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W.R. BERKLEY SYNDICATE LIMITED and
GREAT LAKES INSURANCE SE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMERALD HOLDING, INC.,

Plaintiff,

v.

W.R. BERKLEY SYNDICATE LIMITED and GREAT LAKES INSURANCE SE,

Defendants.

Case No. 8:21-cv-00340-CJC-KES

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO TRANSFER VENUE AND STAY ACTION PENDING DECISION THEREON

Date: May 31, 2021
Time: 1:30 p.m.
Courtroom: 9B

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER VENUE

I. INTRODUCTION

This is an insurance coverage action involving certain trade-show events cancelled in 2020 and 2021 by Plaintiff Emerald Holding, Inc. ("Emerald"). Emerald sought insurance coverage for the cancelled events under two Cancellation and Abandonment Insurance policies (the "Policies") issued by Defendants W.R. Berkley Syndicate Limited ("Berkley") and Great Lakes Insurance SE ("Great Lakes" and, together with Berkley, "Defendants"). After Defendants denied Emerald's claim for coverage, Emerald commenced this action here in the Central District of California—despite the Policies' inclusion of forum-selection clauses which clearly provide that disputes like this must be litigated in courts located in New York. Defendants therefore respectfully request that the Court transfer this case to the United States District Court for the Southern District of New York pursuant to the Policies' forum-selection clauses and 28 U.S.C. Section 1404(a). Defendants further request that the Court stay this action in its entirety pending the Court's decision on Defendants' Motion to Transfer Venue.

The Policies' forum-selection clauses clearly demonstrate that this action belongs in the Southern District of New York. The Supreme Court has held that "a forum-selection clause [must] be given controlling weight in all but the most exceptional cases." *Atlantic Marine Constr. Co. v. United States Dist. Ct. for the W. Dist. of Texas*, 134 S. Ct. 568, 579 (2013) (internal quotation marks omitted). When a defendant seeks to enforce a valid forum-selection clause by moving to transfer under 28 U.S.C. § 1404(a), "a district court should transfer the case unless *extraordinary circumstances* unrelated to the convenience of the parties *clearly* disfavor a transfer." *Id*. at 575 (emphases added). No such circumstances exist here. To the contrary, Emerald is a corporation headquartered in New York, (ECF No. 1 ("Complaint"), ¶ 10), and, in addition to the New York forum-selection clauses, the Policies also include New York choice-of-law provisions.

Accordingly, the United States District Court for the Southern District of New York is the more appropriate forum under any measure. Other factors the Court may consider weigh in favor of transfer (or are neutral), as discussed further below.

Defendants therefore respectfully request that the Court transfer this case to the United States District Court for the Southern District of New York, where it should have been brought in the first place.

II. BACKGROUND

A. The Insurance Policies

Emerald operates business-to-business trade show events throughout the United States. (Compl., ¶¶ 2, 21). Defendants issued Cancellation and Abandonment Insurance Policy No. PACES1800071 to "Emerald Expositions, Inc." for the April 24, 2018 to December 31, 2020 policy period (the "2020 Policy"). (*See* Declaration of Phillip Welsh ("Welsh Dec."), at ¶ 6; **Exhibit A** thereto (2020 Policy), p. 1 of 37;[1] Declaration of Robert Ruskell ("Ruskell Dec."), at ¶ 6). Defendants also issued Cancellation and Abandonment Insurance Policy No. PACES1900032 to "Emerald Expositions Events Inc." for the March 25, 2019 to December 31, 2021 policy period (the "2021 Policy", and collectively with the 2020 Policy, the "Policies"). (*See* Welsh Dec., at ¶ 6; **Exhibit B** thereto (2021 Policy), p. 4 of 44; Ruskell Dec., at ¶ 6).[2] Subject to their terms, conditions, and exclusions, the Policies provide coverage for the cancellation of certain events the insured was scheduled to

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[1] Citations to the 2020 Policy and the 2021 Policy herein refer to the policies attached as **Exhibit A** and **Exhibit B** to the Welsh Declaration, which are materially identical to the 2020 Policy and 2021 Policy attached as **Exhibit A** and **Exhibit B** to the Ruskell Declaration.

[2] As noted above, the 2020 Policy was issued to Emerald Expositions, Inc. and the 2021 Policy was issued to Emerald Expositions Events Inc. Plaintiff Emerald Holding, Inc. alleges in the Complaint that it was previously known as Emerald Expositions, Inc. (Compl., p. 3 n.1). It is not clear what, if any, relationship Emerald Expositions Events Inc., to whom the 2021 Policy was issued, has to Plaintiff Emerald Holding, Inc.

operate during 2020 and 2021.

The "Choice of Law and Jurisdiction" provision of the 2020 Policy provides:

> Unless the Assured requested and the Insurers agreed otherwise in writing this Insurance is mutually agreed to be governed and construed in accordance with the laws of the State of New York whose courts shall have *exclusive* jurisdiction. (emphasis added)

(2020 Policy, p. 3 of 37).

The "Choice of Law and Jurisdiction" provision of the 2021 Policy provides:

> Any dispute concerning the interpretation of the terms, conditions, limitations and/or exclusions contained herein is understood and agreed by both the Insured and the Insurers to be subject to the laws of New York.
>
> Each party agrees to submit to the jurisdiction of any court of competent jurisdiction within New York and to comply with all requirements necessary to give such court jurisdiction.
>
> All matters arising hereunder shall be determined in accordance with the law and practice of such court.

(2021 Policy, pp. 5-6 of 44).

B. The Insurance Coverage Dispute

Plaintiff alleges that, beginning in the first quarter of 2020, certain trade show events that Emerald was scheduled to operate were cancelled due to the Covid-19 pandemic. (Compl., ¶ 36). Emerald submitted claims to Defendants for losses incurred in connection with events cancelled in 2020 and has continued to submit claims in connection with event cancellations in 2021. (*Id*. at ¶ 43). Defendants have made, and continue to make, payments to Emerald for the claims submitted, but a dispute has since arisen between Emerald and Defendants regarding the scope and amount of coverage available under the Policies in connection with certain events that are the subject of Emerald's claims. (*E.g.*, *id*. at ¶¶ 3-4, 7-9).

On February 22, 2021, Emerald filed the Complaint in this action asserting claims against Defendants for Declaratory Relief (First Cause of Action), Breach of Contract (Second Cause of Action), and Bad Faith (Third Cause of Action) in connection with Emerald's claims for coverage under the Policies.

III. THIS ACTION SHOULD BE TRANSFERRED TO THE SOUTHERN DISTRICT OF NEW YORK

A. Emerald Could Have and Should Have Brought This Action in the Southern District of New York

Emerald could have (and should have) brought this action in the United States District Court for the Southern District of New York, which is the proper venue for this action. The Southern District has subject matter jurisdiction over this action; all parties to this action are subject to personal jurisdiction in the Southern District of New York; and that is the district in which the parties intended to litigate any dispute arising under the Policies, as evidenced by the Policies' forum-selection clauses.

The Southern District of New York has subject matter jurisdiction over this action because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000. Pursuant to 28 U.S.C. § 1332(a), "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of a State and citizens or subjects of a foreign state." Defendants are foreign companies organized and existing under the laws of the United Kingdom with their principal places of business in London, England. (Compl., ¶¶ 14, 17). Emerald is a Delaware Corporation with its principal place of business in New York, New York. (*Id*., ¶ 10). The amount in controversy in this action exceeds $75,000, exclusive of costs. (*Id*., ¶ 18). Accordingly, federal diversity jurisdiction exists pursuant to 28 U.S.C. § 1332.

The Southern District of New York also has personal jurisdiction over all parties to this action. *First*, the parties waived personal jurisdiction in courts located

in New York through the forum-selection clauses included in the Policies, each of which provides that coverage disputes like the instant action must be litigated in a court located in New York. (2020 Policy, p. 3 of 37; 2021 Policy, p. 5-6 of 44); *Allied Pros. Ins. Co. v. Harmon*, 2017 WL 5634600, at *6 (C.D. Cal. July 28, 2017) ("A forum selection clause is construed as consent by the contracting parties to the personal jurisdiction of the courts of the selected forum." [citations omitted]).

Moreover, even absent the forum-selection clauses, Emerald is subject to personal jurisdiction in the Southern District of New York because its principal place of business (its headquarters) is located in New York, New York. (Compl., ¶ 10); *e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010) (holding that a company's "principal place of business"—or, "nerve center"—"in practice . . . should normally be the place where the corporation maintains its headquarters"); *Myers v. Wells Fargo Sec., LLC*, 2019 WL 6329629, at *1 (C.D. Cal. Nov. 25, 2019) ("WFS's principal place of business is in Charlotte, North Carolina, which is where WFS's corporate headquarters and executive offices are located . . . ."). Likewise, Defendants are subject to personal jurisdiction in the Southern District of New York because they regularly issue insurance policies to residents and business in New York state, (Welsh Dec., ¶ 4; Ruskell Dec., ¶ 4); and thus have sufficient minimum contacts with the state to support jurisdiction arising from those contacts. *E.g.*, *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (holding that one insurance policy issued by Texas insurer to California resident subjected insurer to personal jurisdiction in California to answer claim based on that policy). Accordingly, both through the waiver of personal jurisdiction effected by the forum-selection clauses and the parties' presence in or contacts with the state of New York, the parties are all subject to personal jurisdiction in the Southern District of New York.

Finally, the Southern District of New York is the proper venue for this action. Pursuant to 28 U.S.C. § 1391(b), venue is proper in

> **(1)** a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> **(2)** a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> **(3)** if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

§ 1391(b). Further, for venue purposes, a corporate defendant is "deemed to reside . . . in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." § 1391(c)(2).

Here, venue is proper in the Southern District of New York because Defendants are subject to personal jurisdiction in that district with respect to this action. § 1391(b)(3). Further, venue is proper in the Southern District of New York because a substantial part of the events or omissions giving rise to the claim occurred there given that Emerald's headquarters is in New York. § 1391(b)(2); (Compl., ¶ 10). Accordingly, there is no question that Emerald could have (and should have) brought this action in the Southern District of New York.

B. The Forum-Selection Clauses are Valid and Enforceable

In diversity cases, federal law governs the validity of a forum-selection clause. *Simonoff v. Expedia, Inc.*, 643 F.3d 1202, 1205 (9th Cir. 2011); *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996). Forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.*, 92 S. Ct. 1907, 1813 (1972) (internal quotations omitted); *Manetti–*

Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 514 (9th Cir. 1988).

A forum-selection clause may be unreasonable for one of three reasons: (a) "the inclusion of the clause in the agreement was the product of fraud or overreaching"; (b) "the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced"; or (c) "enforcement would contravene a strong public policy of the forum in which suit is brought." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004) (quoting *Richards v. Lloyd's of London*, 135 F.3d 1289, 1294 (9th Cir. 1998)). As explained below, none of these exceptions apply here.

Further, on a motion to transfer venue based on a forum-selection clause, the district court is not limited to the pleadings. *Argueta*, 87 F.3d at 324; *Access Biologicals, LLC v. XPO Logistics, LLC*, No. 2:19-CV-01964-JAM-DB, 2020 WL 1139560, at *1 (E.D. Cal. Mar. 9, 2020). Rather, "a party opposing the enforcement of a forum-selection clause must generally produce 'some evidence ... to establish fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating the selected forum so as to deprive that party of a meaningful day in court.'" *Access Biologicals*, 2020 WL 1139560 at *1 *citing Argueta*, 87 F.3d at 324.

1. The Forum-Selection Clauses Are Not the Product of Fraud or Overreach

In evaluating whether a forum-selection clause is the product of fraud or overreach, courts consider whether the forum-selection clause was meaningfully communicated to the plaintiff and/or whether the plaintiff could have learned of its existence. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S. Ct. 1522, 113 L.Ed.2d 622 (1991); *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 835 (9th Cir. 2002). Courts consider the forum-selection clause's physical characteristics and whether the plaintiff had the ability to become meaningfully informed of the clause and to reject its terms. *Wallis*, 306 F.3d at 835-836.

Here, the Policies' forum-selection clauses are contained in the Declarations pages at the beginning of the Policies under the bold and capitalized heading "**CHOICE OF LAW AND JURISDICTION**." (**Ex. A**, p. 3 of 37; **Ex. B**, p. 5-6 of 44). Further, Emerald is a corporate entity that was represented by an insurance broker in connection with the purchase of the Policies. (Welsh Dec., at ¶ 8; Ruskell Dec., at ¶ 8; 2020 Policy, p. 36 of 37 (identifying Marsh USA, Inc. as "surplus lines broker"); 2021 Policy, p. 4 of 44 (same)). Moreover, forum-selection clauses are common in insurance policies and their inclusion here came as no surprise to Emerald. *See, e.g., Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1218 (3rd Cir. 1991). ("Forum selection clauses are in rather widespread use throughout the insurance industry.").[3]

Accordingly, the forum-selection clauses were meaningfully communicated to Emerald, and Emerald knew or should have known of their existence.

2. Enforcing the Forum-Selection Clause Does Not Deprive Emerald of its "Day in Court"

A forum-selection clause may not be enforceable if the other party "would effectively be deprived of his day in court were the clause enforced." *LaCross v. Knight Transp., Inc.*, 95 F. Supp. 3d 1199, 1203 (C.D. Cal. 2015). However, "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Bremen*, 92 S. Ct. at 1917. A party may show that a forum-selection clause should not be enforced if all the relevant witnesses are not located in that forum, the party is physically unable to go to the chosen forum, or the party lacks the financial ability to bear the costs of proceeding in the chosen forum. *See Spradlin v. Lear Siegler Mgmt. Servs. Co.*,

[3] *See also Luedde v. Devon Robotics, LLC*, 2010 WL 2712293, at *7 (S.D. Cal. July 2, 2010) (rejecting as "unavailing" the plaintiff's attempt "to paint herself as naïve" and finding that plaintiff had adequate notice of the forum-selection clause).

926 F.2d 865, 869 (9th Cir. 1991); *Goldman v. U.S. Transp. & Logistics, LLC*, No. 17-cv-00691-BAS-NLS, 2017 WL 6541250, at *5 (S.D. Cal. Dec. 20, 2017).

Those circumstances do not exist here. As a corporate entity headquartered in New York, Emerald is already located in the Southern District of New York and therefore should not have any issues with physical ability to proceed in that forum or financial ability to litigate there. (Compl., ¶ 10). Likewise, most, if not all of Emerald's witnesses are likely to be located in the Southern District of New York because that is where Emerald's corporate headquarters is located.

3. Enforcing the Forum-Selection Clause Does Not Violate California Public Policy

Courts in California routinely hold that forum-selection clauses do not violate California public policy where there is no California statute restricting venue for the subject claims to California courts. *See Richards v. Lloyd's of London*, 135 F.3d 1289, 1294 (9th Cir. 1998) (public policy did not preclude enforcement of forum-selection clause even where the enforcement precluded remedies under federal and state securities law); *Manetti-Farrow*, 858 F.2d at 515 (upholding enforcement of forum-selection clause where plaintiff's contention of unreasonableness was "speculative" and reflected a provincial attitude toward foreign tribunals); *S & J Rentals, Inc. v. Hilti, Inc.*, 294 F. Supp. 3d 978, 990 (E.D. Cal. 2018). New York courts likewise recognize a strong public policy in favor of enforcing forum-selection clauses.[4]

The forum-selection clauses also do not conflict with California public policy

[4] *Martinez v. Bloomberg LP*, 883 F. Supp. 2d 511, 515–16 (S.D.N.Y. 2012), *aff'd*, 740 F.3d 211 (2d Cir. 2014) ("As the Supreme Court and the Second Circuit have made clear, there is a strong federal policy in favor of enforcing forum selection clauses."); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1361 (2d Cir.1993) (noting the "strong public policy in favor of forum selection and arbitration clauses"); *Wachovia Bank Nat'l Ass'n v. EnCap Golf Holdings, LLC*, 690 F.Supp.2d 311, 327 (S.D.N.Y.2010) (explaining the strong public policy in favor of enforcing forum-selection clauses).

based on the availability of potential remedies under California insurance bad faith law. *See, e.g., Crown Cap. Sec., L.P. v. Liberty Surplus Ins. Corp.*, 2015 WL 12748815, at *7 (C.D. Cal. Mar. 30, 2015). In *Crown*, the court held that California's public policy underlying bad faith remedies does not relate to venue. *Id*. at *9. Specifically, the court ruled that enforcing the forum-selection clause would not impact the insured's ability to bring a bad faith claim against the insurer because venue and choice of law issues are separate. *Id*. As with this case, *Crown* involved a motion to transfer venue to the Southern District of New York. The court explained that "the Southern District of New York is capable of vindicating any of Crown Capital's claims that may arise under California law because, despite the existence of a choice-of-law provision, the transferee court can apply California law if it determines that is appropriate." *Id*. at *7 (citing *Beatie and Osborn LLP v. Patriot Scientific Corp.*, 431 F. Supp. 2d 367, 381–82 (S.D.N.Y. 2006) (analyzing at length California's public policy interests in the matter despite choice of law provision stating the matter "shall be governed by the laws of the State of New York[.]")).

