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United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID J. GUENTHER, d/b/a J. DAVID'S  
CUSTOM CLOTHIERS, on behalf of  
himself and all others similarly situated,

No. C 09-01106 WHA

Plaintiff,

**ORDER ON MOTION  
TO REMAND**

v.

CROSSCHECK INC., a California  
Corporation; UNITED BANK CARD,  
INC., a New Jersey Corporation; and  
DOES 1 through 200, inclusive,

Defendants.

**INTRODUCTION**

Plaintiff filed this proposed class action in Sonoma County Superior Court. Plaintiff alleges that he was fraudulently enrolled in defendant Crosscheck Inc.'s check-verification service without his knowledge and was then forced to pay termination fees and penalties to extricate himself. Defendants removed the action to federal court, and plaintiff now moves to remand seeking enforcement of a forum-selection clause. For the reasons stated below, plaintiff's motion to remand is **GRANTED**.

**STATEMENT**

In this proposed class action, plaintiff David Guenther, d/b/a David's Custom Clothier, alleges that he was fraudulently enrolled as a subscriber in defendant Crosscheck Inc.'s check-verification service without his knowledge when he enrolled in co-defendant United Bank Card,

1 Inc.'s credit-card authorization service. The two defendants have a partnership whereby they  
 2 combined their credit-card and check-authorization services. Plaintiff alleges that, when he  
 3 discovered and attempted to cancel the undesired service, he was assessed "termination"  
 4 penalties and fees. He filed suit in Sonoma County Superior Court on January 22, 2009, and  
 5 filed an amended complaint soon thereafter. The amended complaint asserts claims on behalf  
 6 of a putative nationwide class for (1) unjust enrichment, (2) money had and received, (3) fraud  
 7 by concealment, (4) unfair business practices, and (5) RICO violations.

8 On March 14, 2009, defendants removed the case to federal court on the basis of  
 9 diversity jurisdiction under the Class Action Fairness Act as well as federal-question  
 10 jurisdiction. Plaintiff now moves to remand the case to state court. Plaintiff seeks enforcement  
 11 of a forum-selection clause included in the contract plaintiff signed with defendant UBC for  
 12 credit-card authorization service. The clause states the following (Br. Exh. A; emphasis added):

13 **XII. VENUE: THIS AGREEMENT SHALL BE GOVERNED**  
 14 **BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS**  
 15 **OF THE STATE OF CALIFORNIA. THE PARTIES AGREE**  
 16 **THAT ANY ACTION ARISING OUT OF THE**  
 17 **NEGOTIATION, EXECUTION OR PERFORMANCE OF**  
 18 **THE TERMS AND CONDITIONS OF THIS AGREEMENT**  
**SHALL BE BROUGHT IN THE COURTS OF SONOMA**  
**COUNTY, CALIFORNIA. YOUR STORE(S) AGREES THAT**  
**THIS AGREEMENT WAS FORMED IN SONOMA COUNTY,**  
**CALIFORNIA UPON ACCEPTANCE BY AN OFFICER OF**  
**CHECK CENTER.**

19 Plaintiff contends that the emphasized portion of this clause is a mandatory and  
 20 enforceable forum-selection clause requiring that this case be litigated in the Sonoma County  
 21 Superior Court.

## 22 ANALYSIS

23 "A contractual forum selection clause is prima facie valid and should be enforced unless  
 24 enforcement is shown by the resisting party to be 'unreasonable' under the circumstances," for  
 25 example, due to "fraud or undue influence underlying the forum selection clause." *Docksider,*  
 26 *Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762 (9th Cir. 1989). Where such a clause selects state  
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 28

1 court as the appropriate forum and is mandatory rather than permissive, remand is required in  
 2 order to enforce the clause. *Ibid.*<sup>1</sup>

3 Defendants make no allegation of fraud or undue influence nor otherwise challenge the  
 4 enforceability of the forum-selection clause. Indeed, the forum-selection clause was included in  
 5 the “terms and conditions” of defend UBC’s own standard-form contract. This motion therefore  
 6 concerns only the proper interpretation and scope of the clause. Plaintiff contends that the  
 7 forum-selection clause is mandatory and that defendants have contracted away their removal  
 8 rights. Defendants, in turn, contend that the clause (although mandatory as to place of initial  
 9 filing) is permissive *as to removal*.

