IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

Pandi Rrapo, Plaintiff, v. Coffee Meets Bagel, Inc., Defendant.	No. 18 CH 13834 Calendar 15 Hon. Anna M. Loftus Judge Presiding

MEMORANDUM OPINION & ORDER

Pandi Rrapo purchased a premium subscription to Coffee Meets Bagel's matchmaking app. Two days later he reconsidered, cancelling the subscription. CMB's Terms of Service contain a no-refund policy. Plaintiff has alleged that this violates an obscure consumer protection statute, the Dating Referral Services Act, which he argues requires services such as CMB's to offer refunds.

Defendant has sought to dismiss the Complaint on a number of grounds. The Motion is denied in part and granted in part. To wit:

Defendant argues that its Terms of Service contain jurisdictional clauses, requiring any litigation to be brought in Delaware under Delaware law. The DRSA provides that any waiver of its provisions is void. Transferring this case out of Illinois to apply foreign law would negate the DRSA's protections, which is flatly impermissible. The Terms of Service must give way to the clear and unambiguous statutory command; the Court denies this portion of the Motion, holding that the jurisdictional clauses are void, and the case is properly brought.

But the Complaint does have two defects—curable, to be sure, but warranting dismissal nevertheless. First, Plaintiff does not attach the Terms of Service to his Complaint. His claim is founded on the document, and the Code of Civil Procedure requires that it be attached as a foundational element.

Second, Plaintiff could state actual damages under the DRSA in the amount of the refund he was unable to receive: $34.99. The problem for Plaintiff's claim as pled is that he does not actually allege that he *wanted* a refund, just that he was *unable* to receive one. Plaintiff can certainly be entitled to actual damages in the amount of his desired refund, but because the DRSA requires actual damages, Plaintiff must allege his desire.

The Complaint is dismissed, pursuant to Section 2-615; Plaintiff is granted leave to amend. This matter is set for further status by separate order.

I. Background

The Complaint presents the following allegations. The Court takes them as true for the purposes of the present Motion to Dismiss. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 184 (Ill. 1997). The Court also notes that the parties do not appear to disagree as to the principal facts; their dispute is centered on the legal effects, if any, of those facts.

A. Coffee Meets Bagel

Coffee Meets Bagel is a Delaware corporation that operates an eponymous dating app. Users create a profile on the CMB App and populate it with various data. They are then algorithmically matched with a number of other users, and prompted to either "pass" or "like" the various profiles presented. When two users mutually like each others' profiles, the CMB App matches them. Matched users can then communicate directly, presumably for the purpose of securing coffee and/or bagels in furtherance of a potential relationship.

The CMB App is available to the general public and free to use. An interested party downloads the app from either Defendant's website or a smartphone app store. The party then signs up for the service through the CMB App with an email address or Facebook account. At both the download and profile creation stage, users are presented with links to the Terms of Service, and advised that signing in to the CMB App constitutes acceptance of such terms. The CMB App is widely used; Defendant claims its operation matched nearly a million Chicago residents in 2017 alone.

As providing a free service is not generally a sustainable business model, Defendant also offers a paid service, in the form of an upgrade from the CMB App's free service. Free users may purchase a premium subscription or tokens of a digital currency, called Beans. Premium users interact with free users in the same manner as free users, but are able to see additional information about other profiles. Beans are used for discrete perks, and may be expended to determine whether users share mutual friends, to move up other users' queues to be seen faster, and so forth.

A free user may purchase a premium product at any time by making an in-app purchase through the CMB App. Premium subscriptions run monthly, while Beans are one-time purchases. No additional terms or conditions are presented at the time of purchase to govern premium features.

B. Plaintiff's Purchase

Plaintiff downloaded the CMB App in October 2018, and created a free profile thereafter. On October 24, he purchased a one-month premium subscription for $34.99. Two days later, he cancelled the subscription.[1] Plaintiff did not request a

[1] The parties engage in a side dispute about the extent to which Plaintiff *used* the premium features, if any. The Complaint does not explicitly state that he made use of such features; the affidavit of David Miller, offered in support of the Motion to Dismiss, indicates that Plaintiff did not even check any matches provided after purchasing the premium subscription. Ultimately, the scope of

refund from Defendant or otherwise seek an arrangement. Instead, he filed the present lawsuit on November 5.

C. The Litigation

Plaintiff's Complaint was filed as a putative class action. It raises three counts: Count I alleges the failure to provide for a refund is a violation of the Illinois Dating Referral Services Act ("DRSA"), Count II raises the same issue under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), and Count III raises unjust enrichment.

Plaintiff has filed a Motion to Certify, though no further action has been taken on the Motion at this time. Certification will presumably be sought on the two alleged classes: first, all individuals in Illinois who purchased a premium subscription through the CMB App; and second, the subclass of individuals who cancelled their subscription within three days but did not receive a refund.

Defendant responded with the present Motion to Dismiss, which has been fully briefed. The Court heard argument on June 12, 2019, and continued the matter for the present ruling.

II. Legal Standard

Defendant's Motion combines challenges to the Complaint under both Sections 2-606 and 2-619. It is brought under Section 2-619.1, which authorizes combined motions. 735 ILL. COMP. STAT. 5/2-619.1.

The Section 2-606 portion of the Motion seeks dismissal for failure to attach the written instrument upon which the claim is founded. 735 ILL. COMP. STAT. 5/2-606. If a claim hinges on a written instrument, but it is not attached, the claim cannot stand. *Plocar v. Dunkin' Donuts of America, Inc.*, 103 Ill. App. 3d 740, 749 (1st Dist. 1981).

The Code of Civil Procedure does not authorize this particular type of hybrid motion practice: by its terms, it only authorizes a combination of Section 2-615, 2-619, and 2-1005 arguments. 735 ILL. COMP. STAT. 5/2-619.1. Defendant identifies its arguments as being brought directly under Section 2-606. Defendant's Memo. in Support, p.6. On its face, the Motion to Dismiss is therefore improper.

But standing on this triviality would elevate form over substance, and would simply force the parties to grind through a second round of likely identical motion practice. Rather, the Court will consider the Section 2-606 argument as a facial challenge to the sufficiency of the pleadings under Section 2-615. *Evers v. Edward Hosp. Ass'n*, 247 Ill. App. 3d 717, 724 (2d Dist. 1993) (Section 2-606 argument properly framed within Section 2-615).

The thusly rechristened Section 2-615 portion of the motion challenges the legal sufficiency of the Complaint based on defects apparent on the face of the pleadings. 735 ILL. COMP. STAT. 5/2-615(a). In such an analysis, the Court accepts

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Plaintiff's use, if any, is not relevant to the issues at bar; there is no need to ignite this factual tinder in the present ruling.

as true all well-pleaded facts and inferences stemming therefrom. The essential question is whether the allegations, "when construed in the light most favorable to the [non-moving party], are sufficient to establish a cause of action upon which relief may be granted." *Blumenthal v. Brewer*, 2016 IL 118781, ¶19.

The Section 2-619 portions of the motion also require that the Court accept as true all well-pleaded facts and their attendant inferences. The Section 2-619(a)(9) arguments raised by Defendant seek a dismissal upon a showing of other affirmative matters, outside the four corners of the complaint, which defeat the claim in whole or in part. *Alford v. Shelton (In re Estate of Shelton)*, 2017 IL 121199, ¶21.

Under either standard, should the allegations be insufficient, the Court may consider permitting or requiring amendment as appropriate. 735 ILL. COMP. STAT. 5/2-615(d), 2-616(a); *see also Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273–76 (Ill. 1992). Nevertheless, if the underlying legal theory is flawed such that no cause of action could be stated, amendment would be futile. *Regas v. Associated Radiologists*, 230 Ill. App. 3d 959, 968 (1st Dist. 1992) (discussing *Loyola Academy* factors).

III. Motion to Dismiss

Plaintiff's case hinges on the Terms of Service, which are not attached to the Complaint as they must be. Here, however, Defendant's affidavit properly introduces the document for consideration pursuant to Section 2-619(a)(9).

On that analysis, neither the choice of forum nor choice of law clauses can stand. The DRSA provides that any waiver of its protections is void. The jurisdictional clauses, in taking the case out of Illinois courts and law, would functionally waive its protections. Thus, the clauses are void. The Court expresses no opinion as to the voiding of the Terms of Service as a whole, because such relief is neither pled in the Complaint nor properly sought on a Motion to Dismiss.

Finally, Plaintiff's Complaint frames a cause of action for actual damages in the amount of a refund, but Plaintiff does not actually allege that he *wanted* a refund in the first place. Without such an allegation, no actual damages are stated, and the Complaint cannot stand under Section 2-615.

A. Attaching the Terms of Service

Defendant's first argument is that the claim as pled cannot stand, because the Complaint fails to attach the Terms of Service, and Plaintiff has not averred that they were not otherwise available. *See* 735 ILL. COMP. STAT. 5/2-606. Plaintiff counters by framing his claims as statutory violations founded on the relevant statutes, rather than the Terms of Service themselves. Under Plaintiff's reading, his cause of action is "indirectly connected with the writing," and though the terms of service "may be a link to the chain of evidence establishing liability," that does not make them essential to the claim within the scope of Section 2-606. Response, p.5 (quoting *Estate of Garrett v. Garrett*, 24 Ill. App. 3d 895, 899 (2d. Dist. 1975)).

Plaintiff's legal proposition is correct, but his theory of his own case is not. Here, liability under either the DRSA or ICFA can only be established, if at all, by Defendant's failure to provide for certain statutorily required language in the Terms of Service. Plaintiff's case rests on his pleading a negative: that a certain written instrument *did not* contain the relevant language.

