

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

MYADVERTISINGPAYS (MAP) LIMITED	§	
an Anguillan corporation	§	
	§	
V.	§	C.A. No. 4:16-CV-03541
	§	(Judge Nancy Atlas)
VX GATEWAY CORP., a Texas Corporation,	§	
VW GATEWAY, INC., A Panamanian	§	
Corporation, VX GATEWAY, LIMITED,	§	
A U.K. Corporation, CELIA DUNLOP, An	§	
Individual, & TIMOTHY MACKAY,	§	
An Individual	§	

**Defendants' Response to Plaintiff's
Motion for Temporary Restraining Order**

Defendants VX Gateway Corp., a Texas corporation, VX Gateway, Inc., a Panamanian corporation, VX Gateway Limited, a United Kingdom corporation, Celia Dunlop, an individual, and Timothy MacKay, an individual, respond to Plaintiff's Motion for a Temporary Restraining Order as follows:

I. NON WAIVER OF DEFENDANT'S RIGHT TO FILE F.R.C.P. 12(b)(2-6) MOTION(S)

In filing this response, Defendants do not waive, and expressly reserve, their right to timely and subsequently file F.R.C.P. 12(b)(2-6) motion(s) on the following grounds:

A. Improper Venue.

The Southern District of Texas is an improper venue for this case. The only Defendant to do business with the Plaintiff is VX Gateway, Inc., a Panamanian Corporation

(the-real party-in-interest) (VW-Panama). The contract between those parties relating to the matters asserted herein contains a choice of law and mandatory forum selection clause, which provides:

This Agreement and performance under it will be interpreted, construed and enforced in all respects in accordance with the laws of the Republic of Panama, without reference or giving effect to its conflicts of law principles. You hereby irrevocably consent to the personal jurisdiction of and venue in the Republic of Panama with respect to any action, claim or proceeding arising out of or related to this Agreement **and agree not to commence or prosecute any such action, claim or proceeding other than in such courts, except as otherwise provided in Section 18.7 above.** (Emphasis Added).¹

Forum selection clauses are enforceable under both Texas and Federal case law. *See In Re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016); *Atlantic Marine Constr. Co. v. U.S. Dist. Court for the W.D. of Texas*, 134 S. Ct. 568, 574 (2013).

B. Lack of Personal Jurisdiction.

This Court does not have personal jurisdiction over any of the defendants. More specifically, none of the corporate defendants are doing business or maintain offices in the United States. Neither Defendant VX-Panama nor Defendant VX Gateway Limited (VX-UK) have an office in the U.S., do not have any real or personal property in the U.S., and do not have any bank accounts in the U.S.²

Defendant VX Gateway Corp., a Texas corporation (VX-Texas), ceased business

¹ See Exhibit E-1, Jurisdiction at p. 21.

² See Affidavit of Celia Dunlop, ¶¶ 9, 10, and 15.

operations in December 2015, closed its bank account in January 2016, and has no real or personal property.³

Neither defendant VX-UK nor VX-Texas have a contract with the plaintiff.⁴

As for the individual defendants, neither are U.S. citizens, neither have resided in the U.S. since May 2008, neither have a residence in the U.S., and neither have any bank accounts in the U.S.⁵

Furthermore, the claims asserted in Plaintiff's complaint do not reflect Plaintiff's or Defendants' activity in the State of Texas or any other state. *See Daimler AG v. Bauman*, 134 S.Ct. 746 (2014) ("in order for a foreign defendant to be subject to general jurisdiction, it must not only possess continuous and systematic contacts with a forum state, but those contacts must also surpass some unspecified level when viewed in comparison to the company's 'nationwide and worldwide' activities," *Id.* at 770) (allowing this suit "would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available." *Id.* at 764).

C. Insufficient Process/insufficient Service of Process.

The Defendants have not been given proper service relating to this Motion as required by the Court's December 2, 2016 order [Doc. #10] (proof of service required by December

³ See Affidavit of Celia Dunlop, ¶ 10.

⁴ See Affidavit of Celia Dunlop, ¶¶ 12 and 15.

⁵ See Affidavit of Celia Dunlop, ¶¶ 2-3.

5, 2016). In addition, none of the Defendants have been served with process.

II. RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER

The Plaintiff cannot establish one or more of the factors supporting a temporary restraining order.

1. Irreparable Injury/adequate Remedy at Law.

It is horn book law that a restraining order requires a threat of imminent irreparable injury and no adequate remedy at law.

Plaintiff does not assert an irreparable injury. Rather, Plaintiff's complaint speaks only of monetary damages. Monetary loss alone is not an irreparable injury. *Rent-A-Center v. Canyo TV & Appl. Rental, Inc.*, 944 F.2d 597, 603 (9TH Cir. 1991).

Furthermore, Plaintiff has an adequate remedy at law. Defendant VX-Panama commenced a dissolution proceeding in Panama and established a claim procedure under Panamanian law. VX-Panama has previously encouraged the Plaintiff to participate in the claims process, including an offer to be a co-trustee of Defendant's assets. The Plaintiff refused the offer.⁶ As previously indicated, VX-Panama has no assets in the U.S.

Last, but not least, if Plaintiff believes a judicial remedy is the appropriate course of action, then it has the remedies afforded under Panamanian law and, per the terms of the parties' agreement, Plaintiff is required to pursue such remedies in the Republic of Panama.

⁶ See Affidavit of Celia Dunlop, ¶¶ 31-32

2. Imminent Harm.

Plaintiff has not established imminent harm. The operable facts of Plaintiff's claims as asserted in its Complaint relate back to early 2016. Given the substantial passage of time, there is no reason to believe that Plaintiff's claimed harm has suddenly become imminent.

3. No Substantial Likelihood of Success.

Plaintiff has not established a substantial likelihood of success. Plaintiff's Complaint and affidavits present a complicated business relationship intertwined with complicated international banking and other financial regulations. Plaintiff has asserted that its funds are not available to it, but does not establish that VX-Panama, or any other defendant, is at fault or in possession of those funds.

4. Balance of Hardships.

Plaintiff seeks an order that Defendants escrow an amount of approximately \$60,000,000.00, or secure a bond for that amount.

Defendants do not have physical possession of Plaintiff's funds and do not have the assets to acquire a bond in that amount.⁷ As noted above, VX-Panama has initiated a claims process in Panama related to its dissolution, and the Plaintiff refused to participate.

Nor should the court require an escrow or a bond because the Plaintiff has failed to provide any evidence that constitutes a review or audit of the thousands of transactions that would comprise its alleged damages. It is inappropriate to grant the requested relief on a

⁷ See Affidavit of Celia Dunlop, ¶ 36.

bald-faced assertion of harm without the factual data to support the amount alleged.

Furthermore, in the event this case is not dismissed on the Rule 12(b)(2-6) motions, if anyone should be required to post a bond, it should be the Plaintiff for the harm that could be caused to VX-Panama's dissolution and claims process. As indicated by the Affidavit of Celia Dunlop, the financial harm would be the approximately sum of \$24,500,000.00.⁸ In addition, the court should include as part of that bond an amount for interest and attorneys' fees.

Prayer

Defendants respectfully request this Court to deny Plaintiff's Motion for Temporary Restraining Order.

Respectfully submitted,

// s // Syd Phillips

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⁸ See Affidavit of Celia Dunlop, ¶ 36.

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Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following:

J. Cary Gray
GRAY REED & McGraw, P.C.
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
Attorney in charge for Plaintiff

via e-service, facsimile, or certified mail, return receipt requested on December 7, 2016.

// s // Syd Phillips

Syd Phillips