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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MIKE CLARK-ALONSO,
Plaintiff,
v.
SOUTHWEST AIRLINES CO., *et al.*,
Defendants.

Case No. [19-cv-06113-SI](#)

**ORDER DENYING DEFENDANT'S
MOTION TO TRANSFER VENUE**

Re: Dkt. No. 16

On February 14, 2020, the Court held a hearing on defendant's motion to transfer this case to the United States District Court for the Northern District of Texas. For the reasons set forth below, the Court DENIES defendant's motion to transfer.

BACKGROUND

The lawsuit arises out of defendant Southwest Airlines Company's ("Southwest") alleged "policy and practice of recording and/or monitoring, without the consent of all parties, (1) California residents' telephone calls to Defendant's toll-free Rapid Rewards customer service telephone number and, on information and belief, (2) Defendant's return calls to California residents." Compl. ¶ 1 (Dkt. No. 1-1).

Plaintiff Mike Clark-Alonso is and was at all times relevant herein a resident of California. *Id.* at ¶ 5. Defendant Southwest is a Texas corporation with its headquarters in Dallas, Texas. *Id.* at ¶ 6. Plaintiff is a member of defendant's Rapid Rewards program, which is a frequent flyer program. Tilley Decl., ¶¶ 4, 18 (Dkt. No. 16-1). According to the declaration of John Richardson Tilley, Southwest's Business Consultant, Rapid Rewards Program Administrator, Southwest customers can enroll in the Rapid Rewards program through the internet, telephone, or mail. *Id.* at

1 ¶ 6. Mr. Tilley states, “[r]egardless of whether a Southwest customer enrolled over the internet,
2 over the telephone, or through the mail, he or she received a copy of Southwest’s Rapid Rewards
3 Rules and Regulations (‘Rules and Regulations’).” *Id.* Mr. Tilley states, “[t]he Rules and
4 Regulations make clear that by enrolling and participating in the Rapid Rewards program, each
5 customer agreed to abide by the Rules and Regulations.” *Id.* at ¶ 7.¹

6 Southwest has submitted a copy of the Rules and Regulations that were in effect in July
7 2019. *Id.*, Ex. A. The Rules and Regulations is a six-page document, with the relevant provisions
8 posted at the end of page five under the sub-section “Additional Program Rules and Regulations.”
9 Tilley Decl. Ex. A, “Program Terms and Conditions” at 12-13. The Rules and Regulations contain
10 the following relevant provisions²:

11 . . .

12 Any and all matters arising out of or relating to the program rules and/or the subject
13 matter hereof shall be governed by, construed, and enforced in accordance with the
14 laws of the United States of America, and to the extent not preempted by Federal
15 law, the laws of the State of Texas without regard to conflict of law principles,
16 regardless of the legal theory upon which such matter is asserted.

17 You and we consent to the personal and exclusive jurisdiction and venue of the state
18 and federal courts within Dallas County, Texas. You and we also agree to litigate
19 any disputes between or involving you and us exclusively in the state and federal
20 courts within Dallas County, Texas. You agree that any cause of action arising out
21 of and/or relating to this program be commenced within (2) years after the cause of
22 action accrues. Otherwise, such cause of action is permanently barred.

23 **NO TRIAL BY JURY:**

24 **YOU WAIVE A TRIAL BY JURY IN ANY ACTION OR PROCEEDING**
25 **BETWEEN YOU AND SOUTHWEST ARISING OUT OF AND/OR**
26 **RELATING TO THIS PROGRAM.**

27 **NO CLASS ACTIONS:**

28 ¹ At the hearing, defense counsel represented that before an individual could enroll in the Rapid Rewards program, he or she was required to affirmatively agree to be bound by the Rules and Regulations. While Mr. Tilley’s declaration states that “The Rules and Regulations make clear that by enrolling and participating in the Rapid Rewards program, each customer agreed to abide by the Rules and Regulations,” Mr. Tilley does not state that customers affirmatively consent prior to enrollment. In any event, because the Court concludes that plaintiff’s dispute is not covered by the Rules and Regulations, the precise manner by which customers enroll in the program and are informed about the Rules and Regulations is not significant.

