IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MYADVERTISINGPAYS (MAP) LIMITED, *et al.*, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-16-3541
VX GATEWAY, INC., *et al.*, Defendants.	§	

MEMORANDUM AND ORDER

This case is before the Court on the Motion to Dismiss [Doc. # 48] filed by Defendants VX Gateway Corp. ("VX-Texas"), VX Gateway, Inc. ("VX-Panama"), VX Gateway Limited ("VX-UK"), Celia Dunlop, and Timothy Mackay, in which Defendants argue, *inter alia*, that the case should be dismissed under the doctrine of *forum non conveniens* in favor of mandatory arbitration in Panama.[1] Plaintiffs MyAdvertisingPays (MAP) Limited ("MAP") and Michael Deese filed a Response [Doc. # 54], and Defendants filed a Reply [Doc. # 56]. Based on the Court's review of the record and the application of relevant legal authorities, the Court **grants** the Motion to Dismiss in favor of arbitration in Panama.

[1] Also pending is Plaintiffs' Motion for a Preliminary Injunction [Doc. # 49], to which Defendants filed a Response [Doc. # 50], and Plaintiffs filed a Reply [Doc. # 55]. Because the case is dismissed in favor of arbitration in Panama, the Motion for a Preliminary Injunction is denied without prejudice.

I. BACKGROUND

MAP is an Anguillan corporation. Plaintiff Deese, the President of MAP, is a resident and citizen of Mississippi.

VX-Texas is a Texas corporation, VX-Panama is Panamanian corporation, and VX-UK is a corporation in the United Kingdom.[2] Defendants Celia Dunlop and Timothy Mackay are citizens of Australia and permanent residents of Panama. Dunlop is the owner of VX-Panama, VX-Texas, and VX-UK. Mackay is Dunlop's husband.

Plaintiffs allege that MAP operates a marketing website where individuals purchase "credit packs" which allow them to view certain advertisements on myadvertisingpays.com for which the individuals are paid based on the number of advertisements they view. Plaintiffs allege that they entered into a contract with "VX Gateway" for payment processing services which would allow individuals to use credit cards to purchase the "credit packs." Plaintiffs allege that "VX Gateway" improperly withdrew millions of dollars from MAP's account.

Plaintiffs filed their First Amended Complaint, asserting causes of action for breach of contract, conversion, fraud, breach of fiduciary duty, and violation of the

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[2] In its First Amended Complaint, Plaintiffs refer to VX-Texas, VX-Panama, and VX-UK collectively as "VX Gateway."

Texas Deceptive Trade Practices Act. Plaintiffs allege that they seek to recover assets that were "fraudulently retained in violation of the payment processing agreement (the "Agreement") entered into by and between Plaintiffs and VX Gateway." *See* First Amended Complaint [Doc. # 67], ¶ 1. Plaintiffs assert diversity of citizenship as the basis for this Court's subject matter jurisdiction.

Defendants filed their Motion to Dismiss, asserting the doctrine of *forum non conveniens* as a basis for dismissal. The Motion to Dismiss has been fully briefed and is now ripe for decision.

II. ***FORUM NON CONVENIENS***

VX-Panama and MAP entered into a Merchant Service Agreement (the "Agreement" referred to in the First Amended Complaint). The Agreement provides that it is to be "interpreted, construed and enforced in all respects in accordance with the laws of the Republic of Panama . . .." *See* Agreement, Exh. C to Motion to Dismiss, ¶ 18.10. The Agreement contains a Dispute Resolution provision that requires the parties to attempt to resolve any dispute through mediation. "Any dispute or claim arising out of or relating to [the] Agreement, except claims involving intellectual property and claims for indemnification, that cannot be settled through mediation will be resolved by binding arbitration" in Panama. *See id.*, ¶ 18.7.

"Arbitration provisions . . . are a species of forum-selection clauses." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 698 (2010) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)); *see also SGIC Strategic Glob. Inv. Capital, Inc. v. Burger King Europe GmbH*, 839 F.3d 422, 426 (5th Cir. 2016). The parties agree that this *forum non conveniens* issue is governed by the decision by the United States Supreme Court in *Atlantic Marine Construction Co., Inc. v. United States District Court*, __ U.S. __, 134 S. Ct. 568 (2013), relating to enforcement of forum-selection clauses. The Supreme Court in *Atlantic Marine* held that "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens.*" *Atl. Marine*, 134 S. Ct. at 580. This Court is to evaluate a forum-selection clause pointing to a foreign forum in the same manner, with certain modifications, as it would evaluate a federal forum-selection clause under 28 U.S.C. § 1404(a). *See id.*

Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). To determine whether to transfer a case pursuant to § 1404(a), the district court considers private and public interest factors. *See Weber v. PACT XPP Tech., AG*, 811 F.3d 758, 766 (5th Cir.

2016). The private-interest factors include "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 766-67 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n. 6 (1981)). The 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 767.

"When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause." *Atl. Marine*, 134 S. Ct. at 580. "Only under extraordinary circumstances unrelated to the convenience of the parties" should the Court decline to enforce a valid forum-selection clause. *See id.*

Forum selection clauses are presumed valid and "should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). In this case, there is no dispute that the Agreement is a valid contract between the parties. Indeed, Plaintiff Deese admits that he read the Agreement and had no objection to

signing it with the forum-selection provision. *See* Depo. of Michael Deese, Exh. G to Motion to Dismiss, p. 22.

The first modification to the usual § 1404(a) analysis is that "the plaintiff's choice of forum merits no weight. Rather, as the party defying the forum-selection clause, the plaintiff bears the burden of establishing" that enforcement of the forum-selection clause "is unwarranted." *Atl. Marine*, 134 S. Ct. at 581. The plaintiff is deemed to have exercised its "plaintiff's venue privilege" by agreeing in the contract to resolve disputes in a particular forum, and only that first, contractual choice "deserves deference." *See id.* at 582.

The second modification to the § 1404(a) analysis is that the Court "should not consider arguments about the parties' private interests." *Id.* In this case, Plaintiffs argue that it would be inconvenient to arbitrate this dispute in Panama. But "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Id.* As a result, this Court "must deem the private-interest factors to weigh entirely in favor of the preselected forum." *Id.*

The Court may, however, consider the § 1404(a) public interest factors, which 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." *Weber*, 81 F.3d at 767 (quoting *Piper Aircraft*, 454 U.S. at 241 n.6). "Because those factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases." *Id.* In this case, there is no evidence of administrative difficulties in conducting an arbitration in Panama. The local interest in having localized controversies decided at home favors enforcement of the forum-selection clause. VX-Panama is a Panamanian corporation, and Defendants Dunlop and Mackay are permanent residents of Panama. Neither MAP nor Deese is a citizen of Texas. The Agreement provides that it is governed by Panamanian law and, therefore, the third private-interest factor also favors enforcement of the forum selection clause.

Plaintiffs argue that the forum-selection clause is unenforceable because it (1) would deprive Plaintiffs of their day in court due to unfairness and (2) contravenes public policy. *See* Response to Motion to Dismiss, pp. 20-21. Plaintiffs have failed to satisfy their heavy burden to demonstrate that arbitration in Panama would be overly burdensome or unfair. The parties to the Agreement and the primary parties to this lawsuit are a Panamanian company and an Anguillan company. It appears that Deese attended his deposition in Panama and has Panamanian lawyers who represent him. There is no evidence that Plaintiffs cannot obtain adequate relief in the

Panamanian arbitration. With reference to public policy, Plaintiffs have not identified any public policy that would be contravened by enforcement of the forum-selection clause. There is no evidence of Panamanian law to the contrary.

Where, as here, the parties have agreed to a valid forum-selection clause, the Court should generally enforce the parties' selection. *See Atl. Marine,* 134 S. Ct. at 581. "Only under extraordinary circumstances unrelated to the convenience of the parties" should the Court decline to enforce a valid forum-selection clause. *See id.* Plaintiffs have failed to demonstrate extraordinary circumstances that would lead this Court to deny enforcement of the Agreement's provision requiring disputes that are not resolved through mediation to be resolved through arbitration in Panama. As a result, the Court must enforce the forum-selection clause and will dismiss this case in favor of arbitration in Panama pursuant to ¶ 18.7 of the Agreement.

III. CONCLUSION AND ORDER

The parties agreed that any dispute that could not be resolved through mediation would be resolved by arbitration in Panama. As a result, it is hereby

ORDERED that Defendants' Motion to Dismiss [Doc. # 48] is **GRANTED** to the extent that this case is **DISMISSED** in favor of arbitration in Panama. It is further

ORDERED that Plaintiffs' Motion for a Preliminary Injunction [Doc. # 49] is **DENIED WITHOUT PREJUDICE** to any rights Plaintiffs may have to renew the preliminary injunction request in connection with the Panamanian arbitration.

SIGNED at Houston, Texas, this 16th day of **May, 2017**.

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE