IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

REALSCAPE GROUP LLC DBA REALOGIC SOLUTIONS,	)	CASE NO.: 1:24-cv-00558
Plaintiff,	)	JUDGE CHARLES ESQUE FLEMING
vs.	)	
ORACLE AMERICA, INC.,	)	**MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR TO TRANSFER VENUE**
Defendant.	)	

I. INTRODUCTION AND BACKGROUND

Plaintiff, Realogic Group, LLC ("Realogic") brought this action on behalf of itself and a putative class of customers swindled by Defendant, Oracle America, Inc. ("Oracle"). Plaintiff, along with many other Oracle customers, believed they had purchased functional software products only to discover that Oracle could never have provided the products it had promised. Plaintiff and putative class members were instead locked into expensive subscription fee obligations anyway, disproportionately benefitting Oracle. Oracle now seeks to avoid accountability for its misdeeds by seeking an order from this Court dismissing this case or transferring the matter across the country to a forum that Realogic never agreed to with its motion to dismiss or, in the alternative to transfer venue ("Motion"). Realogic respectfully requests that the Court deny the motions.

For the Court to grant Oracle's Motion, the Court must first conclude that the litany of onerous terms contained in hidden documents were "agreed" to by the parties and that they are enforceable—a question that has not been definitively proven at this early stage in the case. As set forth in the Complaint and herein, these additional terms were never "agreed upon" due to Oracle's deliberate obfuscation of their existence. As pleaded in Plaintiff's Complaint, there was no meeting of the minds on any of the terms Oracle claims were incorporated into the parties' agreement for Oracle to provide functioning software in exchange for thousands of dollars of fees.

Oracle's deception is apparent from the face of the "Docusigned" documents attached to its Motion. Oracle seeks to incorporate terms and conditions into the parties' relationship through its "Subscription Services Agreement" (SSA) which Oracle never affirmatively disclosed or provided to Realogic. Instead, Oracle presented a document to Realogic via its emailed "docusign" platform described as an "Estimate," which in common business parlance refers to a preliminary, non-binding document.

However, the "Estimate" is a sleight of hand because it contains a hyperlink that is not easily discernible as it is contained within nondescript fine print on the fourth page of the "Estimate" document. That hyperlink (if discovered) directs users---not to terms and conditions themselves---but to a website where users are presented with a maze of options in the form of dropdown menus each of which lead to another series of options with multiple documents with more than one"subscription agreement" document referenced on these websites. As a result determining which document applies is not abundantly clear from the four corners of the Estimate document. Therefore, in order for Oracle's customers to see, review, and agree to the "contract" terms, they would have to (1) conclude that the improperly termed "estimate" is really

a final contract (2) discover the tiny print several pages in with a disguised hyperlink (3) click on the hyperlink that arrives at a website labeled "Oracle NetSuite Cloud Services Contracts" with no fewer than five separate drop down menus leading to different areas, (4) select the correct dropdown menu, and (5) select from a series of options within the correct drop down menu to locate and then select the correct version of the document Oracle claims applies. It is difficult for Oracle to argue with a straight face that these terms were ever seen by the Plaintiff let alone accepted or agreed to by Realogic. Indeed, there is no evidence that Realogic even knew the terms existed at all.

As a result, Oracle's motion is fundamentally flawed because it prematurely relies on terms embedded on a website in a deceptive and misleading manner rather than presented to Realogic or other Oracle customers in an upfront and transparent manner that could conceivably be considered fair notice. The terms Oracle seeks to impose here were buried within a labyrinthine series of hyperlinks and websites, rendering them objectively inaccessible, unreviewable and, ultimately, not agreed to. Oracle now seeks to use these terms to avoid responsibility, proof that the terms of the SSA never really contain promises to perform by Oracle anyway and instead are utilized to evade any requirement to provide the functioning software promised to Realogic and the scores of other small businesses it sells subscriptions to.

This deceptive (and apparently widespread) practice completely undermines any claim that the parties had a mutual agreement on these terms, as there could never have been a genuine "meeting of the minds" under the circumstances. Thus, Oracle's arguments premised on these contract terms are meritless, including all the purported defenses to Realogic's legitimate claims and its claim to venue in the Northern District of California.

Realogic, an Ohio limited liability company with its principal place of business in Rocky River, Ohio, initiated this action to address substantial grievances arising from Oracle's deceptive business practices. Oracle, a Delaware corporation with its primary place of business in Austin, Texas, regularly conducts business in Ohio, thereby establishing sufficient grounds for this Court's jurisdiction and venue under 28 U.S.C. § 1332 and § 1367. Given the legitimate basis for jurisdiction in the Northern District of Ohio and the fact that Oracle never disclosed any valid forum clause, allowing this case to proceed in this forum is entirely appropriate. As a result, Oracle's Motion is properly denied in its entirety.