10 The parties’ forum-selection clause governs “venue” and specifies that “any action”  
 11 arising from the contract “shall be brought” in the courts of Sonoma County, California. This  
 12 language is mandatory: the plain language of the clause requires litigation in the state courts of  
 13 Sonoma County. Decisions regarding similarly worded forum-selection clauses confirm as  
 14 much. *Air Ion Devices v. Air Ion*, 2002 WL 1482665 (N.D. Cal. 2002) (Illston, J.), for example,  
 15 addressed the following virtually indistinguishable forum-selection clause:

16 In the event AI has failed to meet its obligations under this  
 17 agreement . . . then the parties agree that any action commenced  
 18 by AID to enforce its rights against AI *shall be brought in the  
 County of Marin, State of California . . . .*

19 *Id.* at \*2 (emphasis added). Just like here, the clause stated that any action “shall” be “brought”  
 20 in a particular state court. Judge Illston ruled that the clause was mandatory and required  
 21 remand so that the action could be litigated in the specified state court.

22 Similarly, in *Docksider v. Sea Technology*, the Ninth Circuit ruled that the following  
 23 forum-selection clause was mandatory rather than permissive (albeit in a motion to dismiss  
 24 rather than to remand):

25 Licensee hereby agrees and consents to the jurisdiction of the  
 26 courts of the State of Virginia. *Venue of any action brought  
 hereunder shall be deemed to be in Gloucester County, Virginia.*

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 28 <sup>1</sup> Unless otherwise noted, all internal quotations and citations are omitted from authority cited by this  
 order.

1 875 F.2d 762, 763 (9th Cir. 1989) (emphasis added). The decision explained, “[t]his language  
2 requires enforcement . . . . This mandatory language makes clear that venue, the place of suit,  
3 lies exclusively in the designated county.” Like here, the clause at issue in *Docksider* governed  
4 “venue” and provided that any action “brought” under the contract “shall” be in the courts of a  
5 particular county. Defendants’ arguments in support of a different interpretation in this case are  
6 unpersuasive.

7 \* \* \*

8 *First*, defendants focus on the forum-selection clause’s use of the word “brought.” They  
9 argue that the clause required only that plaintiffs had initially *filed* their claim in state court but  
10 not that the action *remain* — *i.e.*, actually be litigated — in state court. They argue, in other  
11 words, that the clause may have been mandatory with respect to the place of initial filing but  
12 was (and is) permissive *as to removal*. Although defendants offer an impressive volume of  
13 citations, none supports this interpretation of the clause.

14 Defendants rely on *Hunt Wesson Foods. v. Supreme Oil Company*, 817 F.2d 75 (9th  
15 Cir.1987). That decision ruled that the following contract language was permissive rather than  
16 mandatory and thus did not require remand: “[t]he courts of California, County of Orange, shall  
17 have jurisdiction over the parties in any action at law relating to the subject matter or the  
18 interpretation of this contract.” *Id.* at 76. The decision explained that this clause contained no  
19 language rendering a particular forum *exclusive* and thus did not preclude jurisdiction in courts  
20 *other* than those of Orange County.

21 The clause in *Hunt Wesson* did not utilize the word “brought.” Here, defendants  
22 nevertheless contend, “brought” should be interpreted narrowly — to refer only to the place of  
23 initial filing — because the clause contains no mandatory or exclusive language *as to removal*.  
24 In rejecting remand, however, *Hunt Wesson* distinguished a prior decision that had ordered  
25 remand based on the following language: “any dispute . . . *shall be brought* in either San Diego  
26 or Los Angeles County.” *Hunt Wesson*, 817 F.2d at 77 (emphasis added). There, *Hunt Wesson*  
27 explained, “it [was] clear that the language mandate[d] more than that a particular court has  
28 jurisdiction. *The language mandate[d] that the designated courts [were] the only ones which*

1 *ha[d] jurisdiction.” Id.* at 77–78 (emphasis added). Defendants own authority (binding here)  
2 therefore rejected its interpretation of the word “brought.”

3 Defendants also rely on *Northern California District Council of Laborers v.*  
4 *Pittsburg-Des Moines Steel Company*, 69 F.3d 1034 (9th Cir. 1995). That decision concerned  
5 the following forum-selection clause:

6 [a] decision of the Board of Adjustment ... or the decision of a  
7 permanent arbitrator shall be enforceable by a petition to confirm  
8 an arbitration award filed in the Superior Court of the City and  
9 County of San Francisco, State of California.

10 *Id.* at 1036. It ruled (relying on *Hunt Wesson*) that this language was permissive rather than  
11 mandatory, explaining that “[a]lthough the word ‘shall’ is a mandatory term, here it mandates  
12 nothing more than that the Orange County courts have jurisdiction.” *Ibid.* The clause at issue  
13 in *Pittsburg-Des Moines Steel*, however, did not state that the action had to be “brought” in any  
14 particular forum. In fact, the decision actually hurts defendants’ cause. It emphasized that the  
15 clause at issue “d[id] not contain additional language such as ‘venue ... shall be deemed to be in  
16 Gloucester County,’ which, in *Docksider*, designated the state court as the exclusive forum.”  
17 *Id.* at 1037 (emphasis added). Here, in contrast, the *title* of the contract provision at issue is  
18 “VENUE,” and the clause proceeds direct the parties to Sonoma County.

19 Next, defendants cite *Green v. Moore*, 2006 WL 1638282 (W.D. Wash. 2006). That  
20 decision addressed a forum-selection clause that stated: “[a]ny lawsuit arising from this  
21 Agreement must be filed in Whatcom County Superior Court, Bellingham, Washington, USA.”  
22 *Id.* at \*1 (emphasis added). The decision evidently relied heavily on the word “filed.” It  
23 explained, “[a]ccording to its plain language, the clause requires only filing, not litigation, in  
24 Whatcom County.” *Id.* at \*2. It proceeded, however, to contrast *Docksider* (among other  
25 decisions):

26 [i]f plaintiff had intended for Whatcom County to have exclusive  
27 jurisdiction, he could have included that language in the  
28 Agreement. *See, e.g., . . . Docksider, Ltd. v. Sea Tech., Ltd.*, 875  
F.2d 762, 764 (9th Cir.1989) (finding clause mandatory in stating  
that “venue of any action brought hereunder shall be deemed to be  
in Gloucester County, Virginia”)

1 Here, like *Docksider*, the clause specifies “VENUE” and states that any action “shall” be  
 2 “brought” in Sonoma County. To interpret the clause as defendants propose would be to read  
 3 the word “venue” out of the provision.

4 Finally, defendants cite *Project Development Group v. Sonoma County Junior College*  
 5 *District*, 2007 WL 2518034 (N.D. Cal. 2007) (Alsup, J.), but that decision addressed an entirely  
 6 different forum-selection clause that expressly referred to “the appropriate state *or federal* court  
 7 located in Sonoma County.” Indeed, *Project Development Group* expressly contrasted *Air Ion*  
 8 (quoted above), which ordered remand based on a clause that (like here) provided that any  
 9 action “shall” be “brought” in state court. 2002 WL 1482665, at \*2. In short, the law in this  
 10 circuit forecloses defendants’ argument that the word “brought” requires only that an action be  
 11 *initially filed* in a particular forum but not that it *remain* or actually be litigated in that forum —  
 12 particularly where (as here) the clause also specifies “venue.”<sup>2</sup>

13 \* \* \*

14 *Second*, defendants focus on the forum-selection clause’s use of the word “courts” and  
 15 argue that the plural form of that word must refer both to state *and* federal courts. Under this  
 16 interpretation, even if the clause is mandatory it would permit litigation in either the state or  
 17 federal court encompassing Sonoma County. Again, the authority is to the contrary.

18 The clause here at issue requires that any action be brought in the “courts *of* Sonoma  
 19 County, California.” The Northern District of California is not a court “of” Sonoma County,  
 20 California. As a Fifth Circuit decision explained in rejecting a similar argument: “[f]ederal  
 21 district courts may be *in* Texas, but they are not *of* Texas. Black’s Law Dictionary defines ‘of’  
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 24 <sup>2</sup> Defendants offer yet further citations — they reference the Rutter Guide and two decisions cited  
 25 therein. The first is *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), a  
 26 decision that *did* require remand (finding a clause to contain mandatory language), and the second is *Dixon v.*  
 27 *TSE Intern. Inc.*, 330 F.3d 396 (5th Cir. 2003), another decision that *did* require remand based on the following  
 28 contract language: “The Courts of Texas, U.S.A., shall have jurisdiction over all controversies with respect to  
 the execution, interpretation or performance of this Agreement, and the parties waive any other venue . . . .”  
 Finally, defendants cite *John’s Insulation v. Siska Construction*, 671 F. Supp. 289 (S.D.N.Y. 1987), which  
 ordered remand based on the following clause: “any action hereunder shall be commenced in the Supreme  
 Court of the State of New York.” The clause there at issue, however, referred to where an action was  
 “commence” rather than “brought;” the clause (unlike here) did not specify “venue” (and distinguished a  
 decision that had); and in all respects could not trump the above-cited Ninth Circuit law.

1 as ‘denoting that from which anything proceeds; indicating origin, source, descent’ . . . .”

2 *Dixon v. TSE Intern. Inc.*, 330 F.3d 396, 398 (5th Cir. 2003) (emphasis in original).

3 In support of its interpretation of the plural “courts,” defendants cite *Project*  
 4 *Development Group*, 2007 WL 2518034, but as explained, that decision concerned an entirely  
 5 different forum-selection clause that expressly referred to “the appropriate state *or federal* court  
 6 located in Sonoma County.” It was not a case (like here) where the clause directed the parties  
 7 (only) to the state courts “of” a particular county.<sup>3</sup> Defendants also cite *Merrell v. Renier*, 2006  
 8 WL 1587414 (W.D. Wash. 2006), but again, that decision (unlike here) addressed a clause that  
 9 could be interpreted specifically to provide for federal or state court: “venue . . . will reside in  
 10 the *United States and* in the county of residence of the non-breaching party.” Here, in contrast,  
 11 the clause allows suit only in the courts “of” Sonoma County. This order rejects defendants’  
 12 expansive interpretation of the plural “courts.”

13 \* \* \*

14 *Third*, defendants argue that “plaintiff cannot attempt to enforce a forum selection clause  
 15 in a contract he claims does not exist.” Defendants contend that the crux of plaintiff’s unjust-  
 16 enrichment claim is that no valid contract existed between him and defendant CrossCheck (just  
 17 between him and defendant United Bank Card). Defendants cite authority indicating that “[t]he  
 18 settled rule is that one who would rescind for fraud or other reason cannot cling to the portion of  
 19 the deal he deems favorable and reject the balance. He must rescind the contract as a whole or  
 20 not at all.” *Int’l Marble and Granite of Colo. v. Congress Financial Corp.*, 465 F. Supp. 2d  
 21 993, 1004 (C.D. Cal. 2006) (citation omitted). Moreover, defendants contend, unjust-  
 22 enrichment claims generally require that no valid contract actually authorized the conduct  
 23 underlying the alleged unjust enrichment — otherwise the enrichment would not be unjust.

