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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GLORIA YOUNG, et al.,
Plaintiffs,
v.
HOLLAND AMERICA LINE, N.V., et al.,
Defendants.

Case No. 16-cv-04820-JST
**ORDER DENYING MOTION TO
TRANSFER**
Re: ECF No. 12

Before the Court is Defendant Holland America Line, N.V.’s (“Holland”) Motion to Transfer Venue. ECF No. 12. For the reasons set forth below, the Court will deny the motion.

I. BACKGROUND

In September 2015, Plaintiffs Gloria Young and Margaret Cephias-Gross (“Plaintiffs”) booked a 14-day Caribbean cruise. ECF No. 1 ¶ 14. Plaintiffs chose a cruise operated by Holland, but purchased their tickets through Defendant Costco Travel. *Id.* Plaintiffs allege that they suffered physical injuries during their cruise. On August 22, 2016, Plaintiffs filed suit against Holland, Carnival Corporation, and Costco Travel (“Defendants”), claiming that Defendants’ negligence caused their injuries. *Id.* ¶ 1. On October 17, 2016, Holland filed a motion to transfer venue to the Western District of Washington “pursuant to the terms of the forum-selection clause in the Passage Contract that governs the relationship between the moving party and Plaintiffs.” ECF No. 12 at 6. Plaintiffs oppose the motion.¹

¹ Although Plaintiffs filed their opposition brief six minutes past the filing deadline, ECF No. 35-1 at 6, the Court will exercise its discretion to consider it. Therefore, the Court grants Plaintiffs’ administrative motion in part, ECF No. 35, and accepts Plaintiffs’ corrected opposition and supporting declarations. ECF Nos. 30-32. The Court denies the administrative motion to the extent it asks the Court to consider the untimely Supplemental Declaration of John Scarpino. ECF No. 36.

1 **II. LEGAL STANDARD**

2 Section 1404(a) is the proper “mechanism for enforcement of forum-selection clauses that
3 point to a particular federal district.” Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of
4 Texas, 134 S. Ct. 568, 579 (2013). “[W]hen the parties’ contract contains a valid forum-selection
5 clause,” that clause “represents the parties’ agreement as to the most proper forum.” Id. (citing
6 Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 31 (1988)). Therefore, “a valid forum-selection
7 clause [should be] given controlling weight in all but the most exceptional cases.” Id.
8 Specifically, the “presence of a valid forum-selection clause requires district courts to adjust their
9 usual § 1404(a) analysis in three ways: (1) “the plaintiff’s choice of forum merits no weight,”
10 (2) “a court evaluating a defendant’s § 1404(a) motion to transfer based on a forum-selection
11 clause should not consider arguments about the parties’ private interests”, and (3) “when a party
12 bound by a forum-selection clause flouts its contractual obligation and files suit in a different
13 forum, a § 1404(a) transfer of venue will not carry with it the original venue’s choice-of-law
14 rules.” Id. at 581-82.

15 Before a forum-selection clause gains the benefit of this deferential 1404(a) analysis,
16 however, it must be valid. Because it is the moving party here, Holland bears the burden of
17 demonstrating the forum-selection clause’s validity. See Commodity Futures Trading Comm’n v.
18 Savage, 611 F.2d 270, 279 (9th Cir. 1979). Only once the clause is determined to be valid do
19 Plaintiffs face the “heavy burden of proof” to demonstrate unfairness that would justify setting
20 aside the forum-selection clause. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991).

21 The Ninth Circuit “employ[s] a two-pronged ‘reasonable communicativeness’ test . . . to
22 determine under federal common law and maritime law when the passenger of a common carrier
23 is contractually bound by the fine print of a passenger ticket.” Wallis v. Princess Cruises, Inc.,
24 306 F.3d 827, 835 (9th Cir. 2002). The first prong “focuses on the physical characteristics of the
25 ticket.” Id. The second prong looks at “the circumstances surrounding the passenger’s purchase
26 and subsequent retention of the ticket/contract.” Id. So long as the term at issue was reasonably
27 communicated, a passenger “need not have actually read a ticket to be bound by the terms.”
28 Walker v. Carnival Cruise Lines, 63 F. Supp. 2d 1083, 1089 (N.D. Cal. 1999), affirmed in relevant

1 part on reconsideration, 107 F. Supp. 2d 1135 (N.D. Cal. 2000).

