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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIASAFE2CORE, INC.,  
Plaintiff,

v.

HCMM, INC., et al.,  
Defendants.

Case No. 17-cv-02945 NC

**ORDER GRANTING MOTION TO  
DISMISS FOR *FORUM NON  
CONVENIENS***

Re: Dkt. No. 6

Plaintiff Safe2Core, Inc. brings this breach of contract action against defendant HCMM, Inc., a business consulting firm. HCMM initially moved to dismiss Safe2Core's complaint because it was filed in an improper venue. However, the Court converted HCMM's improperly filed motion to dismiss for improper venue into a *forum non conveniens* motion. Dkt. No. 16. The Court gave Safe2Core the opportunity to respond to the conversion of the motion, and Safe2Core filed a supplemental brief. *Id.*

The Court reviewed all of the filings by HCMM and Safe2Core and GRANTS HCMM's *forum non conveniens* motion. This case is DISMISSED WITHOUT PREJUDICE to it being refiled in the Hamilton County Court of Common Pleas, Cincinnati, Ohio.

Case No. 17-cv-02945 NC

1 **I. BACKGROUND**

2 This case arose from a contract between Safe2Core and HCMM for HCMM to  
3 provide Safe2Core with its business consulting services. Dkt. No. 1 at 3. The contract  
4 contained the following forum selection clause: “it is specifically agreed that, in the event  
5 of litigation, exclusive jurisdiction shall vest in the Hamilton County Court of Common  
6 Pleas, Cincinnati, Ohio; Ohio law applying.” *Id.* at 6. Safe2Core alleges that HCMM did  
7 not complete the work and provide the services promised in the contract. Dkt. No. 1 at 4.  
8 Safe2Core then terminated the agreement with HCMM, and demanded HCMM return the  
9 \$78,548.83 Safe2Core had paid it. *Id.* at 4-5. Safe2Core then filed this lawsuit for (1)  
10 intentional misrepresentation, (2) negligent misrepresentation, (3) concealment, and (4)  
11 breach of contract.

12 Both parties consented to the jurisdiction of a magistrate judge under 28 U.S.C. §  
13 636(c). Dkt. Nos. 11, 12.

14 **II. LEGAL STANDARD**

15 “[T]he appropriate way to enforce a forum-selection clause pointing to a state or  
16 foreign forum is through the doctrine of *forum non conveniens*.” *Atlantic Marine Const.*  
17 *Co. Inc. v. U.S. Dist. Court*, 134 S. Ct. 568, 580 (2013).

18 *Forum non conveniens* allows a court to decline to exercise its jurisdiction in cases  
19 where litigation in the forum would place an undue burden upon one of the parties. *Forum*  
20 *non conveniens* is an “exceptional tool to be used sparingly[.]” *Ravelo Monegro v. Rosa*,  
21 211 F.3d 509, 514 (9th Cir. 2000). Yet the *forum non conveniens* determination ultimately  
22 lies in the court’s discretion. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir.  
23 2001). It is the moving party’s burden to make “a clear showing of facts which establish  
24 such oppression and vexation of a defendant as to be out of proportion to plaintiff’s  
25 convenience, which may be shown to be slight or nonexistent.” *Ravelo*, 211 F.3d at 514.  
26 “A party moving to dismiss based on *forum non conveniens* bears the burden of showing  
27 (1) that there is an adequate alternative forum, and (2) that the balance of private and  
28 public interest factors favors dismissal.” *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104 (9th

1 Cir. 2002).

2 “In a typical case not involving a forum-selection clause, a district court  
3 considering a § 1404(a) motion (or a *forum non conveniens* motion) must evaluate both the  
4 convenience of the parties and various public-interest considerations.” *Atlantic Marine*,  
5 134 S. Ct. at 581. “The calculus changes, however, when the parties’ contract contains a  
6 valid forum-selection clause, which ‘represents the parties’ agreement as to the most  
7 proper forum.’” *Id.* (quoting *Stewart Org. Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)).

8 Where there is a valid forum selection clause, the court’s usual *forum non*  
9 *conveniens* analysis changes in three ways. *Id.* First, the court may accord no weight to  
10 the plaintiff’s chosen forum; “the plaintiff must bear the burden of showing why the court  
11 should not transfer the case to the forum to which the parties agreed.” *Id.* at 581-82.  
12 “Second, a court evaluating a defendant’s § 1404(a) motion to transfer based on a forum-  
13 selection clause should not consider arguments about the parties’ private interests.” *Id.* at  
14 582. The public interest factors that a court may consider are “the administrative  
15 difficulties flowing from court congestion; the local interest in having localized  
16 controversies decided at home; [and] the interest in having the trial of a diversity case in a  
17 forum that is at home with the law. The Court must also give some weight to the  
18 plaintiffs’ choice of forum.” *Id.* (quoting *Piper Aircraft*, 454 U.S. at 241 n.6) (alteration in  
19 original).

20 The party challenging the forum selection clause must show that the “public-interest  
21 factors overwhelmingly disfavor a transfer.” *Id.* at 583. “In all but the most unusual cases,  
22 therefore, ‘the interest of justice’ is served by holding parties to their bargain.” *Id.*

23 **III. DISCUSSION**

24 **A. The Forum Selection Clause Is Enforceable.**

25 The heart of Safe2Core’s opposition to HCMM’s *forum non conveniens* motion  
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1 concerns the enforceability of the forum selection clause.<sup>1</sup> This is because if the clause is  
2 invalid and therefore unenforceable, the burden shifting analysis in *Atlantic Marine* does  
3 not apply. 134 S. Ct. at 581. In its supplemental brief in response to the motion,  
4 Safe2Core apparently concedes that if the *Atlantic Marine* factors were applied, the motion  
5 to transfer would have to be granted. Dkt. No. 17.

6 Forum selection clauses “are prima facie valid and should be enforced unless  
7 enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”  
8 *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). Such unreasonable  
9 circumstances include the following:

- 10 (1) [The forum selection clause’s] incorporation into the  
11 contract was the result of fraud, undue influence, or  
12 overweening bargaining power; (2) the selected forum is so  
13 gravely difficult and inconvenient that the complaining party  
14 will for all practical purposes be deprived of its day in court; or  
15 (3) enforcement of the clause would contravene a strong public  
16 policy of the forum in which the suit is brought.

17 *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (internal citations and  
18 quotation marks omitted).

19 Here, the Court is unpersuaded that the forum selection clause was incorporated  
20 into the contract as a result of fraud, undue influence, or overweening bargaining power.  
21 *Id.* Safe2Core argues that it was induced into entering into the *underlying contract* by  
22 fraud, but this argument does not go to whether the forum selection clause was agreed to as

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23 <sup>1</sup> Safe2Core argues that the forum selection clause is actually a venue selection clause, and  
24 so a *forum non conveniens* motion is inappropriate. Dkt. No. 17 at 5. The Court finds this  
25 argument unpersuasive. Safe2Core quotes language in *Alexander v. Superior Court*, a case  
26 in which the clause at issue was explicitly a state county venue selection clause. 114 Cal.  
27 App. 4th 723, 726-27 (2003) (“4.12 Choice of Law: The construction, interpretation, and  
28 performance of this Agreement shall be governed by the laws of the State of California and  
each party specifically stipulates to *venue* in Santa Clara County, California.” (emphasis  
added)). That is not the case here, and law regarding venue shopping in California in  
contravention with California state law has nothing to do with a forum selection clause  
specifying Ohio as the forum state, and also specifying the county in which the case must  
be brought. Safe2Core cannot change the fact that Ohio, of which Hamilton County is a  
part, is “a place of jurisdiction.” *Forum*, BLACK’S LAW DICTIONARY (9th ed. 2009).  
Because the clause at issue here is a forum selection clause, “[a] contractual provision in  
which the parties establish the place (such as the country, state, or type of court) for  
specified litigation between them[,]” the reasoning in *Alexander* is irrelevant here. *Forum-*  
*selection clause*, BLACK’S LAW DICTIONARY (9th ed. 2009).

1 a result of fraud. *Id.* Safe2Core’s vaguely made allegations regarding duress regarding the  
 2 underlying contract are likewise irrelevant here. Dkt. No. 14 at 6. Safe2Core further  
 3 asserts that the forum selection clause is “crudely-drafted, arguably a grammatically  
 4 unintelligible sentence.” *Id.* The Court had no such difficulty discerning the clause’s  
 5 meaning on its first reading. Safe2Core’s fraud arguments go towards the *other* clauses in  
 6 the contract, not to the forum selection clause.<sup>2</sup> This element weighs towards HCMM.  
 7 Safe2Core does not address the second and third elements set forth in *Argueta*, either in its  
 8 opposition, or in its supplemental brief, except to point out that Cincinnati is 2,500 miles  
 9 away. The Court considers waived any other argument regarding the inconvenience of the  
 10 Ohio court or arguments regarding the public policy of California. *Argueta*, 87 F.3d at  
 11 325.

12 Given that the *Argueta* factors weigh in favor of finding the forum selection clause  
 13 enforceable, the Court next considers *Atlantic Marine*.

14 **B. The Public Interest Factors Weigh In Favor of HCMM.**

15 The pleadings by both parties are barren of substantive analysis of the *Atlantic*  
 16 *Marine* factors. This failure to set forth arguments prejudices Safe2Core, as it is  
 17 Safe2Core’s burden to show why the forum selection clause should not be enforced.

18 The public interest factors the Court may consider are “‘the administrative  
 19 difficulties flowing from court congestion; the local interest in having localized  
 20 controversies decided at home; [and] the interest in having the trial of a diversity case in a  
 21 forum that is at home with the law.’ The Court must also give some weight to the  
 22 plaintiffs’ choice of forum.” *Atlantic Marine*, 134 S. Ct. at 581 n.6 (quoting *Piper*

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24 <sup>2</sup> In its supplemental brief, Safe2Core argues the Court should reject the forum selection  
 25 clause because it was part of an adhesion contract under California law. Dkt. No. 17 at 4-  
 26 5. Safe2Core also argues the Court should apply California law to the interpretation of the  
 27 contract. Based on the language of the forum selection clause, however, the Court  
 28 disagrees. Yet even applying California law, the forum selection clause *would* be  
 enforceable, as HCMM points out. *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1028 (9th  
 Cir. 2016) (collecting California state court cases). Safe2Core’s authorities do not stand  
 for the proposition that forum selection clauses in adhesion contracts are never  
 enforceable, and its argument lacks factual allegations regarding this issue.

1 *Aircraft*, 454 U.S. 235, 241 n.6). The party challenging the forum selection clause must  
2 show that the “public-interest factors overwhelmingly disfavor a transfer.” *Id.* at 583.

3 Safe2Core did not brief these factors, but the Court will consider them. First, the  
4 Court is unfamiliar with Ohio law, which it would have to apply to interpret the contract.  
5 *Id.* at 581 n.6. Further, the Court, like all courts in this district, is busy with many matters.  
6 Second, the events in this case occurred in this district, so this factor weighs in favor of  
7 retaining the case. *Id.* The third factor, the interest in having the case decided in a forum  
8 that is at home with the law suggests that this case should be heard in Ohio, because the  
9 contract will be construed in accordance with Ohio state law. *Id.* All of Safe2Core’s  
10 claims are state law claims. Fourth, Safe2Core’s choice in filing this case here is a reason  
11 to keep this case in the Northern District of California. *Id.* In weighing these factors, the  
12 Court finds they are insufficient to overwhelmingly disfavor granting HCMM’s motion.  
13 *Id.* at 583. Thus, HCMM’s *forum non conveniens* motion is GRANTED.

14 Lastly, the Court notes an issue that neither party briefed: the clause’s limitation of  
15 lawsuits filed under the contract to Ohio state court. Under Ninth Circuit law, such a  
16 limitation is permissible. *See Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081-82 (9th Cir. 2009)  
17 (“We hold that the forum selection clause at issue here—designating the courts of  
18 Virginia—means the state courts of Virginia only; it does not also refer to federal courts in  
19 Virginia”). As a result, rather than transfer this case to an Ohio federal court, the Court  
20 dismisses this case without prejudice to refile in Ohio state court.

21 **IV. CONCLUSION**

22 The Court GRANTS HCMM’s motion and DISMISSES this case WITHOUT  
23 PREJUDICE to it being refiled in the Hamilton County Court of Common Pleas,  
24 Cincinnati, Ohio.

25 **IT IS SO ORDERED.**

26  
27 Dated: September 20, 2017

  
NATHANAEL M. COUSINS  
United States Magistrate Judge