24 Plaintiff’s unjust-enrichment claim, however, does not prevent enforcement of the  
 25 forum-selection clause. Plaintiff does not seek rescission or repudiation of the contract. The

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 27 <sup>3</sup> *Project Development Group* addressed whether the Northern District is “located in” Sonoma County  
 28 given that there was no federal courthouse physically located there. It ruled that the Northern District *was* an  
 appropriate court because it was the federal judicial district covering Sonoma. The decision was not confronted  
 with the question here at issue because it interpreted a clause expressly including the parties to state *or* federal  
 court in Sonoma County, not just the courts “of” Sonoma County.

1 portions of the complaint defendants emphasize do not claim that the contract is invalid but  
 2 instead simply allege (for example) that defendants engaged in fraud or unfair business  
 3 practices by “surreptitiously signing their customers up for defendant UBC’s check  
 4 authorization service” and taking money for it (or its termination) without disclosure.

5 True, plaintiff’s theory must be that there was no valid contract with CrossCheck for the  
 6 (unwanted) check-authorization service and ensuing termination fees, and/or that plaintiff was  
 7 fraudulently induced to enter a contract for the service, but such a claim does not render the  
 8 forum-selection clause un-enforceable. Plaintiff’s theory, in effect, is that although plaintiff *did*  
 9 contract with UBC for credit-card authorization service, the contract did not allow defendants to  
 10 take his money for CrossCheck’s different, undisclosed and unwanted check-verification  
 11 service. When defendants did so they committed torts and other violations and thereby were  
 12 unjustly enriched. As a decision of this district explained,

13 the Ninth Circuit has found that forum selection clauses can be  
 14 equally applied to contractual and tort causes of action where  
 15 resolution of the tort claims relates to the interpretation of the  
 contract. *See Manetti-Farrow, Inc. v. Gucci America*, 858 F.2d  
 509, 514 (9th Cir. 1988).

16 *Graham Technology Solutions v. Thinking Pictures*, 949 F. Supp. 1427, 1432–33 (N.D. Cal.  
 17 1997). The forum-selection clause is enforceable.

18 \* \* \*

19 *Fourth*, defendants contend that the policy or spirit behind the Class Action Fairness Act  
 20 supports removal. CAFA gave federal courts “original” jurisdiction over class actions that  
 21 satisfy certain criteria, but it did not give federal courts *exclusive* jurisdiction over this action.  
 22 *See* 28 U.S.C. 1332(d). Defendants cite legislative history suggesting that Congress generally  
 23 wanted to channel interstate class actions to federal court. Although CAFA may otherwise  
 24 afford this Court jurisdiction, however, CAFA does not trump a valid, enforceable and  
 25 mandatory forum-selection clause by which parties agreed to litigate in state court — at least,  
 26 defendants cite no provision so providing nor any authority so suggesting. It is often the case  
 27 that federal courts have jurisdiction yet decline to exercise it in the face of a valid forum-  
 28 selection clause.


1 Finally, insofar as any lingering ambiguity remains about the proper interpretation of the  
2 forum-selection clause (a doubtful proposition), the Ninth Circuit has repeatedly emphasized  
3 that “where language is ambiguous the court should construe the language against the drafter of  
4 the contract” — including in forum-selection clauses. *Hunt Wesson*, 817 F.2d at 78. Here,  
5 defendants drafted the forum-selection clause: it was included in defendant UBC’s own  
6 “Standard Guarantee Terms and Conditions.” Thus, any ambiguity that persists regarding the  
7 clause must be construed against defendants, *i.e.*, in favor of remand. For all of these reasons,  
8 the parties’ forum-selection clause requires remand.

9 **CONCLUSION**

10 For all of the above-stated reasons, plaintiff’s motion to remand is **GRANTED**. Despite  
11 the fact that Attorney Wells did an excellent job and made the most of what material she had to  
12 work with, the case law is decidedly against the position of her client.

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14 **IT IS SO ORDERED.**

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16 Dated: April 30, 2009.

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19 WILLIAM ALSUP  
20 UNITED STATES DISTRICT JUDGE  
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