2 **III. ANALYSIS**

3 Here, the focus of the parties' dispute is whether the forum-selection clause in Holland's
4 Passage Contract was reasonably communicated to Plaintiffs.² In its moving papers, Holland
5 focuses the Court's attention on its "Internet-based booking conformation and check-in system."
6 ECF No. 12 at 6. Holland claims that both Plaintiffs booked their cruise reservations through this
7 online system. Id. In order to book online, Holland states that Plaintiffs "were required to first
8 view and then acknowledge the terms and conditions of the Passage Contract," which include the
9 forum-selection clause. Id. Indeed, Holland claims "Plaintiffs would have been unable to print
10 their boarding passes without first accepting the terms and conditions." Id. at 7. Holland then
11 explains how, within the Passage Contract, the forum-selection clause is "notably distinguished"
12 by its physical characteristics. Id. at 12-13.

13 The problem with Holland's argument is that Plaintiffs did not use the online booking
14 system. In their opposition papers, Plaintiffs explain that they purchased their cruise tickets
15 through Costco Travel in September 2015. ECF No. 29 at 5. On September 11, 2015, a Costco
16 Travel agent sent Plaintiffs written confirmation of their booking along with their itinerary. ECF
17 No. 30 at 7-16.³ None of these documents mentioned the forum-selection clause. On October 12,
18 2015, Costco Travel sent Plaintiffs another email regarding their upcoming trip, which, again, did
19 not include the forum-selection clause. Id. at 17-27. The October email directed Plaintiffs to
20 check in for their cruise on Holland's website in order to obtain their boarding passes and luggage
21 tags. ECF No. 30 at 17. Matt Nodine, the Costco travel agent who completed Plaintiffs'
22 bookings, recalls reminding Plaintiffs of the need to check in online during their September phone
23 call as well. ECF No. 34 at 2.

24 After receiving the October 12 email, Plaintiffs attempted to check in with Holland's

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26 ² There is no dispute that the forum-selection clause names the Western District of Washington.

27 ³ Both Plaintiffs submitted declarations with supporting documents. ECF No. 30 (Young
28 Declaration; ECF No. 31 (Cephas-Gross Declaration). Because these documents are largely
identical, the Court refers only to Plaintiff Young's Declaration and documents.

1 online system but were unable to do so. ECF No. 29 at 6. Together, Plaintiffs called Holland’s
2 customer service line for help and spoke with Holland employee Sean Johnson.⁴ Id. Plaintiffs
3 claim that they described their problem with Holland online system to Johnson, who then
4 promised to send them their boarding passes and luggage tags. Id. Plaintiffs received emails with
5 those documents just as the call ended. ECF No. 30 at 33. Page 8 of the 11-page boarding pass
6 contains the warning, “IMPORTANT NOTICE REGARDING THE CRUISE CONTRACT,” and
7 related disclosures regarding the forum-selection clause that Holland discusses at length in its
8 transfer motion. Id. at 42. According to Plaintiffs, Johnson did not direct them to “review the
9 cruise contract or accept the terms and conditions” of the contract while on the call. Id.

10 Plaintiffs’ next contact with Holland occurred on November 3, 2016, when they called the
11 help line again to obtain their stateroom assignments. ECF No. 29 at 7. As before, the Holland
12 representative did not notify Plaintiffs that they needed to accept the terms of the Passage
13 Contract. Id. Plaintiffs boarded the cruise on November 8, 2015. Id.

14 The upshot is that Plaintiffs were not notified of the forum-selection clause in their Passage
15 Contract until after they booked their cruise tickets and, even then, the clause was buried near the
16 back of an 11-page document. For three reasons, the Court finds that this chain of events did not
17 result in an effective forum-selection clause.

18 As an initial matter, the Court is skeptical that a term disclosed only after a purchase is
19 made and at a time when cancellation would cost up to 75% of the ticket price, ECF No. 29 at 11,
20 can satisfy the reasonable communicativeness test. See Carnival Cruise Lines, Inc. v. Shute, 499
21 U.S. 585, 595 (1991) (finding it important that the cruise ship passengers “retained the option of
22 rejecting the contract with impunity”). Holland responds that another court in this district rejected
23 a similar cancellation fee theory. ECF No. 34 at 7 (citing Walker, 63 F. Supp. 2d at 1090.
24 Holland is correct that the Walker court described a \$100 cancellation fee as a “relatively minor
25 charge [that] is not an unreasonable infringement on either plaintiff’s option to reject the ticket
26 contract.” Id. But Holland leaves out the fact that the court contrasted the \$100 fee before it with

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28 ⁴ Johnson did not submit a declaration because he is no longer employed with Holland. ECF No.
34 at 6.

1 another case in which cancellation resulted in the passenger forfeiting the entire fare, a penalty that
2 the Walker court agreed would provide no reasonable opportunity to reject the provision. Id. The
3 75% cancellation fee that Plaintiffs faced is much closer to a forfeiture of the entire fare than it is
4 to a \$100 fee. This is an extrinsic factor that weighs against a finding that the clause is valid.

5 Second, the rest of Holland’s analysis of extrinsic factors relies on the proper functioning
6 of its online system. ECF No. 12 at 13 (“[T]he structure of [Holland’s] online check-in process is
7 designed to ensure that all passengers are ‘meaningfully informed of the contractual terms at
8 stake’ before entering into the agreement.”). That analysis is unhelpful because, as described
9 above, Plaintiffs never completed the online check-in process.

10 Third, even assuming that Holland’s after-the-fact notice could suffice, the physical
11 characteristics of the Passage Contract emailed on October 16 did not reasonably communicate the
12 forum-selection clause to Plaintiffs. In so finding, the Court assesses “[f]eatures such as size of
13 type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a
14 passenger can read the provisions in question.” Wallis v. Princess Cruises, Inc., 306 F.3d 827, 835
15 (9th Cir. 2002). Here, it is true that the contract says in all capitals: “YOUR ATTENTION IS
16 ESPECIALLY DIRECTED TO CLAUSES A.1, A.3, A.4, A.5, A.6, A.7, A.9 and C.4 OF THE
17 CRUISE CONTRACT, WHICH CONTAIN IMPORTANT LIMITATIONS ON YOUR RIGHT
18 TO ASSERT CLAIMS AGAINST US AND AGAINST CERTAIN THIRD PARTIES.” ECF No.
19 30 at 42. This disclosure, however, came on the eighth page of the document containing
20 Plaintiffs’ tickets, and the face of the ticket itself did not highlight the existence of these limits on
21 Plaintiffs’ rights. Id. at 35. In sum, the existence of the forum-selection clause was not
22 conspicuous.

23 Holland points out that Plaintiffs’ Complaint alleges that they “were required to ‘Accept’
24 the terms and conditions” in the contract in order to confirm their booking and that they “entered
25 into a contract” with Defendants for a cruise. ECF No. 34 at 5. Holland argues these allegations
26 are inconsistent with Plaintiffs’ current claim that they were unaware of the forum-selection
27 clause. The Court disagrees. Plaintiffs could have generally agreed to accept terms or to form a
28 contract and still not have been given reasonable notice of the forum-selection clause. Plaintiffs

1 are not, as Holland claims, “asserting a breach of contract claim for a contract that they now argue
2 they were never aware of.” Id. Rather, they are arguing that Holland never reasonably
3 communicated the contract’s forum-selection clause. That term, not the existence of a contract
4 generally, is the relevant question here.

5 Finally, Holland argues that even if the forum-selection clause was not reasonably
6 communicated to Plaintiffs, it was communicated to the Costco travel agent who booked their
7 tickets. ECF No. 34 at 7. Through this agent, Holland argues that Plaintiffs had “constructive
8 possession” of the ticket terms and therefore constructive notice. Id. As support, Holland cites
9 one unpublished out-of-circuit district court case. See Hicks v. Carnival Cruise Lines, Inc., 1995
10 A.M.C. 281 (E.D. Pa. 1994).

11 That case does not help Holland. The Hicks court did not find that a travel agency was
12 plaintiff Hicks’ agent for purposes of notice. Rather, it found that the organizer of Hicks’ group
13 trip, who was himself a member of that group and who had received the tickets of all the group
14 members, was Hicks’ agent. The court specifically declined to decide whether the ticket agency
15 that had sold the tickets was also Hicks’ agent. Id. at 288 n.17 (“While Defendant argues
16 strenuously that the agency is also Hicks’ agent, I need not decide that issue to dispose of this
17 motion.”). Thus, the Hicks court never reached the issue for which Holland cites it.⁵ Moreover,
18 nowhere in his declaration does Nodine, the Costco Travel agent, even mention his knowledge of
19 the forum-selection clause. The Court will not find reasonable communication on this basis.

20 In sum, Holland’s forum-selection clause does not meet the reasonable communicativeness
21 test, meaning the Court need not adjust its § 1404(a) analysis. Because the forum-selection clause
22 was the only basis for Holland’s Motion to Transfer Venue, see ECF No. 12 at 9 (noting that “the
23 propriety of the original venue is not disputed”), the motion must therefore be denied.

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27 ⁵ Another distinction is that, unlike in the present case, plaintiff Hicks could have cancelled her
28 trip without forfeiture once she became aware of the forum selection clause. Id. at 283.

CONCLUSION

Holland's Motion to Transfer Venue is denied.

IT IS SO ORDERED.

Dated: December 28, 2016



JON S. TIGAR
United States District Judge

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