II. LAW AND ARGUMENT

A. Realogic Pleaded A Valid Breach of Contract Claim Against Oracle For Its Failure To Provide Functioning Software Products As Agreed

While Oracle feigns confusion about what contract claim Realogic pleaded, it is apparent that Realogic pleaded the elements of a contract claim since Realogic identified the basic elements of the transaction the parties had agreed to, which is sufficient under Ohio law's interpretation of the Uniform Commercial Code. See Premier Constr. Co. v. Maple Glen Apartments & Townhouses Ltd., 2020-Ohio-4779, 159 N.E.3d 1201 (12th Dist. 2020)(a contract for sale of goods may be made in any manner sufficient to show agreement). In the absence of a fully formed agreement, the contract "will consist of those terms on which the writings of the parties agree and any U.C.C. supplemental terms." Extreme Mach. & Fabricating, Inc. v. Avery Dennison Corp., 2016 Ohio 1058, 49 N.E.3d 324, (Ohio App. 7th Dist.). Here the parties had an agreement on the basics: that Oracle would agree to provide software it possessed for the requested functions and Realogic would pay for the software license. Therefore, this is sufficient to form an agreement under the Uniform Commercial Code since software is typically a "good" under Article 2 in most circumstances, particularly, as here, the software is marketed as an "off

the shelf" product. Rottner v. AVG Techs. United States, Inc., 943 F. Supp. 2d 222 (D. Mass. 2013)(applying the UCC to a sale of software). Where a plaintiff pleads a breach of contract claim and also seeks a determination of the parties' rights and duties under the agreement, a declaratory judgment count appropriately accompanies the breach of contract claim. See Cook v. Ohio National Live Ins. Co., Civil Action No. 1:19-cv-195 at *14 (S.D. Ohio, June 28, 2019)(denying motion to dismiss).[1]

Here, Realogic pleaded the essential elements of the parties' agreement under the UCC. For example, Realogic stated that Oracle offered its Netsuite software as an "off the shelf" solution meaning it was available promptly with minimal implementation time and "ready to be used immediately."(a claim that turned out to be untrue) Complaint ¶9, p. 3. Oracle's offer to sell the software to Realogic was premised on Realogic paying Oracle fees for its use. Complaint ¶ 10, p. 3. Therefore the basic elements of a contract between the parties existed—the sale of software for a price to be paid. This is sufficient to identify the agreement at issue.

B. Oracle's Attempt To Include Hidden Contract Terms Fails As A Matter of Law

1. The Parties' Contract Could Not Have Included Oracle's SSA Because Realogic Never Agreed to Oracle's Deceptively Hidden Terms and Conditions

Under Ohio common law, contract formation requires mutual assent (generally, offer and acceptance) and consideration. Kostelnik v. Helper, 96 Ohio St. 3d 1, 3-4, 770 N.E.2d 58 (2002)(no enforceable agreement existed absent evidence of meeting of the minds). The party seeking to enforce a contract bears the burden of proof that "a meeting of the minds" occurred and that "the contract was definite as to its essential terms.'" Faurecia Auto. Seating, Inc. v.

[1] Plaintiff's Declaratory Judgment Claim is brought pursuant to 28 U.S. Code § 2201 which permits the Court the jurisdiction to hear an "actual controversy" regardless of "whether or not further relief is or could be sought." 28 U.S.C. §2201(a)

Toledo Tool & Die Co., Inc., 579 F. Supp. 2d 967, 971 (N.D. Ohio 2008) (quoting Nilavar v. Osborn, 127 Ohio App. 3d 1, 711 N.E.2d 726, 732 (Ohio Ct. App. 1998)); See Tocci v. Antioch Univ., 967 F. Supp. 2d 1176, 1195 (S.D. Ohio 2013); Kostelnik v. Helper, 96 Ohio St. 3d 1, 2002 Ohio 2985, 770 N.E.2d 58, 61 (Ohio 2012) ("A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract."); See also Bruzzese v. Chesapeake Exploration, LLC, 998 F. Supp. 2d 663, 673 (6th Cir. 2014) (noting that, under Ohio law, the term "mutual assent" is used interchangeably with the term "meeting of the minds"); Accord Advance Sign Grp., LLC v. Optec Displays, Inc., 722 F.3d 778, 784 (6th Cir. 2013). Here, Oracle did not properly disclose its additional contract terms and conditions and, as a result, there could not have been any “meeting of the minds” with respect to including terms referenced with a hyperlink.

