SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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ABYSS LTD.

Plaintiff,

- v -

NETKI, INC.

Defendant.

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INDEX NO.	652287/2019
MOTION DATE	04/01/2020
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISS.

Upon the foregoing documents and for the reasons set forth below, Netki, Inc.'s (**Netki**) motion to dismiss the Abyss Ltd.'s (Abyss) complaint pursuant to CPLR 3211 (a)(1)(7) and (8) is granted.

THE FACTS RELEVANT TO THE INSTANT MOTION

Reference is made to (i) a Netki Order Form (the **Order Form**), dated February 2, 2018 and (ii) a Netki Master Services Agreement (the **Netki MSA**), dated of even date therewith, both by and between Netki and Abyss (NYSCEF Doc. No. 8, 9).

Abyss, which operates a digital platform for video games powered by blockchain technology, planned to sell Abyss digital tokens to investors pursuant to Regulation D under the Securities and Exchange Act of 1933. The digital tokens can be used by consumers to purchase goods and services on the Abyss platform. In February, 2018, Abyss engaged Netki to perform client

verification services in connection with the same by entering into the Order Form and the Netki MSA.

Pursuant to the Order Form, Abyss agreed to purchase client verification services from Netki at the rate of $65 per verification (NYSCEF Doc. No. 8), a "setup fee" of $20,000, and a "verification fee deposit" of $65,000 (*id.*). The Order Form states that it incorporates and is governed by the Netki MSA (*id.*).

Significantly, Section 11.8 of the Netki MSA provides:

> Governing Law. This Agreement shall be governed by and construed under the laws of the State of California, without reference to conflicts of law principles. Both parties expressly agree that ***any action relating to this Agreement shall exclusively be brought in Los Angeles, California,*** and both parties irrevocably consent to the jurisdiction of the State and Federal courts located in Los Angeles, California.

(NYSCEF Doc. No. 9, ¶ 11.8 [emphasis added]).

Abyss sued Netki alleging that its' highly publicized sale which was originally scheduled for March 7, 2018 needed to be rescheduled because Netki misrepresented its technological capabilities and falsely verified purchasers. As a result, Abyss alleges that (i) it lost more than 50% of its pre-approved purchasers and $15 million in lost profits and (ii) it was exposed to civil and criminal liability.

DISCUSSION

A forum selection clause is a contractual provision designating a forum for the resolution of all disputes arising out of a contract and rendering that forum convenient as a matter of law (*Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006]). The purpose of forum selection clauses is "is to avoid litigation over personal jurisdiction, as well as disputes arising over the application of the long-arm statute" (*id.*). Forum selection clauses "are *prima facie* valid and enforceable unless shown by the resisting party to be unreasonable" (*Brooke Group Ltd. v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]).

A party opposing the enforcement of a forum selection clause

> must show that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court.

(*British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234, 234 [1st Dept 1991]). A party opposing enforcement of a forum selection clause must allege fraud or overreaching, not with respect to the contract as a whole, but with respect to the forum selection clause itself (*Sterling Natl. Bank*, 35 AD3d at 223).

Netki argues that dismissal is mandated because pursuant to Section 11.8 of the Netki MSA, the parties clearly and unambiguously designated the state and federal courts of Los Angeles as the ***exclusive*** forum for any action relating to the Netki MSA (NYSCEF Doc. No. 9 ¶ 11.8). And, the use of the term "shall" makes the forum selection clause mandatory rather than permissive (*Spirits of St. Louis Basketball Club, L.P. v Denver Nuggets, Inc.*, 84 AD3d 454, 455-456 [1st Dept 2011]).

In their opposition papers, and relying on *DeSola Group, Inc. v Coors Brewing Co.* (199 AD2d 141 [1st Dept 1993]), Abyss argues that the forum selection clause is unenforceable because "the complaint contains extensive allegations of Defendants' fraud luring Plaintiff into signing Defendants' forms and transferring over $80,000 for services Defendants were never going to perform" (Pl. Mem. in Opp. at 13). Abyss' reliance is, however, misplaced.

In *DeSola*, the plaintiff alleged that it had an oral agreement where it was to be paid a monthly retainer of $75,000 plus expenses for marketing services, none of which included market research (*DeSola*, 199 AD2d at 141). The defendants moved to dismiss based on a forum selection clause (*id.*). The IAS court, relying on a standard integration clause in the agreement, dismissed the complaint (*id.*). On appeal, the First Department reversed, holding that the forum selection clause was inapplicable because the complaint made no reference to the agreement which contained the forum selection clause, and that reliance on the integration clause was misplaced because that clause expressly provided that all prior communications concerning the subject matter of the agreement (*i.e.*, market research and not marketing services), were superseded (*id.*). The First Department when on to write that

> [e]ven assuming the Agreement is applicable, the forum selection clause contained therein is unenforceable since the record is replace with allegations indicating that the entire Agreement was permeated with fraud. Plaintiff claims that the Agreement was not intended to constitute a binding contract between the parties and that defendant represented that the sole purpose of the Agreement was to provide a billing number for accounting purposes so that plaintiff could be paid. Lending credence to this argument is the fact, as stated above, that the Agreement does not describe the very services plaintiff had been hired to provide (i.e., market analysis), but rather, pertains to market research. Since plaintiff's allegations of fraud pervading the Agreement would render the entire Agreement void, the forum selection clause contained therein is unenforceable (*id.* at 141-142, citing *Telford v Metropolitan Life Ins. Co.*, 223 AD 175, 177 [3d Dept 1928]).

Those allegations are very different than the allegations that Abyss makes here. To wit, Abyss does not allege that it thought it was signing a different agreement and that the agreement does not govern the parties relationship. In fact, Abyss alleges that "Plaintiff and Netki were bound by the terms of the [Order Form]," which was governed by the Netki MSA, and that "Netki breached its obligations under the [Order Form] by failing to provide any services specified in the [Order Form]" (Compl., ¶¶ 92, 94). Put another way, the gravamen of the complaint is that Netki misrepresented its capabilities and its intent to perform its obligations and is in breach of the Order Form and Netki MSA, not that the agreements themselves are unenforceable.

To the extent that Abyss argues that it should not be bound by the forum selection clause because it was "buried" in the Agreement, the argument is equally unavailing. A forum selection clause is reasonably communicated if it is set forth in clear and unambiguous language (*British West Indies*, 172 AD2d at 234 [upholding enforcement of forum selection clause where the clause in question was clear and unambiguous]). Here, as discussed above, the forum selection clause set forth in Section 11.8 of the Netki MSA is clear and unambiguous.

Finally, and for the avoidance of doubt, Abyss has failed to demonstrate that enforcement of the forum selection clause would be unreasonable, unjust, or invalid (*Arya's Collection, Inc. v Brink's Global Servs., USA, Inc.*, 67 AD3d 525, 525 [1st Dept 2009]). Accordingly, the forum selection clause is *prima facie* valid and enforceable and this court is not a proper forum for this action. Therefore, the motion to dismiss is granted.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is granted and the complaint is dismissed.

Date: April 1, 2020