The same is true here. New York bad faith law applies in this matter given the Policies' New York choice-of-law provisions. However, even if the Southern District of New York were to determine that California bad faith law applies, that court is capable of applying California bad faith law. *Id*.

C. The Forum-Selection Clauses Apply to Emerald's Claims in This Action

"In order to determine the scope of the forum selection clause, the Court must examine its construction." *Cedars-Sinai Med. Ctr. v. Global Excel Mgmt., Inc.*, No. CV 09-3627 PSG (AJWx), 2010 WL 5572079, at *5 (C.D. Cal. Mar. 19, 2010) *citing Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983). The 2020 Policy's forum-selection clause provides that New York courts have "exclusive" jurisdiction over the governance and construction of the

2020 Policy. (2020 Policy, p. 3 of 37). Likewise, the 2021 Policy provides that all matters arising under the 2021 Policy, including disputes concerning interpretation of its terms, conditions, limitations, and/or exclusions, shall be submitted to the jurisdiction of New York courts and are subject to the laws of New York. (2021 Policy, pp. 5-6 of 44).

A breach of contract claim falls within the scope of a contract's forum-selection clause. *White Knight Yacht LLC v. Certain Lloyds at Lloyd's London*, 407 F. Supp. 3d 931, 943–44 (S.D. Cal. 2019) (holding that breach of contract claims "paradigmatically fall within a forum selection clause").[5] Accordingly, Emerald's Breach of Contract and Declaratory Relief claims are within the scope of the Policies' forum-selection clauses.

Additionally, a bad faith claim under an insurance policy also falls within a forum-selection clause if the bad faith claim relates to the interpretation of the policy. *White Knight Yacht*, 407 F. Supp. 3d at 943–44.[6] Here, Emerald's bad faith claim relates to the issues of interpretation of the Policies. Emerald makes this explicit in the Complaint, which alleges that Defendants denied coverage for three

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[5] *See also Manetti-Farrow,* 858 F.2d at 514 (even if claims in an action do not allege breach of the contract containing the forum-selection clause, the forum-selection clause still applies if the claims asserted arise out of the contractual relation or implicate the contract's terms.); *Crescent Intern., Inc. v. Avatar Communities, Inc.*, 857 F.2d 943, 944-45 (3d Cir. 1988); *see also Hugel v. Corporation of Lloyd's,* 999 F.2d 206, 209 (7th Cir. 1993) ("Regardless of the duty sought to be enforced in a particular cause of action, if the duty arises from the contract, the forum selection clause governs the action."); *Bense v. Interstate Battery System of America,* 683 F.2d 718, 720 (2d Cir.1982) (holding that a forum-selection clause applied to anti-trust claims because a forum-selection clause covers "causes of action arising directly or indirectly from" the agreement).

[6] *See also Graham Technology Solutions, Inc. v. Thinking Pictures, Inc.,* 949 F. Supp. 1427, 1433 (N.D. Cal.1997) ("[T]he better view, and the one that is consistent with the Ninth Circuit approach adopted in *Manetti–Farrow*, is the one which upholds the forum selection clause where the claims alleged in the complaint *relate* to the interpretation of the contract.") (emphasis in original).

events "based on [their allegedly] *improper interpretation of the Policies* that, unless there is an order legally prohibiting an event from going forward, cancellation was avoidable, and so there is no coverage." (Compl., ¶ 62 (emphasis added)). Likewise, Emerald alleges that "an interpretation of the Policies that the Underwriters get credited corporate overhead savings is directly contrary to the language of the Policies." (*Id.*, ¶ 66). Thus, Emerald's bad faith claim is within the scope of the forum-selection clauses because it relates to the interpretation of the Policies.

D. There is a Presumption in Favor of Transfer Under the 2020 Policy's Forum-Selection Clause

1. The 2020 Policy's Forum-Selection Clause is Unambiguously Mandatory

A forum-selection clause is mandatory where the clause "contain[s] language that clearly designates a forum as the exclusive one." *In re 1250 Oceanside Partners*, 652 F. App'x 588, 589 (9th Cir. 2016); *N. Cal. Dist. Council of Laborers v. Pittsburgh-Des Moines Steel Co.*, 69 F.3d 1034, 1037 (9th Cir. 1995); *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989) ("The prevailing rule is... that where venue is specified with mandatory language the clause will be enforced."); *see also John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs*., 22 F.3d 51, 53 (2d Cir.1994) ("Of course if mandatory venue language is employed, the clause will be enforced."). Here, the 2020 Policy's forum-selection clause is mandatory because it provides that New York courts will have "*exclusive* jurisdiction" over claims arising from the 2020 Policy. (2020 Policy, p. 3 of 37).

2. Mandatory Forum-Selection Clauses Are Presumptively Valid and Entitled to Great Weight

As discussed above, "[a] forum selection clause is presumptively valid; the party seeking to avoid a forum selection clause bears a 'heavy burden' to establish a ground" that renders the clause unenforceable. *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009). No such grounds exist here for the reasons discussed above.

Indeed, courts in this district routinely grant motions to transfer venue based on mandatory forum-selection clauses.[7] Likewise, federal courts throughout California regularly enforce forum-selection clauses in insurance policies.[8] New York courts also routinely enforce forum-selection clauses in insurance policies.[9]

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[7] *See, e.g., Derosa v. Thor Motor Coach*, Inc., 2020 WL 6647734, at *2 (C.D. Cal. Sept. 30, 2020) (Judge Wilson) (transferring venue to Northern District of Indiana); *Tanious v. Landstar Sys., Inc.*, 2020 WL 3166610, at *6 (C.D. Cal. June 15, 2020) (Judge Fischer) (transferring venue to the Middle District of Florida); *PennyMac Loan Servs., LLC v. Black Knight, Inc.*, 2020 WL 5985492, at *7 (C.D. Cal. Feb. 13, 2020) (Judge Klausner) (transferring venue to the Middle District of Florida); *Domen v. Vimeo, Inc.*, 2019 WL 4998782, at *3 (C.D. Cal. Sept. 4, 2019) (Judge Wilson) (transferring venue to the Southern District of New York); *Yates v. Norsk Titanium US, Inc.*, 2017 WL 8232188, at *4 (C.D. Cal. Sept. 20, 2017) (Judge Guilford) (transferring venue to the Southern District of New York); *Britvan v. Cantor Fitzgerald, L.P.*, 2016 WL 3896821, at *6 (C.D. Cal. July 18, 2016) (Judge Wright) (transferring venue to the Southern District of New York); *Kabbash v. Jewelry Channel, Inc. USA*, 2016 WL 9132930, at *6 (C.D. Cal. Feb. 22, 2016) (Judge Gee) (transferring venue to the Western District of Texas); *LaCross v. Knight Transportation, Inc.*, 95 F. Supp. 3d 1199, 1207–08 (C.D. Cal. 2015) (Judge Bernal) (transferring venue to the District of Arizona); *Garcia v. Top Rank, Inc.*, No. EDCV1400928JAKSPX, 2014 WL 12791946, at *13 (C.D. Cal. Sept. 9, 2014) (Judge Kronstadt) (transferring venue to the District of Nevada).

[8] *See, e.g., Mitsui Sumitomo Ins. USA, Inc. v. Tokio Marine & Nichido Fire Ins. Co., Ltd.*, 659 F. App'x 918, 920 (9th Cir. 2016) (enforcing policy's Japanese forum-selection clause); *White Knight Yacht LLC v. Certain Lloyds at Lloyd's London*, 407 F. Supp. 3d 931, 949 (S.D. Cal. 2019) (enforcing policy's England and Wales forum-selection clause); *Lewis v. Liberty Mut. Ins. Co.*, 321 F. Supp. 3d 1076, 1078 (N.D. Cal. 2018), *aff'd*, 953 F.3d 1160 (9th Cir. 2020) (enforcing policy's Australian forum-selection clause); *Nikolas Weinstein Studios, Inc. v. State Nat. Ins. Co.*, 2010 WL 3703713, at *2 (N.D. Cal. Sept. 16, 2010) (transferring venue to Southern District of New York based on policy's forum-selection clause).

[9] *See, e.g., AGL Indus., Inc. v. Cont'l Indem. Co.*, 2018 WL 3510387, at *5 (E.D.N.Y. July 19, 2018) (transferring venue to Nebraska); *Malagoli v. AXA Equitable Life Ins. Co.*, 2016 WL 1181708, at *4 (S.D.N.Y. Mar. 24, 2016) (transferring venue to New Jersey); *Ohuche v. Allstate Prop. & Cas. Ins. Co.*, 2012 WL 2900530, at *5 (S.D.N.Y. July 12, 2012) (transferring venue to Georgia).

E. Because Emerald's Claims Under the 2021 Policy Are Brought in the Same Action, Those Claims Should Also Be Transferred Pursuant to the 2020 Policy's Mandatory Forum-Selection Clause

To the extent the Court would construe the 2021 Policy's forum-selection clause as permissive rather than mandatory, its presence in the 2021 Policy is still a "significant factor" favoring transfer. *See Mitchell v. 1Force Gov't Sols., LLC*, 2018 WL 6977476, at *3 (C.D. Cal. Nov. 29, 2018); *Almont Ambulatory Surgery Ctr., LLC v. United Healthcare Group, Inc.*, 99 F. Supp. 3d 1110, 1166 (C.D. Cal. 2015); *Citicorp Leasing, Inc. v. United Am. Funding, Inc.*, 2004 WL 102761, at *6 (S.D.N.Y. Jan. 21, 2004) ("[A]lthough a permissive forum selection clause is entitled to less weight than a mandatory one, the fact that both parties initially accepted the jurisdiction of the courts of New York must count" in the factor analysis"); *Zapways.Com, Inc. v. Xerox Corp.*, 2002 WL 193155, at *1 (S.D.N.Y. Feb. 6, 2002). Further, because Plaintiff's claims arise from both a policy containing a mandatory forum-selection clause (the 2020 Policy) and a policy containing what is arguably a permissive forum-selection clause (the 2021 Policy), the mandatory forum-selection clause warrants transfer of the entire action. *See, e.g., Garcia v. Top Rank*, 2014 WL 12791946 (C.D. Cal. Sep. 9, 2014). *Garcia* involved claims governed by multiple contracts. Some of the claims were not subject to a forum-selection clause, other claims were subject to a permissive forum-selection clause, and others were subject to a mandatory forum-selection clause. *Id*. at *4-6. The defendant moved to transfer venue based on the forum-selection clauses. *Id*. at *1. This Court concluded that venue should be transferred as to all claims based on the mandatory forum-selection clause, reasoning that

> [w]hen there are multiple . . . claims in an action, the plaintiff must establish that venue is proper as to . . . each claim. . . . Plaintiff has brought his declaratory and Ali Act claims in this single action. Therefore, the mandatory forum selection clause governing the latter applies to the entire action.

Id. at *12 (internal quotation marks and citations omitted). Accordingly, this Court found that although the mandatory forum-selection clause only applied to one of the claims, because the plaintiff brought the claims in a single action, "the mandatory forum selection clause . . . applies to the entire action." *Id*.

Similarly, *in Primary Color Sys. Corp. v. Agfa Corp.*, 2017 WL 8220729 (C.D. Cal. July 13, 2017), this Court held that, where a plaintiff brings multiple claims subject to different forum-selection clauses in the same action, only one forum-selection clause should be enforced to avoid piecemeal litigation. *Id*. at *7 ("In the interest of justice, the Court will not enforce both forum selection clauses and divide this action. Instead, the Court enforces only one forum-selection clause.") In *Primary Color*, this Court determined that enforcing both forum-selection clauses would require the plaintiff to litigate three of its claims in New Jersey and one of its claims in Belgium. *Id*. To avoid piecemeal litigation, the court enforced only the New Jersey forum-selection clause and transferred the entire action to New Jersey. *Id*. ("the public interest factors favor having all claims litigated together in a New Jersey arbitration panel, rather than in a Belgian court.").

Here, Emerald chose to bring its claims under the 2020 Policy and the 2021 Policy in the same action. Because the forum-selection clause in the 2020 Policy is mandatory, it should be enforced pursuant to its terms, *Atlantic Marine*, 134 S. Ct. at 582; and, to avoid piecemeal litigation, the Court should transfer this entire action to the Southern District of New York. The fact that the forum-selection clause of the 2021 Policy also provides for venue in New York and that both Policies include New York choice-of-law provisions further weighs in favor of transferring the entire action. (2020 Policy, p. 3, 18 of 37 (New York choice-of-law provisions); 2021 Policy, pp. 5-6, 22 of 44 (New York forum-selection and choice-of-law provisions)).

F. The Public Interest Factors Weigh in Favor of Transfer

"In the typical case not involving a forum-selection clause, a district court considering a § 1404(a) motion . . . must evaluate both the convenience of the parties and various public interest considerations," and then "weigh the relevant factors [to] decide whether, on balance, a transfer would serve 'the convenience of parties and witnesses' and otherwise promote 'the interest of justice.' " *Atlantic Marine*, 134 S. Ct. at 581 (emphasis added) (quoting 28 U.S.C. § 1404(a)). But this analysis must give way when a forum-selection clause is involved, because "[t]he enforcement of valid forum-selection clauses . . . protects [the parties'] legitimate expectations and furthers vital interests of the justice system." *Id*. (internal quotation marks omitted). Accordingly, "a proper application of § 1404(a) requires that a forum-selection clause be given controlling weight in all but the most exceptional cases." *Id*. at 579 (internal quotation marks omitted); *Yei A. Sun v. Advanced China Healthcare, Inc*., 901 F.3d 1081, 1088 (9th Cir. 2018).

Atlantic Marine explains that the analysis under Section 1404(a) must be "adjust[ed] . . . in three ways" when a forum-selection clause is involved. *Id*. at 581. "First, the plaintiff's choice of forum merits no weight"; "as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." *Id*. "Second, a court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests"; rather, the court "must deem the private-interest factors to weigh entirely in favor of the preselected forum," and "may consider arguments about public-interest factors only," which "will rarely defeat a transfer motion." *Id*. at 582. "Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules." *Id*.

Because the forum-selection clauses are valid, enforceable, and apply to this

dispute as explained above, the Court's review under Section 1404(a) is limited to the public interest factors. *Id*. at 582 ("When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation.") Public interest factors "may include 'the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law.'" *Id*. at 581 n.6. "Because those factors will rarely defeat a transfer motion, the practical result is that forum selection clauses should control except in unusual cases." *Id*. at 582.

1. **The Public Interest Factors Favor Transfer**

As discussed below, each of the public interest factors either weighs in favor of transfer or is neutral. None of the factors weigh against transfer.

Judicial economy: Transferring venue to the Southern District of New York will not have a negative impact on judicial economy. Rather, because the Policies have New York choice of law provisions, it will be more efficient to have a New York court apply New York law to Emerald's claims and the interpretation of the Policies. (2020 Policy, pp. 3, 18 of 37; 2021 Policy, pp. 5-6, 22 of 44). This factor therefore weighs in favor of transfer.

Relative ease of access to proof: Relevant documents or evidence are likely to be located in New York because that is where Emerald's corporate headquarters are located. (Compl., ¶ 10). However, even if relevant documents or evidence were located in California, the "ease of access to documents does not weigh heavily in the transfer analysis, given that advances in technology have made it easy for documents to be transferred to different locations." *Metz v. U.S. Life Ins. Co. in City of New York*, 674 F. Supp. 2d 1141, 1149 (C.D. Cal. 2009) *quoting Szegedy v. Keystone Food Prods., Inc.*, No. CV 08–5369, 2009 WL 2767683, at*6 (C.D. Cal. Aug. 26, 2009))." Accordingly, this factor favors transfer or is neutral.

Public Policy of the Forum State: As noted above, Emerald's principal place of business is in New York. (Compl., ¶ 10). The Policies are also governed by New York law. (2020 Policy, pp. 3, 18 of 37; 2021 Policy, pp. 5-6, 22 of 44). New York therefore has a greater interest than California in resolving this matter. *See, e.g., Glob. Decor, Inc. v. Cincinnati Ins. Co.*, 2011 WL 2437236, at *5 (C.D. Cal. June 16, 2011) (holding that California did not have an interest in resolving insurance coverage dispute where parties were located outside of California and the policy was not governed by California law).

Availability of compulsory process to subpoena non-party witnesses: Other than experts, the testimony of non-party witnesses is not anticipated in this case. Accordingly, this factor is neutral. *See, e.g., Ashmore v. Ne. Petroleum Div. of Cargill, Inc.*, 925 F. Supp. 36, 38 (D. Me. 1996) (location of witnesses is not a significant factor where the witnesses are employees of a party whose attendance can be compelled).

Feasibility of consolidation with action pending elsewhere: There are no other pending actions which might be consolidated with this action. This factor is therefore neutral. *Compare Hawkins v. Gerber Products Co.* 924 F.Supp.2d 1208, 1214 (S.D. Cal. 2013) ("Here, five similar cases against Defendants have already been consolidated and are currently pending in the District of New Jersey. The Court finds that the transfer of this action to the District of New Jersey would serve the interest of justice due to the possible consolidation of discovery and the conservation of time, energy and money, and the avoidance of the possibility of inconsistent judgments.").

Familiarity with governing state law (in diversity cases): Both Policies have New York choice of law provisions. (2020 Policy, pp. 3, 18 of 37; 2021 Policy, pp. 5-6, 22 of 44). Accordingly, this factor weighs in favor of transfer. *Sallyport Glob. Servs., Ltd. v. Arkel Int'l, LLC*, 78 F. Supp. 3d 369, 375 (D.D.C. 2015) ("The Supreme Court has acknowledged the advantages in diversity actions

of having federal judges who are the most familiar with the governing state law deciding legal disputes subject to state law.") *citing Van Dusen v. Barrack*, 376 U.S. 612, 645, 84 S. Ct. 805, 823–24, 11 L. Ed. 2d 945 (1964) ("it has long been recognized that: 'There is an appropriateness in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself'").

Relative docket congestion: In evaluating this factor, courts examine the median number of months from filing to disposition and/or the median number of months from filing to trial. *See, e.g.*, *McNulty v. J.H. Miles & Co., Inc.*, 913 F. Supp. 2d 112, 122 (D. N.J. 2012) ("Although relative court congestion is not the most important factor on a motion to transfer and alone is insufficient to warrant a transfer, when considered in relation to the lack of substantial events occurring in this District, this factor weighs rather strongly in favor of a transfer to the Eastern District of Virginia"); *see also Nike, Inc. v. Lombardi*, 732 F. Supp. 2d 1146, 1159 (D. Or. 2010) ("As noted earlier, the data regarding case disposition in Oregon and the Southern District of Indiana show about an equal timeline. Court congestion is slightly higher in Indiana.").

The Central District of California handles more cases relative to the Southern District of New York. (*See Table C. U.S. District Courts – Civil Cases Commenced, Terminated, and Pending during the 12-Month Periods Ending March 31, 2019 and 2020*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020-tables (attached as Exhibit 1 hereto). The time from filing of the case to disposition is substantially similar in the two districts. (*See Table C.5 U.S. District Courts – Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition during the 12-Month Period Ending March 31, 2020*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-

2020-tables (attached as Exhibit 2 hereto). Accordingly, this factor favors transfer.

G. Private Interest Factors Also Weigh in Favor of Transfer

As noted above, the Court's review under Section 1404(a) should be limited to the public interest factors because of the valid and enforceable forum-selection clauses. *Atlantic Marine*, 134 S. Ct. at 582. However, to the extent the Court considers the private interest factors in connection with the 2021 Policy's permissive forum-selection clause, those factors also weigh in favor of transfer as set forth below.

Convenience of the Parties and Witnesses: As noted above, Emerald's headquarters are in New York, and as a result, Defendants anticipate that most (if not all) of Emerald's witnesses in this case will reside in New York. (Compl., ¶ 10). Given the location of Emerald's corporate headquarters, New York is at least as convenient a forum as California, if not more convenient. Accordingly, this factor weighs in favor of transfer, or is neutral.

Relative Means of the Parties: This factor is neutral as both parties are business entities with sufficient means to litigate in either forum. *See, e.g.*, *Rare Breed Distilling v. Heaven Hill Distilleries*, No. C-09-04728 EDL, 2010 WL 335658, at *5 (N.D. Cal. Jan. 22, 2010) ("[T]his case involves two major corporate competitors. The ability to absorb costs here is a neutral factor.").

Location Where Relevant Agreements Were Negotiated and Executed: While the Policies were issued to Emerald in California, Emerald has since relocated its headquarters to New York, within the District to which transfer is sought. This factor is therefore neutral.

The Parties Other Respective Contacts with the Chosen Forum: Emerald's corporate headquarters are in New York. (Compl., ¶ 10). Emerald is Delaware corporation. (*Id.*) Defendants regularly issue insurance policies to residents and businesses in New York. (Welsh Dec., at ¶ 4; Ruskell Dec., at ¶ 4). The Policies here have New York forum-selection clauses and New York choice of

law provisions. Accordingly, this factor weighs in favor of transfer.

Plaintiff's Choice of Forum: Plaintiff's choice of forum receives little weight because Plaintiff does not reside in its chosen forum. *Healey v. Spencer*, No. CV 09–7596, 2010 WL 669220, at *1 (C.D. Cal. Feb. 22, 2010) ("if the plaintiff does not reside in his chosen forum, courts accord considerable less deference to his choice of forum."); *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1191 (S.D. Cal. 2007) ("plaintiff's choice of forum receives less deference because California is not plaintiff's domicile").

Moreover, that Emerald chose to commence this action in the Central District of California does nothing to avoid the Policies' forum-selection provisions. Rather, these provisions, read in concert with the Policies' "Service of Suit" provisions, lay out a clear framework for enforcement of the New York forum-selection clauses in the event Emerald commences an action in a court located outside of New York, as it has in this action.

First, as a general matter, the boilerplate "Service of Suit" provision in each Policy provides that the parties "submit to the jurisdiction of any Court of competent jurisdiction within the United States." (2020 Policy, p. 17 of 37; 2021 Policy, p. 21 of 44). This provision does not, as Emerald will likely argue, conflict with or otherwise impact the forum-selection clauses' requirement that litigation be adjudicated only by courts in New York. Rather, this is a standard provision included in all of Defendants' policies which simply assures its policyholders that the UK-based insurers will not challenge jurisdiction in the event an action is commenced in a United States court. The "Service of Suit" provision explicitly is *not* a waiver of the forum-selection clause. Indeed, in an effort to avoid waiver arguments arising from the ostensible (though illusory) incongruence between the "Service of Suit" provision (i.e., "any Court") and the forum-selection clause (i.e., "New York" courts), Defendants—like other non-U.S.-based insurers—took care to explicitly state in the "Service of Suit" provision that "[n]othing in this clause

constitutes or should be understood to constitute a waiver of underwriters' rights to . . . seek a transfer of a case to another Court as permitted by the laws of the United States or any State in the United States." (2020 Policy, p. 17 of 37; 2021 Policy, p. 21 of 44); *Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.*, 88 F. Supp. 3d 1156, 1164 (S.D. Cal. 2015) ("[A]n insurer may prevent the preclusive effect of a service of suit clause simply by including an express reservation of the insurer's right to remove or transfer the action to a different forum.").

As the Southern District of New York explained in construing nearly identical policy provisions, "it is well-settled that a service of suit clause (unlike a mandatory forum-selection clause) generally provides no more than a consent to jurisdiction. It does not bind the parties to litigate in a particular forum, or give the insured the exclusive right to choose a forum unrelated to the dispute." *Dornoch Ltd. ex rel. Underwriting Members of Lloyd's Syndicate 1209 v. PBM Holdings, Inc.*, 666 F. Supp. 2d 366, 370 (S.D.N.Y. 2009). Rather than conflict with one another, these two provisions "are perfectly complementary":

> [T]he Service of Suit Clause merely ensures that Underwriters are subject to suit in the United States, and the Forum Selection Clause, in turn, designates the forum in which any disputes between the parties are to be litigated, namely, the state and federal courts of New York. Moreover, since the endorsement containing the Service of Suit Clause does not include any language purporting to overrule or modify the Forum Selection Clause, the two clauses should not be read as inconsistent but as complimentary.

Id.; *see also Connor Grp. v. Certain Underwriters at Lloyds, London*, 2018 WL 2937443, at *4 (S.D. Ohio June 12, 2018) ("[T]he service of suit clause within the policies operates as an assurance that a foreign insurance services provider (Lloyd's of London) will be amendable to suit within the insured's country in the event of a

payment dispute arising, while the forum-selection clause specifies the exact agreed-upon forum within the United States where that dispute is to be settled.").

Here, Defendants are not only seeking transfer to the contractually-selected forum for this action—they are doing so through precisely the process laid out in the Policies. As indicated in the "Service of Suit" provision, Emerald was not prohibited from commencing an action in the court of its choosing. Doing so, however, accomplishes little more than wasting the time and resources of the parties and this Court: as is explicitly stated in the Policies, Defendants have the right—which they now exercise—to have an action commenced outside of New York transferred to a court located in the Empire State, which all parties agreed would be the forum in which any coverage disputes arising from the Policies would be litigated. For that reason, in addition to the Southern District of New York constituting a proper forum—as well as the more convenient and efficient forum for litigation between parties domiciled or operating in New York, and who have agreed that New York law will govern their dispute—Defendants respectfully request this Court transfer this action to the Southern District of New York, where Emerald's baseless and wasteful procedural machinations can come to an end and this action can proceed in earnest.

IV. THE COURT SHOULD STAY THIS ACTION PENDING DECISION ON DEFENDANTS' MOTION TO TRANSFER VENUE

In order to avoid unnecessary expense of the Court's time and judicial resources should the Court ultimately grant Defendants' Motion to Transfer Venue, Defendants request that the Court enter an order staying this action in its entirety until a decision on the Motion to Transfer Venue is rendered. Whether to grant a motion to stay is determined based on three factors:

> (1) the possible damage which may result from the granting of a stay, (2) the hardship or inequity which a party may suffer in being required to go forward, and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Gustavson v. Mars, Inc., 2014 WL 6986421, at *2 (N.D. Cal. Dec. 10, 2014) (internal quotation marks and citation omitted; applying factors originally articulated in *Landis v. N. American Co.*, 299 U.S. 248 (1936)). All three factors weigh in favor of staying this action pending the Court's decision on Defendants' Motion to Transfer Venue.

Damage Resulting from Stay: No damage would result from an order staying this action, which is in its infancy and likely would not progress substantially while the Court considers and renders decision on the Motion to Transfer Venue.

Hardship to Parties: The parties would suffer hardship in the event they are required to continue litigating this action while the Court considers Defendants' Motion to Transfer Venue. Should the Court ultimately transfer this action to the Southern District of New York, the parties will likely be required to duplicate efforts taken here during the pendency of the Motion to Transfer Venue—including but not limited to discovery planning conferences, initial pre-trial conferences with the Court, and potentially responsive pleadings and/or Rule 12 Motions, should the Motion to Transfer Venue remain pending beyond Defendants' deadline to file such responses and/or motions.

Orderly Course of Justice: The orderly course of justice would be upset by requiring the parties to continue this action while the Motion to Transfer Venue remains pending. Again, should the Court decide to transfer this action, the parties will likely find it necessary to duplicate certain efforts once this action is transferred to and proceeds in the Southern District of New York. In the interest of simplifying the issues raised in this action, the orderly course of justice would be served by imposing a stay of this action during what will likely be a brief period in which Defendants' Motion to Transfer Venue remains pending before the Court.

V. CONCLUSION

For the foregoing reasons, Defendants request that the Court transfer this case to the United States District Court for the Southern District of New York and enter an Order staying this action until such time as a decision on Defendants' Motion to Transfer Venue has been rendered.

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