While Ohio law does permit parties to incorporate contract terms by reference to a separate document there must be a clear reference to the exact document incorporated so that the identity of the included terms are “***beyond doubt.***” Volovetz v. Tremco Barrier Sols., Inc., 2016-Ohio-7707, 74 N.E.3d 743 (Ohio Ct. App. 2016)(citing 11 Lord, Williston on Contracts, Section 30:25, 294-301 (4th Ed.2012)). Mere references to additional terms in the parties agreement are insufficient to trigger adoption into the agreement at issue. See HB Martin Logistics, Inc. v. Paccar, Inc., 233 N.E.3d 150 (Ohio Ct. App. 2023); See also Vericool World LLC v. Temperpack Techs., Inc., No. 1:23cv1761 (DJN), 2024 U.S. Dist. LEXIS 136857 (E.D. Va. July 2, 2024)(a reference alone is insufficient). Bd. of Educ. of Martins Ferry City Sch. Dist. v. Colaianni Constr., Inc., 219 N.E.3d 1021 (Ohio Ct. App. 2023)(additional terms not incorporated into agreement where language did not clearly convey adoption of all terms). Whether or not a contract has incorporated another document by reference presents a question of

law for a court to determine." Volovetz, supra at ¶ 27 (denying summary judgment since contract limitations were not properly referenced in the signed component of the parties' agreement). The terms incorporated into the contract must be clear and specific. Id. at ¶ 28. However, even this analysis has changed slightly in the age of the internet, as contracts are being handled electronically, ensuring that parties are not surprised with hidden contract terms which are properly disclosed in a prominent fashion to secure actual mutual assent.

For example, simply embedding a hyperlink in a written document is often insufficient to justify incorporation into a contract, especially where the hyperlink is buried in nondescript print. See Starke v. Squaretrade, Inc., 913 F.3d 279 (2d Cir. 2019)(affirming trial court's refusal to enforce arbitration language due to inclusion via nondescript hyperlink). Agreements containing inconspicuous hyperlinks are particularly problematic because they call into question whether a party had reasonable notice of the additional language sought to be incorporated since "the duty to read does not morph into a duty to ferret out contract provisions when they are contained in inconspicuous hyperlinks. " Id. at 295; See also Walker v. Nautilus, Inc., 541 F. Supp. 3d 836 (S.D. Ohio 2021)(declining to enforce arbitration language buried several pages into a nondescript hyperlinked document). "In the internet era, when agreements are often maintained, delivered and signed in electronic form, a separate document may be incorporated through a hyperlink, but the traditional standard nonetheless applies: the party to be bound must have had reasonable notice of and manifested assent to the additional terms." Holdbrook Pediatric Dental, LLC v. Pro Comput. Serv., LLC, No. 14-6115 (NLH/JS), 2015 U.S. Dist. LEXIS 94556 (D.N.J. July 21, 2015)(denying motion to arbitrate based on hidden contract terms). Thus, the appropriate inquiry is whether the facts demonstrate that both parties "knew or should have known about the existence of the [additional] terms." Liberty Syndicates at Lloyd's v. Walnut

Advisory Corp., Civ. A. No. 09-1343, 2011 U.S. Dist. LEXIS 132172, 17-18, 2011 WL 5825777 (D.N.J. Nov. 16, 2011)(forum selection clause not properly disclosed could not be enforced due to inadequate notice).

2. Oracle's Misrepresentations Precluded Any Ability To "Agree" To Oracle's SSA and Justifying Damages[2]

Where a party misrepresents key components of an agreement, the misrepresentation "precludes a meeting of the minds concerning the nature or character of the purported agreement." Haller v. Borror Corp., 50 Ohio St.3d 10, 13, 552 N.E.2d 207 (1990). Agreements premised on misrepresentations are either void or voidable depending on whether the misrepresentations are in the inducement or the nature of the agreement itself. Yoskey v. Eric Petroleum Corp., 2014-Ohio-3790, ¶9 (Ct. App.)(reversing summary judgment against plaintiff for inducement claim). "Fraud in the factum" is "fraud exercised in reference to the manual acts of signing and delivering an instrument, sometimes by a substitution of the documents accomplished by deception." Krist v. Curtis, NO. 76074, 2000 Ohio App. LEXIS 2093 (Ct. App. May 18, 2000)(affirming trial court's decision to deny enforcement of arbitration term where plaintiff alleged that agreements were premised on misrepresentations by Defendant). Here, Plaintiff has alleged facts that demonstrate significant misrepresentations that precluded any formation of an agreement that contains the terms set forth in Oracle's "Subscription Agreement."

First, there are the documents themselves. Oracle told Realogic that the documents presented for signature were "estimates" rather than formal agreements. Indeed, the first few pages recite the cost of the software to Realogic. The bait and switch is later in the agreement

[2] While Oracle argues that the economic loss rule bars Realogic's tort claims, the case law clearly states otherwise. J.F. Meskill Enterprises, LLC v. Acuity, No. 05-CV-2955 (N.D. Ohio, Apr. 7, 2006)(negligent misrepresentation claims are not barred by economic loss rule).

with hidden language seeking to incorporate terms that were neither disclosed or easily discernible. Oracle sent the "estimate" electronically via docusign thereby deceptively attempting to incorporate the SSA into the Estimate. Second, the Complaint is replete with allegations of misrepresentations made by Oracle to induce Realogic into purchasing software from Oracle. For example, Oracle misrepresents that its software is usable "off the shelf" when it is not. See Complaint ¶¶18-19, p. 4. Furthermore, Oracle entices businesses like Realogic with "discounts" to enticements "but with no real plan to ensure the functionality of any software provided." ¶17, p. 4. Oracle also misrepresents that its software is "easily" integrated and functional. ¶21, p. 4. Oracle's misrepresentations, unknown to Realogic at the time, were material to Realogic's decision to purchase software from Oracle. From its inducements to its "bait and switch" contracting tactics, it is clear that these misrepresentations prevented Realogic from ever having a "meeting of the minds" with Oracle and, as a result, the terms in Oracle's SSA are not enforceable.

B. The Lack of Notice and Oracle's Misrepresentations Also Counsel Against Enforcing Oracle's Chosen Forum

While Ohio courts typically would enforce a choice of forum clause, state and federal courts do not enforce forum clauses procured through fraud or, as noted above, where the parties did not specifically assent to the term. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, at 10, 92 S.Ct. 1907 (1972); Preferred Capital v. Power Eng. Group, 112 Ohio St.3d 429, 434 (2007)(choice of forum clause unenforceable); Accord National City Commercial Capital Corp. v. Bullard, 2011 Ohio 5780 (12th Dist.2011)(choice of forum clause unreasonable and not enforceable). Where neither party has any connection with the forum set forth in an agreement and no part of the underlying transaction occurred there, the court may sever the forum selection clause from the agreement and has the discretion not to enforce it. Miller-Holzwarth, Inc. v. L-3

Communications, Corp., CASE NO.: 4:09CV2282, 2010 U.S. Dist. LEXIS 53809, 2010 WL 2253642 (N.D. Ohio, June 2, 2010)(declining to enforce choice of forum clause). A forum clause is but one consideration of many that a district court must weigh in deciding whether to transfer venue, as the Court must also weigh several "case-specific factors such as the convenience of parties and witnesses, public-interest factors of systemic integrity, and private concerns falling under the heading 'the interest of justice'." Kerobo v. Sw. Clean Fuels, Corp., 285 F.3d 531 (6th Cir. 2002)(reversing District Court's decision to dismiss for improper venue)(citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 30, 92 S. Ct. 1907 (1972)).

According to Oracle's publicly available SEC filings, it is a multi-billion-dollar enterprise based in Austin, Texas and organized under the laws of the state of Delaware.[3] Oracle employs 159,000 full-time employees around the globe and owns properties around the world as well.[4] Oracle recently announced that it is in the process of relocating its headquarters from Austin to Nashville, Tennessee.[5] By contrast, Realogic is a small business that conducts business primarily in Cuyahoga County, Ohio with fewer than 100 employees.[6] Realogic has no sustained contacts with California, let alone the Northern District. While the Northern District of California may be eminently convenient for opposing counsel, the lack of any relationship between this dispute and that forum is remote at best. Therefore, the factors weigh in favor of allowing Realogic to pursue its claims against Oracle in the forum Plaintiff chose and where the harm alleged in this case occurred.

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[3] Oracle's Annual Report (10-K) filed with the SEC on June 20, 2024 is available here: https://investor.oracle.com/sec-filings/default.aspx (last visited September 6, 2024). Oracle notes that its headquarters is located in Austin TX on p. 35.

[4] June 20, 2024 10-K, p. 14.

[5] https://www.cnbc.com/2024/04/23/oracle-is-moving-its-world-hq-to-nashville.html published April 23 2024 (last visited September 6, 2024).

[6] See Declaration of Richard McDonald attached as Exhibit A.

C. Realogic Properly Asserted An Unjust Enrichment Claim Given Oracle Knowingly Received Benefits It Should Not Be Entitled To Retain

An unjust enrichment claim is an alternative to a breach of contract claim. " 'Unjust enrichment operates in the absence of an express contract or a contract implied in fact to prevent a party from retaining money or benefits that in justice and equity belong to another.' " Kwikcolor Sand v. Fairmount Minerals Ltd., 8th Dist. Cuyahoga No. 96717, 2011-Ohio-6646, 2011 WL 6775580, ¶ 14 (quoting Gallo v. Westfield Natl. Ins. Co., 8th Dist. Cuyahoga No. 91893, 2009-Ohio-1094, 2009 WL 625522, ¶ 19). To prove an unjust enrichment claim, a plaintiff is required to show: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. Just Like Us Family Enrichment Ctr. v. Easter, Cuyahoga No. 94180, 2010-Ohio-4893, 2010 WL 3931107, ¶ 13(citing Hambleton v. R.G. Barry Corp.) 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984)). "Unjust enrichment claims ordinarily can be pleaded in the alternative to breach of contract" if there is a dispute over the existence of an enforceable contract. Browning v. Ohio National Life Ins. Co., No. 1:18-cv-2019 U.S. Dist. LEXIS 172113 at *14 (S.D. Ohio Oct. 2, 2019).

Realogic asserted its unjust enrichment claim as an alternative form of relief in an effort to recover amounts wrongfully retained by Oracle as a result of its failure to perform. Given the parties' dispute over whether a contract existed and the contest over what terms might apply, Realogic's alternatively pleaded complaint is proper and just under the circumstances. Granting Oracle's motion to dismiss this count, at best, is premature.

D. Realogic Pleaded Plausible Warranty Claims Given Oracle's Failure To Provide Working Software

After alleging the detailed facts related to Oracle's representations regarding the goods sold to Plaintiff, Realogic pleaded breach of implied and express warranties based on Ohio's adoption of the Uniform Commercial Code. Under the UCC, express warranties are created during the sale of goods by "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." O.R.C.§1302.26((A)(1).

Similarly, a claim for breach of implied warranty "also arises pursuant to the law of sales codified in Ohio's Uniform Commercial Code." Curl v. Volkswagen of Am., Inc., 114 Ohio St. 3d 266, 2007-Ohio-3609, 871 N.E.2d 1141, ¶ 26. Under the Ohio UCC, "a warranty that goods sold are merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." DG Equipment Co., Inc. v. Caterpillar, Inc., No. 3:08-cv-317, 2008 WL 4758672, at *3 (S.D. Ohio Oct. 27, 2008)(citing O.R.C. § 1302.27(A)). The Ohio UCC also provides for a warranty of fitness for a particular purpose. Under O.R.C. § 1302.28, when "the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose." Since none of Oracle's hidden terms and conditions apply, any warranty disclaimers contained therein also fail, especially given Oracle's express representations about its products.

Oracle markets its NetSuite products as fully functioning products usable to assist in performing a variety of business functions from general ledger accounting, management of human resources, and payroll. Complaint ¶ 8, p. 2. Oracle represents that its NetSuite products are essentially usable "off the shelf" during its sales pitch to customers. Complaint ¶11, p. 3;

¶18, o. 4. As set forth in Realogic's Complaint, Oracle's software failed on every account despite Oracle's representations regarding capability and functionality being material to the sale. Complaint ¶27, p. 5; ¶¶32-33. These allegations are more than sufficient to put Oracle on notice of the breach of warranties at issue in this case.

III. CONCLUSION

Oracle''s attempt to dismiss this case or transfer it to a distant venue is both unfounded and inappropriate. Realogic has demonstrated a valid basis for its claims, all of which are rooted in Oracle's deceptive practices and failure to provide functional software as promised. The alleged contract terms, hidden behind deceptive hyperlinks and not disclosed transparently, fail to establish additional enforceable terms beyond the sale transaction itself. Moreover, Realogic's choice of forum in the Northern District of Ohio is justified, given the connection to the harm suffered and the lack of any valid forum selection clause. Thus, for the foregoing reasons, Realogic respectfully requests that the Court deny Oracle's motion to dismiss or to transfer venue and allow Realogic the opportunity to pursue its claims in its chosen forum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2024, a copy of the foregoing Memorandum in Opposition was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Jeffrey A. Crossman
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