkaraillath in April and May of 2005. (SAC ¶¶ 9-11). However, plaintiffs allege that Puzhakkaraillath was making representations on behalf of Skylux, not STPL. It appears that STPL was not involved in the MOU negotiations and representations that allegedly induced plaintiffs to enter into the MOU. While the court recognizes that Skylux, STPL, and Puzhakkaraillath are related, plaintiffs must clarify each party's role in the alleged

misrepresentations such that they can more clearly respond to plaintiffs' allegations.

Defendants argue that representations one, two, and six cannot constitute fraud as a matter of law because they merely recite contractual provisions. Under California law, however, a promise made without any intention of performance constitutes fraudulent deceit. Cal. Civ. Code §§ 1709, 1710(4). A cause of action for fraudulent inducement is valid where the plaintiff pleads that the defendant never intended to honor its contractual promises. See, e.g., Tom Trading, Inc. v. Better Blue, Inc., No. 00-56793, 2002 WL 74447, at *2 (9th Cir. Jan. 18, 2002) (intent to breach, however, does not rise to misrepresentation until breach occurs); Aguilera v. Pirelli Armstrong Tire Corp., 223 F.3d 1010, 1017 (9th Cir. 2000) (discussing § 1710(4)); Robinson Helicopter, 34 Cal. 4th at 989-90 (tort of fraudulent inducement to enter contract permissible); Las Palmas Associates v. Las Palmas Ctr. Associates, 235 Cal. App. 3d 1220, 1238-39 (1991) ("[N]o public policy is served by permitting a party who never intended to fulfill his obligations to fraudulently induce another to enter into an agreement. . . . A promise to do something necessarily implies the intention to perform, and, where such an intention is absent, there is an implied misrepresentation of fact, which is actionable fraud.") (internal quotation marks and citations omitted); Harazim v. Lynam, 267 Cal. App. 2d 127, 133 (1968).

The SAC alleges that defendants' representations were false and were made with the intent to induce plaintiffs to enter the MOU. It remains unclear, however, whether plaintiffs intend

to allege that defendants never intended to honor their contractual promises when they made the above representations to plaintiffs. The court will therefore allow plaintiffs leave to amend their complaint.

Several deficiencies remain with respect to representations three, four, and five. Plaintiffs have not pled facts showing their reliance on these representations was reasonable. Instead, plaintiffs have merely recited the elements of fraud. These representations appear to be nothing more than mere speculation about the future profitability of the call center, and ordinarily such statements cannot satisfy the first or fourth elements of fraud. See Harazim, 267 Cal. App. 2d at 131 (speculation of future profit is not actionable in fraud); Cal. Civil Code § 1710 (misrepresentation generally must be past or existing fact). Furthermore, plaintiffs have not pled facts to support an inference that these statements were false when made and that defendants knew they were false. Rather, the alleged facts support no more than the inference that the joint venture was slightly less successful than the parties anticipated. (See SAC ¶ 33 (alleging that call center was open six days a week rather than 24/7 as promised).) As such, these representations are insufficient to survive a motion to dismiss.

D. Skylux, STPL, and Puzhakkaraillath's Motion To Transfer Venue

Skylux and Puzhakkaraillath joined in Interactive's motion to transfer venue, and additionally moved to transfer the entire action even in the event that Interactive's motion to dismiss and compel arbitration was granted. (Skylux Mot. To

Dismiss 13.) 18 U.S.C. § 1404 permits a district court to transfer a civil action to any other district where it might have been brought for "the convenience of parties and witnesses, [and] in the interest of justice." 18 U.S.C. § 1404(a). The purpose is "to prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) (internal citation omitted). "The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986). The district court must consider both public factors which go to the interests of justice, and private factors, which go to the convenience of the parties and witnesses. Id.