² The print used in Ex. A is considerably finer than the print used in this order.

1 **YOU WAIVE ANY RIGHT TO PURSUE DISPUTES ON A CLASSWIDE**
2 **BASIS. YOU AGREE THAT NO CLAIM OR DISPUTE ARISING OUT OF**
3 **AND/OR RELATING TO THIS PROGRAM MAY BE JOINED WITH A**
4 **CLAIM OR DISPUTE OF ANY OTHER PERSON OR ENTITY, AND YOU**
5 **MAY NOT ASSERT A CLAIM IN A REPRESENTATIVE CAPACITY ON**
6 **BEHALF OF ANYONE ELSE IN ANY LAWSUIT OR OTHER LEGAL**
7 **PROCEEDING.**

8 *Id.* (emphasis in original).

9 On July 22, 2019, while located in California, plaintiff used his cordless telephone to call
10 defendant’s Rapids Rewards number, which connects callers to defendant’s customer service
11 representatives. Compl. at ¶¶ 12, 16. Plaintiff alleges that defendant failed to disclose to plaintiff
12 that the telephone conversation was being recorded. *Id.* at ¶ 17. Plaintiff claims that he did not give
13 consent for the telephone conversation to be recorded or monitored. *Id.* Plaintiff claims that he
14 believes other callers in California who called defendant’s Rapid Rewards program were not
15 informed the calls were being recorded. *Id.* at ¶ 18.

16 On August 12, 2019, plaintiff filed this lawsuit against Southwest and DOES 1 through 100,
17 who plaintiff alleges were responsible in some manner for the alleged occurrences. *Id.* at ¶ 7. The
18 complaint alleges one cause of action under the California Invasion of Privacy Act (“CIPA”), Cal.
19 Penal Code §§ 632.7³, 637.2,⁴ for unlawful recording and/or monitoring of cellular and cordless
20 telephone communications. Plaintiff filed the complaint on behalf of himself and as a representative
21 of a putative class of “all California residents who, while located within California at any time during
22 the [applicable time period], and while one or both parties to the call were using a cellular or cordless
23 telephone, engaged in a telephone conversation with Defendant’s employee(s) or agent(s) and were
24 recorded and/or monitored by Defendant without any warning or disclosure at the call outset.” *Id.*

25 ³ California Penal Code section 632.7, titled “Cordless or cellular radio telephones;
26 intentional recordation of communications without consent,” provides: “(a) Every person who,
27 without the consent of all parties to a communication, intercepts or receives and intentionally
28 records, or assists in the interception or reception and intentional recordation of, a communication
transmitted between two cellular radio telephones, a cellular radio telephone and a landline
telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless
telephone and a cellular radio telephone [shall be subject to punishment].”

⁴ California Penal Code section 637.2, titled “Civil action by person injured,” provides: “(a)
Any person who has been injured by a violation of this chapter may bring an action against the
person who committed the violation for the greater of the following amounts: (1) [\$5,000] per
violation; (2) three times the amount of actual damages, if any, sustained by the plaintiff.”

1 at ¶ 21. Plaintiff requests certification of the California Penal Code section 632.7 class, an order
2 declaring that defendants have violated section 632.7, and monetary/statutory damages. *Id.* at 11.

3
4 **LEGAL STANDARD**

5 In diversity cases, “federal law governs the analysis of the effect and scope of forum
6 selection clauses.” *Jones v. GNC Franchising, Inc.*, 211 F.3d 495 (9th Cir. 2000); *see also Yei A.*
7 *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018). Federal contract law
8 applies to “interpret the scope of a forum-selection clause even in diversity actions.” *Yei A. Sun*,
9 901 F.3d at 1086; *see also Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009).

10 If the Court determines that a dispute is covered by a forum-selection clause, the Court
11 should enforce the forum-selection clause “unless enforcement is shown by the resisting party to be
12 ‘unreasonable’ under the circumstances.” *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972);
13 *Murphy v. Schneider National Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2003). A “a valid forum-selection
14 clause [should be] given controlling weight in all but the most exceptional cases.” *Atlantic Marine*
15 *Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 62 (2013). “The party challenging
16 the clause bears a ‘heavy burden of proof’ and must ‘clearly show that enforcement would be
17 unreasonable and unjust, or that the clause was invalid for such reasons as fraud or over-reaching.’”
18 *Murphy*, 362 F.3d at 1140 (quoting *Bremen*, 407 U.S. at 15).

19 A forum selection clause is unenforceable if “enforcement would be ‘unreasonable’ under
20 the circumstances.” *Hendricks v. Bank of America, N.A.*, 408 F.3d 1127, 1137 (9th Cir. 2005). A
21 forum selection clause is unreasonable if (1) its incorporation into the contract was the result of
22 fraud, undue influence, or overweening bargaining power; (2) the selected forum is so “gravely
23 difficult and inconvenient” that the complaining party will “for all practical purposes be deprived
24 of its day in court;” or (3) enforcement of the clause would contravene a strong public policy of the
25 forum in which the suit is brought. *Argueta v. Banco Mexicano*, 87 F.3d 320, 325 (9th Cir. 1996)
26 (internal citations omitted).

1 **DISCUSSION**

2 Defendant argues that plaintiff filed suit in this Court contrary to the venue and forum
3 selection clauses set forth in the Rapid Rewards program’s Rules and Regulations, and that he is
4 obligated to litigate all disputes arising out of this agreement in the courts of Dallas, Texas. Plaintiff
5 contends⁵ that his claim is not covered by the forum-selection clause, and that if the Court
6 determines it is within the scope of the Rules and Regulations, that the forum-selection clause is
7 unenforceable.

8 Plaintiff argues the forum-selection clause contained in the Rapid Rewards Rules and
9 Regulations does not apply to this dispute because his claim (1) “does not require any interpretation
10 of the [Rules and Regulations]”; (2) “does not require analysis of the Rapids Reward program”; and
11 (3) “does not stem from or require membership or participation in the [program].” Opp’n at 3 (Dkt.
12 No. 19). Defendant contends that the Rules and Regulations’ forum-selection clause applies because
13 the sole cause of action “arises out of a phone call [the plaintiff] placed” to the Rapid Rewards
14 telephone number. Reply at 14 (Dkt. No. 20).

15 Federal contract law applies to “interpret the scope of a forum-selection clause even in
16 diversity actions,” such as this one. *Yei A. Sun*, 901 F.3d at 1086; *see also Doe 1 v. AOL LLC*, 552
17 F.3d 1077, 1081 (9th Cir. 2009). “In interpreting a forum-selection clause under federal law, ‘we
18 look for guidance “to general principles for interpreting contracts.”’” *Yei A. Sun*, 901 F.3d at 1086
19 (quoting *Doe 1*, 552 F.3d at 1081). The Ninth Circuit has held that “forum-selection clauses
20 covering disputes ‘arising out of’ a particular agreement apply only to disputes ‘relating to the
21 interpretation and performance of the contract itself.’” *Yei A. Sun*, 901 F.3d at 1086 (quoting *Cape*
22 *Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 922 (9th Cir. 2011). Forum-selection clauses
23 covering disputes “relating to” an agreement “apply to any disputes that reference the agreement or
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25 ⁵ At the hearing, defense counsel argued that plaintiff’s opposition did not contend that
26 plaintiff’s cause of action was not within the scope of the forum-selection clause. The Court
27 disagrees, finding that while plaintiff could have presented the issue more directly, plaintiff’s
28 opposition does assert that the claim does not stem from any dispute related to the Rapid Rewards
Program. *See* Opp’n at 3-4 (Dkt. No. 19). In any event, before the Court can enforce a forum-
selection clause, the Court must determine whether the dispute is covered by the forum-selection
clause.

1 have some ‘logical or causal connection’ to the agreement.” *Yei A. Sun*, 901 F.3d at 1086

2 The Court concludes that forum-selection clause does not apply to plaintiff’s claim. The
3 forum-selection clause applies to “any and all matters arising out of or relating to” the Rules and
4 Regulations “and/or the subject matter hereof.” Tilley Decl., Ex. A at 12. Here, the dispute does
5 not “arise” out of the Rapid Rewards Program or the Rules and Regulations because plaintiff’s claim
6 does not involve the interpretation or performance of the Rapid Rewards Rules and Regulations.
7 *Cf. Manetti-Farrow v. Gucci America, Inc.*, 858 F.2d 509, 513-14 (9th Cir. 1988) (holding tort
8 claims were covered by a forum-selection clause because resolution of the tort claims required
9 interpretation of the parties’ contract). The complaint alleges that defendant recorded plaintiff’s
10 telephone call without his consent in violation of the CIPA. Resolving plaintiff’s CIPA claim will
11 not require the interpretation of the Rules and Regulations, nor does the CIPA claim involve a
12 determination of whether plaintiff or defendant has performed under the Rules and Regulations. *See*
13 *id.*

14 The Court also concludes that plaintiff’s claim does not “relate to” the Rules and
15 Regulations because the CIPA claim does not “reference the agreement or have some ‘logical or
16 causal connection’” to the Rules and Regulations. *Yei A. Sun*, 901 F.3d at 1086-87 (holding that the
17 plaintiffs’ claims were “related to” the parties’ contract, and thus that forum-selection clause
18 applied, because “the Suns’ claim that Kao engaged in various fraudulent practices to induce them
19 to invest \$2.8 million in Advanced China Healthcare relates to the Share Purchase Agreements
20 because the Suns invested pursuant to those agreements”). Here, plaintiff’s CIPA claim does not
21 reference the Rules or Regulations, nor does it have a logical or causal connection to those Rules
22 and Regulations. *Cf. Taub v. Parker Jewish Inst. for Health Care & Rehab.*, Case No. 18-cv-07491-
23 RS, 2019 WL 3292369, at *7 (N.D. Cal. July 22, 2019) (holding dispute was within scope of forum-
24 selection clause because dispute “related to the contract as Taub asserts Defendants are pursuing an
25 illegal debt that is invalid by virtue of the Admission Agreement between the parties”).

26 Defendant argues the “plaintiff’s sole cause of action arises out of a phone call” that plaintiff
27 made to the Rapid Rewards customer service number, and thus that his claim is “related to” the
28 Rapid Rewards program. Reply at 14 (Dkt. No. 20). Defendant is essentially arguing that but for

1 plaintiff's membership in the Rapid Rewards program, he would not have called the Rapid Rewards
2 phone number. The Court finds that this connection is too attenuated to support a conclusion that
3 plaintiff's CIPA claim "relates to" the Rapid Rewards Rules and Regulations.

4 Accordingly, the Court DENIES defendant's motion to transfer venue based upon the Rules
5 and Regulations forum-selection clause. In light of the Court's conclusion that plaintiff's CIPA
6 claim does not arise out of or relate to the Rules and Regulations, the Court finds it unnecessary to
7 address the parties' arguments about the enforceability of the forum-selection clause.

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CONCLUSION

10 For the foregoing reasons and for good cause shown, the Court hereby DENIES defendant's
11 motion to transfer venue.

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IT IS SO ORDERED.

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Dated: February 24, 2020

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SUSAN ILLSTON
United States District Judge

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