Plaintiff points to a recent case, *Joiner v. SVM Management*, in support of its position. 2019 IL App (1st) 172336-U. *Joiner* is not precedential, but it is instructive: the plaintiff in that case brought a claim under the Rental Utility Act, arguing her landlord failed to provide disclosure and notice of the fact that she was paying for common-area utilities, but failed to attach the lease agreement. *Id.* ¶¶2, 47–48. The court held that Section 2-606 did not require the lease agreement to be attached, as the claim arose from the statute, and the lease agreement was merely ancillary to the claim. *Id.* ¶48 (citing *Estate of Garrett*, 24 Ill. App. 3d at 899).

The nature of the statutory claim under the DRSA is different from that under the Rental Utility Act in *Joiner*. The Rental Utility Act requires that a landlord provide a "written statement" of disclosure "*before* offering an initial lease or renewal lease." 765 ILL. COMP. STAT. 735/1.2(a)(1), (a) (emphasis added). Thus, the disclosure or failure to disclose—and thus the cause of action—necessarily accrues *before* executing a lease contract. In contrast, the DRSA requires that the contract *itself* contain certain language. 815 ILL. COMP. STAT. 615/20(a). Any statutory violation necessarily looks to whether the contract contained certain language. Without the contract, there can be no statutory violation.

Fortunately for Plaintiff, this is a flaw easily remedied. *See* Response, p.6 n.2 (alternatively seeking leave to amend). Leave will be granted to file an Amended Complaint attaching the Terms of Service.

Fortunately for *Defendant*, and the remainder of its Motion to Dismiss, the affidavit of David Miller lays foundation for and introduces the Terms of Service. Thus, despite not being attached to the Complaint, the Court can and will consider the Terms of Service as a properly introduced affirmative matter. The remainder of the Motion to Dismiss, which relies on them, is considered under Section 2-619(a)(9).[2]

B. Scope of Terms of Service

Before moving to the bulk of the Motion to Dismiss, the Court takes a moment to note that, at least initially, the Terms of Service govern the parties' contractual relationship. Both parties agree with this proposition, and yet throughout the course of the briefing and argument they each assert the other

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[2] In its opening brief and oral argument, Defendant suggests that the Court could simply notice the Terms of Service, as they are available online at CMB's website and through the CMB App. The Court is reluctant to do so because, for the reasons noted above, the Terms of Service are "critical evidentiary material" of which notice is disfavored. *Vulcan Materials Co. v. Bee Constr.*, 96 Ill. 2d 159, 166 (Ill. 1983) (quoting *Ashland Sav. & Loan Ass'n v. Aetna Ins. Co.*, 18 Ill. App. 3d 70, 78 (1st Dist. 1974)). Notice is not necessary in any event, because the Miller affidavit properly introduces the Terms of Service as they were in October 2018, the relevant time frame.

disputes it. This is because each side has a slightly different twist on how the Terms of Service apply.

Initially, the Court starts from the proposition that the Terms of Service applied. When a user—like Plaintiff—signs up, their use of the CMB App as a free user is subject to the Terms of Service. Then, if the user chooses to purchase a premium service, their use of the CMB App as a premium user is still subject to the same Terms of Service.

This is abundantly clear for a variety of reasons. No additional "Premium Terms of Service" are presented when a user upgrades. The Terms of Service themselves are written broadly, announcing that users are bound by them "for as long as you continue to use the Site or Services," without qualification. Miller Aff, Ex. A, p.6. They are integrated, providing that "This Agreement . . . and any applicable payment, renewal, Additional Services terms, comprise the entire agreement." *Id.* p.13. And the Terms of Service themselves explicitly contemplate that they would govern any paid user: the no-refund provision would be illogical otherwise, if they only regulated a *free* service. *Id.*

From this starting point, each party makes various arguments. Plaintiff, for instance, argues that, because the Terms of Service violate the DRSA, they are void and unenforceable *in toto.* Defendant argues that, because the Terms of Service were valid when Plaintiff was a free user, it is illogical for Plaintiff to argue that his purchase of a premium subscription retroactively voids them.

The Court addresses both arguments below, but for now simply notes the above for clarity. Whether they are invalidated in some respect by statute is a later question, but we start with the Terms of Service themselves.

C. Choice of Forum

The Terms of Service contain a clause entitled "Controlling Law and Jurisdiction." The parties discuss the clause largely in the same breath, but it actually consists of two independent parts: first, a choice of law clause providing that Delaware law is to control, and second, a choice of forum clause requiring any case to be brought in a Delaware federal or state court. Miller Aff, Ex. A, p.13.

Choice of forum and choice of law clauses have different legal effects, and though they are closely related, they are distinct. *Maher & Assocs. v. Quality Cabinets*, 267 Ill. App. 3d 69, 76 (2d Dist. 1994). It is appropriate to address the choice of forum clause first. If dismissal on the choice of forum clause is warranted, then that dismissal only addresses where the claim is to be brought, and Plaintiff may litigate the merits of his claim in the proper forum. *Fabian v. BGC Holdings, LP*, 2014 IL App (1st) 141576, ¶23 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972)).

1. Illinois Law Controls

As an initial matter, the Court notes that Illinois law controls the choice of forum analysis. The Terms of Service themselves provide that "Delaware law (without giving effect to its conflicts of law principles) will govern this Agreement."

Miller Aff, Ex. A, p.13. Thus, where suit is brought outside of Delaware, the relevant conflicts of law principles of the foreign state—here, Illinois—govern the analysis.

In Illinois, a choice of forum clause is *prima facie* valid. *Calanca v. D & S Mfg. Co.*, 157 Ill. App. 3d 85, 87 (1st Dist. 1987) (citing *The Bremen*, 407 U.S. at 10). It will therefore be enforced, "unless the opposing party shows that enforcement would be unreasonable under the circumstances." *Id.* Unreasonability can be shown in one of two ways: either enforcement must be seriously inconvenient, or enforcement must contradict the strong public policy of the forum. *Id.* (quoting *The Bremen*, 407 U.S. at 15–16).

The Court addresses both tests in turn.

2. Serious Inconvenience

Inconvenience is judged with a six-factor balancing test. No one factor is dispositive, but when judging inconvenience, Illinois courts are to consider:

> (1) the law that governs the formation and construction of the contract,
> (2) the residency of the parties,
> (3) the place of execution and/or performance of the contract,
> (4) the location of the parties and their witnesses,
> (5) the inconvenience to the parties of any particular location, and
> (6) whether the clause was bargained for.

Aon Corp. v. Utley, 371 Ill. App. 3d 562, 569 (1st Dist. 2006) (citing *Calanca*, 157 Ill. App. 3d at 88 (itself quoting *Clinton v. Janger*, 583 F. Supp. 284, 289 (N.D. Ill. 1984) (in turn citing *The Bremen*, 407 U.S. at 16))). The parties spend much time discussing the *Clinton* factors, and Defendant offers the affidavit of its employee to support various factual averments in its favor.

First, the contract was formed in Illinois, but purports to apply Delaware law. This suggests a bootstrapping issue—the choice of forum clause would appear to depend on the choice of law clause—but the Court sets it aside for the moment.

Second, Plaintiff is an Illinois resident. Defendant is incorporated in Delaware, but as a practical matter it is headquartered in California, which suggests that the choice of forum clause would be inconvenient to it as well.

Third, the contract was executed and performed in Illinois. That said, as a purely digital service, this is perhaps a less compelling factor—to say nothing of the fact that, per Defendant's affidavit, Plaintiff never actually used the premium services he paid for.

Fourth, Illinois witnesses would prefer Illinois. Defendant's witnesses would presumably come from its headquarters in California, and who might prefer a four and a half hour flight to Chicago to a six hour flight to Delaware.

Fifth, it would be inconvenient for Plaintiff to travel to Delaware, but it would also be inconvenient for Defendant to litigate in Illinois. As with prior factors noting Defendant's headquarters, though, it might be inconvenient for Defendant to litigate in Delaware too.

Sixth, the Terms of Service were a contract of adhesion, not bargained for, which substantially reduces their effective weight in a choice of forum analysis. *Williams v. Ill. State Scholarship Comm'n*, 139 Ill. 2d 24, 72 (Ill. 1990).

The Court need not resolve the balancing of the *Clinton* factors, though, because the *other* prong of the test is plainly dispositive.

3. Public Policy

Wholly apart from unreasonability or convenience, a choice of forum clause will not be enforced where it is contrary to the public policy of Illinois. This analysis is not often seen in choice of forum clauses for two practical reasons. First, public policy arguments are often simply not raised in the first place. *See, e.g., Brandt v. Millercoors, LLC*, 2013 IL App (1st) 120431, ¶15 (no public policy argument made). Second, many choice of forum cases involve choosing a forum *within Illinois*, and because statewide public policy would be the same in one Illinois county as any other Illinois county, it is simply a non-issue. *See, e.g., Williams*, 139 Ill. 2d at 70 (citing *Martin-Trigona v. Roderick*, 29 Ill. App. 3d 553, 555 (1st Dist. 1975)) (discussing propriety of intrastate venue provisions).

But a clear-cut public policy voiding a choice of forum clause is a standalone basis to decline to apply it. One case is here particularly instructive: *Maher & Associates v. Quality Cabinets.* 267 Ill. App. 3d 69 (2d Dist. 1994).

The contract in *Maher* had a clause similar to that in the Terms of Service here, containing a combined choice of law and a choice of forum clause, which both pointed to Texas. *Id.* at 74. The defendant raised the choice of forum clause as a defense to Illinois litigation. The court rapidly dismissed the "inconvenience" analysis in a cursory fashion, as both parties were sophisticated business entities. *Id.* at 74. But it voided the choice of forum clause based on the Sales Representative Act, which governed contracts between sales representatives and principals, the type of contract at issue in *Maher*.

Specifically, the Sales Representative Act provided that "Any provision in any contract between a sales representative and principal purporting to waive any of the provisions of this Act shall be void." 820 ILL. COMP. STAT. 120/2. The language of voidness was tantamount to a declaration of fundamental public policy. *Maher*, 267 Ill. App. 3d at 75–76 (quoting *Midwest Enterprises, Inc. v. Generac Corp.*, 1991 U.S. Dist. LEXIS 12016, at **11–12 (N.D. Ill. 1991)). Because the statute provided that a waiver thereof was void, the forum selection clause—a waiver of the statute—was also necessarily void. *Maher*, 267 Ill. App. 3d at 76.

As with the first of the *Clinton* factors above, this point can easily slip into a choice of *law* discussion. But the *Maher* holding was clear: where an Illinois statute provides that attempted waiver is void, to the extent a choice of forum clause purports to take a contract out of Illinois, it is void.

Here, the DRSA at issue contains a non-waiver provision: "Any waiver by the customer of the provisions of this Act shall be void and unenforceable." 815 ILL. COMP. STAT. 615/35(b). Just as the substantially similar language of the Sales Representative Act was found indicative of public policy in *Maher*, here the Court finds that the language of the DRSA is a conclusive indication of the State's public policy disfavoring any waiver of Illinois law, or transfer away from Illinois courts.

Likewise, the Terms of Service at issue here contain a choice of forum clause tightly packaged with a choice of law clause, and both point to Delaware. Applying the reasoning of *Maher* to the language of the DRSA, it is clear that the same conclusion must issue. Because the choice of forum clause furthers a prohibited waiver of the DRSA, it is unenforceable.

As a final salvo, Defendants suggests that a transfer to Delaware might not be a total waiver: a Delaware court could choose to apply Illinois law. Memo. in Support, p.15. Whatever the practical likelihood of such a case coming to pass, the possibility that it will not—i.e. the possibility that punting the case to a Delaware court would result in it applying Delaware law—runs contrary to the statute. The DRSA's non-waiver prohibition is not probabilistic; no waiver is prohibited, period. The choice of forum clause is unenforceable in the face of the statute's command.

D. Choice of Law

The choice of law clause is unenforceable for substantially the same reason. Defendant raises further arguments here concerning the scope of the Terms of Service, which are unavailing.

1. Choice of Law Void

The *Maher* court was presented with both a choice of forum and a choice of law clause. After voiding the choice of forum clause, it then turned to the question of whether domestic or foreign law should apply:

> It does not automatically follow that because the forum-selection clause is void we must also void the parties' plainly worded and mutually bargained for provision to apply Texas law to any dispute arising under the agreement. . . . [T]his case must be determined under Illinois law in order to avoid the absurd result of permitting this litigation to be brought in Illinois because of the public policy concerns incorporated in the Sales Act and then requiring the application of Texas law, which has no statute or case law comparable to our Sales Act.

Maher, 267 Ill. App. 3d at 76. The *Maher* court concluded that, because Texas had no similar law to the Sales Representative Act, applying Texas law would waive the statute's protections, and thus run directly contrary to fundamental public policy of the state. *Id.* at 76–77.

Maher is not the only court to reach this conclusion. Indeed, setting aside any issues relating to the choice of forum clause, where a claim is founded on an Illinois statute containing an anti-waiver clause, representing fundamental public policy of the state, a choice of law clause must fail on that basis alone. *Rico Indus. v. TLC Grp., Inc.*, 2018 IL App (1st) 172279, ¶¶64-66 (citing *Maher* to reject claims founded on Arkansas law).

Here, this common-sense proposition has the same application. The DRSA states that its protections cannot be waived, and Plaintiff's claim is wholly derived from the DRSA's provisions. Delaware has no similar law.[3] Axiomatically, Plaintiff cannot bring an Illinois state law claim if Illinois law does not apply. Enforcing the choice of law clause to apply Delaware law would work a waiver of the DRSA, which is prohibited. Therefore, the Court finds that the choice of law clause is also unenforceable.

2. Timing of the Terms of Service

Defendant raises an interesting argument in its Motion, based on the timing of when the Terms of Service came into effect. The DRSA's refund provisions only apply to paid services, and therefore are of no application to free services. The Court agrees, for what that's worth; if Plaintiff had not purchased premium services, and remained a free user, then the choice of forum and choice of law clauses would likely be enforceable. (Of course, if Plaintiff has not made a purchase, then his cause of action—premised on a *refund*—would likely suffer, but that's neither here nor there.)

Defendant continues this train of thought: if the Terms of Service were valid and enforceable, in their entirety, at the time that Plaintiff first used the CMB App, then they cannot be invalidated under the DRSA.

This argument is framed as a preemptive distinction of the *Match.com* case, referenced by both parties throughout—and addressed in Part III.E below—but it is incoherent to start with.

The contractual relationship between Defendant and its free users is governed by the Terms of Service and not the DRSA. But at the point in time where a user decides to purchase a premium service, the legal relationship changes: the user pays money, Defendant offers them additional perks, and as a result the DRSA applies. The law is rife with similar examples. A contract for one-time services can be oral, but make it recurring for more than a year and it must be in writing. 740 ILL. COMP. STAT. 80/1 (Statute of Frauds). One business transaction in a state is transient, but engage in enough of them and jurisdictional consequences attach. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 319 (1945). Two persons date for years, but if they say the right words in the right place at the right time, their legal relationship is fundamentally altered. *E.g.*, 750 ILL. COMP. STAT. 5/101 *et seq.* (IMDMA).

The parties here did not bumble into their relationship; Plaintiff paid money and Defendant provided services. As a result, additional statutory protections governing that financial transaction apply.

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[3] At least, the parties have pointed to none, and the Court's independent research has found none.

E. Voiding the Terms of Service

The Court's ruling in Parts III.C and III.D *supra* finds the choice of forum and choice of law provisions unenforceable pursuant to Section 35(b) of the DRSA. As the caselaw demonstrates, this sort of unenforceability is proper on a Motion to Dismiss, because it is on such a motion that these issues are properly raised. Throughout the briefing, however, Plaintiff argues that the Terms of Service are invalid *as a whole*. *E.g.*, Response, pp. 11–12. This would be pursuant to Section 35(c) of the DRSA, which provides that a contract that does not comply with the Act is void and unenforceable. 815 ILL. COMP. STAT. 615/35(c).

The parties' discussion of voidness as a whole largely centers on *Match.com*, a 2012 decision from the Circuit Court of Cook County. *Doe v. Match.com*, 11 L 03249, Order of Oct. 25, 2012. *Match.com* is of course not precedential, but given that the Court can find *no* cases, reported or otherwise, concerning *any* provisions of the DRSA, it provides a useful point of reference.

The plaintiff in *Match.com* had been sexually assaulted by a match through the eponymous defendant's service, and sued. The defendant argued that, pursuant to a choice of forum and a choice of law clause in its terms of use, the case should be brought in a Texas court under Texas law. Analyzing arguments quite similar to those raised here, the Illinois court found that, because the jurisdictional clauses operated as a waiver of rights under the DRSA, the terms of use (and therefore the jurisdictional clauses themselves) were void as a whole under Section 35(c).

As evidenced by the above discussion, the Court reaches the same conclusion as the *Match.com* court concerning the effect of the jurisdictional clauses. But the Court notes one crucial distinction: the *Match.com* ruling addressed not only a motion to dismiss, but also that plaintiff's motion for summary judgment on a declaratory judgment count seeking to void the terms of use as a whole. Here, by contrast, the only motion presented is one to dismiss.

Here, it would be improper to void the Terms of Service, as Plaintiff seeks. First, such a declaration would be outside the scope of the Complaint as pled: the causes of action are for money damages in a class vehicle, not declaratory relief. Second, the only pending motion is one to dismiss. The question is whether Plaintiff has stated a legally sufficient case, not whether he wins on it; voiding the Terms of Service to deny the Motion to Dismiss would put the cart before a horse that isn't even on the scene.

The choice of forum and choice of law provisions are unenforceable under Section 35(b). This does not automatically invalidate the remainder of the Terms of Service, as they contain a severance clause. Miller Aff, Ex. A, p.13. The Court would not in any event invalidate the entirety of a contract on a Motion to Dismiss. If Plaintiff wishes to void the Terms of Service as a whole pursuant to Section 35(b), then because such a request is beyond the Complaint, and has the potential to affect other portions of the case in a way as yet unbriefed, he would need to specifically plead such declaratory relief.

F. Damages

The claimed violation of the DRSA is a failure to include statutorily mandated refund requirements in the Terms of Service. The DRSA provides, in relevant part:

> (a) Every contract for dating referral services shall provide the following:
> (1) That the contract may be cancelled by the customer within 3 business days after the first business day after the contract is signed by the customer, and that all monies paid under the contract shall be refunded to the customer. . . .

815 ILL. COMP. STAT. 615/20(a). The remainder of the subsection concerns the effect of a consumer moving away from the business' physical address—an almost quaint anachronism in the context of an app—and the effect of a customer's death, not relevant here. *Id.* §§ 615/20(a)(2), (a)(3). Slightly later on, the DRSA provides for a private right of action:

> Any customer injured by a violation of this Act may bring an action for the recovery of damages. Judgment may be entered for 3 times the amount at which the actual damages are assessed, plus costs, and reasonable attorney's fees.

815 ILL. COMP. STAT. 615/45. As Defendant argues, and Plaintiff does not contest, this requires a customer to allege actual damages to sustain a claim. *Compare id. with id.* § 615/50 (enforcement by Attorney General). Defendant argues that Plaintiff has not suffered actual damages, and therefore may not maintain his claim.

Here, Plaintiff may state actual damages in the amount of the refund he was unable to receive. Because the Complaint as pled does not allege that he wanted a refund, however, the claim is not properly stated, though it certainly could be. Defendant's arguments concerning Plaintiff's failure to request a refund do not compel a contrary conclusion.

1. Plaintiff's Refund

The DRSA requires that any "contract for dating referral services" must grant a consumer the right to cancel services within three days and receive a refund. It essentially provides a three-day window familiar to other consumer protection laws. *E.g.*, 15 U.S.C. § 1635(a) (three-day rescission of mortgage transactions under TILA). Unlike such other laws, however, the DRSA does not directly grant the consumer the right to a refund, but simply provides that any contract must contain that right.

Here, the distinction is one without a difference. Plaintiff alleges that, by statute, he should have had the contractual right to a refund of the $34.99 he paid

for a premium subscription. Whether that comes directly by statute or by identifying a violation in the contract is irrelevant to the ultimate damages caused.

Trivially, failure to provide a refund to a party who wants and is entitled to it creates actual damages in the amount to be refunded. *E.g.*, *Allabastro v. Cummins*, 90 Ill. App. 3d 394, 398–99 (1st Dist. 1980). Plaintiff's core allegation is that, under the DRSA, the Terms of Service *should have* given him the right to a refund. But for the fact that they didn't, he would have had that right. The effect of the alleged breach is to bar Plaintiff from seeking his claimed refund. Actual damages would therefore the amount that he actually paid: $34.99.[4]

The problem for Plaintiff is that his allegations do not quite connect all the dots. Plaintiff does not allege that he wanted a refund, or that he would have sought one if one were available. The closest the Complaint comes is asserting that "Due to Defendant's non-refund policy, Plaintiff was unable to exercise his right to obtain a full refund pursuant to the DRSA." Complaint, ¶34. This says nothing about what Plaintiff wanted, or what he would have done had the Terms of Service conformed to the DRSA as he claims they should have.

This is admittedly a minor point, but it is an essential one. As the parties agree, the DRSA permits recovery of actual damages only. The *right* to a refund is a mechanism for future recovery, rather than the economic damage itself. Consider: if Plaintiff cancelled his subscription, but did not want a refund, could he be said to be harmed?[5] Under ICFA—a similar consumer protection statute which also requires actual damages—the bare infringement of a right is not actionable. *Duran v. Leslie Oldsmobile*, 229 Ill. App. 3d 1032, 1040–41 (2d Dist. 1992); *see also* 815 ILL. COMP. STAT. 505/10a(a) (private right of action only for actual damages). The Court sees no reason why the same conclusion should not issue here.

The Complaint alleges Plaintiff was wrongfully deprived of the right to a refund, but not that he wanted one in the first place. Loss of an unexercised and unsought right would not give rise to actual damages under the DRSA. The Court understands that inferences must be drawn in Plaintiff's favor, but this pleading lacuna is too broad to paper over with such an inference, because Plaintiff's own motivation is an essential element connecting the allegedly violated right with the actual damages required for his case.

The Complaint will therefore be dismissed, pursuant to Section 2-615. Plaintiff's allegations of damages are consistent with a properly stated claim for actual damages, but do not quite get there. Plaintiff will be granted leave to amend.

2. Plaintiff's Failure to Demand

Apart from the nature of Plaintiff's damages, Defendant challenges Plaintiff's actions in the days—indeed, the hours—following his purchase of a premium

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[4] As Defendant notes, Plaintiff suggests he is entitled to treble damages. Response, p.7. Defendant pushes back. Reply, p.7. The question of treble damages is beyond the scope of the present briefing, and the Court will not address it today.

[5] If, for instance, a premium user found true love on the first swipe, they might well cancel their subscription within three days but consider it money well spent.

subscription. The DRSA sets forth a specific mechanism of how to go about seeking a refund, a mechanism that Plaintiff did not even attempt to use. Defendant therefore asks the reasonable rhetorical question of why Plaintiff should be allowed to sue for a refund without following the statute's clear-cut provisions.

The answer to Defendant's question is equally reasonable: if Defendant wanted to benefit from the DRSA's written notice requirements, it should have complied with the statute in the first place.

i. The DRSA's Statutory Written Demand

Just as the DRSA provides that every contract under its scope must contain a refund provision, it provides that every contract must also contain a specific refund mechanism:

> (b) Every contract for dating referral services shall provide that notice of cancellation under subsection (a) of this Section shall be made in writing and delivered by certified or registered mail to the enterprise at the address specified in the contract. All refunds to which a customer or his or her estate is entitled shall be made within 30 days of receipt by the enterprise of the cancellation notice.

815 ILL. COMP. STAT. 615/20(b). As before, the Terms of Service do not contain such a provision.

Defendant points out that Plaintiff has not made a written demand for a refund delivered by certified or registered mail to its address.[6] And, because Defendant would have thirty days thereafter to provide the refund, it argues that Plaintiff jumped the gun by filing suit after only ten days had passed.

Defendant points to circumstances surrounding the underlying facts—Plaintiff's failure to use premium features, his suspiciously quick turnaround and ensuing lawsuit—to suggest that Plaintiff had the benefit of counsel at the time of his purchase, or at least shortly thereafter, and was therefore fully aware of the DRSA's requirements. Thus, Defendant concludes, Plaintiff has no excuse for not complying with the statute himself. *See* Reply, pp. 4–6.

Defendant misreads the DRSA. As noted above, it does not directly provide the right to a refund (and ensuing obligation to seek one in writing). Rather, it simply provides that *contracts* must contain certain language providing those rights and obligations. The rights and obligations under the DRSA apply, if at all, only to the extent they are contained within the contract.

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[6] Curiously, the Terms of Service themselves do not identify what the proper address may be. They provide a copyright agent address for DMCA purposes. Miller Aff, Ex. A, pp. 14–15. And they provide an email address for "complaints" regarding the CMB App. *Id.* p.12. But they do not contain an "address specified in the contract," as the DRSA contemplates. Clearly, the Terms of Service were not drafted with the DRSA in mind.

Here, the Terms of Service do not contain a refund provision, and they do not contain a written demand requirement. Simply put, Defendant cannot enforce a term that isn't in the parties' contract.[7]

ii. Common-Law Demand

Defendant develops this argument further, beyond the plain text of the DRSA, arguing that if Plaintiff wanted a refund, he should have at least *asked* for one before filing suit. Defendant points to no authority for the proposition—aside from the DRSA argument discussed *supra*—but relies on its rhetorical strength.

The problem with Defendant's argument here is that it is countered by the plain language of its own Terms of Service, which provide that "Coffee Meets Bagel is not responsible for refunding for subscription already purchased." Miller Aff, Ex. A, p.13 (spelling as original).

Under the terms of the contract, Defendant offers no refunds. Why should Plaintiff have a legal obligation to seek one before filing suit? If Defendant follows the not wholly grammatically correct but still unambiguous language of its own Terms of Service, it would deny such a request, making it futile. If Defendant offered a refund, it would be in breach of the letter of its own contract.

It is faintly ridiculous to require, as a precondition to filing suit, that Plaintiff seek a refund on the expectation that Defendant would breach its own contract to accommodate the request. Certainly Plaintiff could have sought one, and if the parties wished to alter the deal, they could have done so at any time. But Plaintiff cannot be said to be under any *obligation* to do so, and the case is properly brought.

G. Counts II and III

The core of Plaintiff's Complaint is the DRSA claim. Count II raises the same issues under an ICFA framework, and Count III seeks a refund through unjust enrichment, but both are essentially restatements of the DRSA claim. Consequently, both parties focus exclusively on the DRSA issues, and neither side engages in substantive discussion on the remaining counts.[8] Counts II and III will therefore stand.

* * *

[7] The statute's function is laid out in clear and unambiguous language, and must therefore be applied by its terms. But to the extent the Court would probe the statute's purpose, the present situation would seem to be consistent with it. The statute protects consumers by mandating that they have the right to a refund. In turn, it protects businesses by mandating that consumers exercise that right a certain way. The two provisions are balanced, as all good statutes should be. If a business declines to offer the right, it cannot seasonably turn around and claim the protection.

[8] Though, the Court notes, Plaintiff's failure to quite go all the way on his pleading of actual damages pursuant to the DRSA would impact the ICFA claim in equal measure. *See* Part III.F.1 *supra*.

IV. Orders

Defendant's Motion to Dismiss is granted in part and denied in part.

Plaintiff's Complaint is dismissed, pursuant to Section 2-615, for failure to attach the Terms of Service and failure to plead actual damages. Plaintiff is granted 21 days to file an Amended Complaint.

In all other respects, the Motion to Dismiss is denied.

This matter is set for status by separate Order entered today.

ENTERED:

Judge Anna M. Loftus

Judge Anna M. Loftus
JUL 30 2019
Circuit Court- 2102