First, a district court must determine that the action could have been brought in the forum to which transfer is sought. See Hatch v. Reliance Ins. Co., 758 F.2d 409, 414 (9th Cir. 1985). The court then engages in a multi-factor analysis which may consider: 1) the plaintiff's choice of forum; 2) convenience of the parties; 3) convenience of witnesses; 4) ease of access to the evidence; 5) familiarity of each forum with applicable law; 6) feasability of consolidation with other claims; 7) any local interest in the controversy; and 8) the relative court congestion and time of trial in each forum. See Vu v. Ortho-McNeil Pharm., Inc., 602 F. Supp. 2d 1151, 1156 (N.D. Cal. 2009)

Venue is proper in a district "in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)(2). Plaintiffs' SAC alleges that

Interactive--a company located within the jurisdiction of the Southern District of Indiana--refused to provide plaintiffs with the correct licenses for its calling center software after being contacted by plaintiffs. (SAC ¶ 22.) Plaintiff states several causes of action based on Interactive's alleged failure to provide the correct software licenses. It is therefore clear that this action could have been brought in the Southern District of Indiana.

Defendants have not, however, met the burden of showing that transfer to another venue is appropriate. A substantial portion of the transactions and actions alleged in the SAC occurred while Randhawa was a resident of San Joaquin County, which is within the Eastern District of California. Plaintiffs' choice of forum is therefore afforded substantial weight. See Jones v. GNC Franchising, Inc., 211 F.3d 495 (9th Cir. 2000) (location where relevant agreements were negotiated and executed is considered in plaintiff's choice of forum); Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987) (plaintiff's choice of forum generally accorded great weight).

Nor do the convenience of the parties and witnesses or access to evidence weigh in favor of transfer. The only Indiana party is Interactive, and the court will grant its motion to dismiss Randhawa' claims against it and to compel arbitration of Shannon Callnet's claims against it. All remaining parties are located in New York, India, and California; no other party is located in Indiana. Sacramento and Indiana appear equally convenient for the India parties. Sacramento may be slightly less convenient for the New York defendants, and Indiana would be

less convenient for Randhawa. With technological advances in document storage and retrieval, transporting documents does not generally create a burden. Van Slyke v. Capital One Bank, 503 F. Supp. 2d 1353, 1362 (N.D. Cal. 2007).

Although the applicable law for resolving disputes under the MOU has not yet been determined, no party has argued that Indiana law would govern the MOU. While the Interactive License Agreement is to be interpreted according to Indiana law, the court will order arbitration of Shannon Callnet's claims against Interactive. In any event, plaintiffs' claims under the License Agreement are overshadowed by plaintiffs' claims under the MOU. This factor therefore weighs against transfer.

All parties concede the feasibility of consolidation and local interest factors are neutral. While the Southern District of Indiana is less congested than the Eastern District of California (see Decl. Gregg A. Rapoport Ex. A-B), courts should not transfer a case when the other factors weigh against transfer. See Costco Wholesale Corp. v. Liberty Mut. Ins. Co., 472 F. Supp. 2d 1183 (C.D. Cal. 2007). The court will therefore deny defendants' motion to transfer venue.

IT IS THEREFORE ORDERED that defendant Interactive's motion to dismiss Randhawa's claims against it be, and the same hereby is, GRANTED with prejudice.

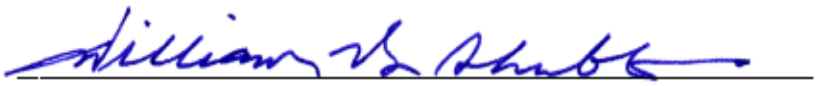
IT IS FURTHER ORDERED that defendant Interactive's motion to compel arbitration is GRANTED.

IT IS FURTHER ORDERED that defendant Skylux, STPL, and Puzhakkaraillath's motion to dismiss plaintiffs' third claim for misrepresentation is GRANTED with leave to amend.

IT IS FURTHER ORDERED that defendant Skylux, STPL, and Puzhakkaraillath's motion to transfer venue to the Southern District of Indiana is DENIED.

Plaintiffs hall have twenty days from the date of this Order to file an amended complaint consistent with this Order.

DATED: March 4, 2010



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE