UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMERALD HOLDING, INC.,

Plaintiff,

v.

W.R. BERKLEY SYNDICATE LIMITED, GREAT LAKES INSURANCE SE, and LLOYD'S SYNDICATE #1967,

Defendants.

Case No.: SACV 21-00340-CJC(KESx)

ORDER DENYING DEFENDANTS' MOTION TO TRANSFER VENUE TO THE SOUTHERN DISTRICT OF NEW YORK [Dkt. 27]

I. INTRODUCTION

Plaintiff Emerald Holding, Inc. filed this insurance action against Defendants W.R. Berkley Syndicate Limited, Great Lakes Insurance SE, and Lloyd's Syndicate #1967. (Dkt. 1 [Complaint, hereinafter "Compl."].) Now before the Court is Defendants' motion to transfer venue to the United States District Court for the Southern District of New

York. (Dkt. 33 [Motion to Transfer, hereinafter "Mot."].) For the following reasons, Defendants' motion to transfer is **DENIED**.[1]

II. BACKGROUND

Plaintiff is a Delaware corporation that operates business trade show events across the United States. (Compl. ¶ 8.) Its headquarters is in New York where it has 106 employees and it maintains two offices in California where it has 98 employees. (Dkt. 36-1 [Declaration of Kate Elder, hereinafter "Elder Decl."] ¶ 8.)

Plaintiff purchased event cancellation insurance from Defendants, which are all European companies. (Compl. ¶¶ 14–17.) Plaintiff's claims concern two policies (the "Insurance Policies") that it purchased from Defendants: the first covered events scheduled for 2020 (the "2020 Policy") while the second covered events scheduled for 2021 (the "2021 Policy"). (*Id.* ¶ 26.) Defendants have already paid over $100 million under these policies, and Plaintiff claims that Defendants still owe an additional $100 million. (*Id.* ¶¶ 3–4.) As a result, Plaintiff brought this suit alleging claims for (1) declaratory relief, (2) breach of contract, and (3) bad faith. (*Id.* ¶¶ 82–103.)

III. LEGAL STANDARD

A district court has discretion to transfer a civil action "for the convenience of parties and witnesses, in the interest of justice," to "any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Under Section 1404(a), two findings are required for proper transfer: (1) the transferee district court "is one where the action

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for June 7, 2021 at 1:30 p.m. is hereby vacated and off calendar.

might have been brought," and (2) "the convenience of the parties and witnesses in the interest of justice favor transfer." *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). Transfer is appropriate only when it is "to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient." *Van Dusen v. Barrack*, 376 U.S. 612, 645–46, (1964).

A court may consider multiple factors in determining whether convenience and the interests of justice favor transfer, including "(1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof." *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000). Courts also consider public-interest factors, which may include "court congestion [and] the local interest in having localized controversies decided at home." *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 63 (2013). The moving party bears the burden of demonstrating that transfer is appropriate. *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001). District courts have broad discretion to adjudicate motions for transfer according to an individualized, case-by-case consideration, *Jones*, 211 F.3d at 498, and must undertake a "flexible and individualized analysis" of relevant factors, *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988).

"The calculus changes, however, when the parties' contract contains a valid forum-selection clause, which represents the parties' agreement as to the most proper forum." *Atl. Marine*, 571 U.S. at 60. "For that reason, and because the overarching consideration

. . . is whether a transfer would promote 'the interest of justice,' a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases." *Id.*

IV. DISCUSSION

Defendants seek to transfer this case to the Southern District of New York. They argue that transfer is warranted because the Insurance Policies contain a forum-selection clause that designates New York as the only appropriate forum. (Mot. at 4.) In opposition, Plaintiff argues that the Insurance Policies do not designate New York as the exclusive forum because their "Service of Suit" provision allows an insured to litigate its claims in "any Court of competent jurisdiction within the United States." (Dkt. 36 [hereinafter, "Opp."] at 9.) The Court agrees with Plaintiff and concludes that transfer is unwarranted.

A. The Forum Selection Clauses

The Court must first determine whether the either Insurance Policy contains a forum-selection clause that designates New York as the only appropriate forum. The Ninth Circuit applies federal law to the enforcement and interpretation of a forum-selection clause. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). When interpreting a contract according to principles of federal common law, courts are guided by "general principles for interpreting contracts." *Cnty. of Santa Clara v. Astra United States,* 588 F.3d 1237, 1243 (9th Cir. 2009). "A written contract must be read as a whole and every part interpreted with reference to the whole." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999). "Contract terms are to be given their ordinary meaning, and . . . [w]henever possible, the plain language of the contract should be considered first." *Id.* "The presumption is that every provision was intended to accomplish some purpose, and that none are . . . superfluous."

Chaly–Garcia v. United States, 508 F.3d 1201, 1204 (9th Cir. 2007). "Any ambiguity in the construction of an insurance policy must be construed against the drafting insurer." *See United Specialty Ins. Co. v. Certain Underwriters at Lloyd's of London*, 2019 WL 7810813, at *5 (N.D. Cal. Mar. 19, 2019).

1. The 2020 Policy

The Court begins with the 2020 Policy, which contains two relevant provisions. First, in the declarations section, there is a provision entitled "Choice of Law and Jurisdiction" which states that unless "agreed otherwise in writing," New York "courts shall have exclusive jurisdiction." (Dkt. 30-1 Ex. A [hereinafter "2020 Policy"] at 2.) Then, in the terms of the policy itself, the "Service of Suit" provision states, "It is agreed that . . . at the request of the [] Insured," the insurer "will submit to the jurisdiction of any Court of competent jurisdiction within the United States" and "abide by the final decision of such Court." (*Id.* at 16–17.)

The plain language of these provisions indicates that Plaintiff may file suit outside of New York. The "Choice of Law and Jurisdiction" provision does state that New York courts shall have exclusive jurisdiction. However, this provision also states that it applies "unless [the insured] requested and the insurers agreed otherwise in writing." (*Id.* at 2.) And, through the "Service of Suit" provision, the parties did agree otherwise in writing. (*Id.* at 16–17.) That provision states that "at the request of the Named Insured," the insurer "will submit to the jurisdiction" of any court within the United States. (*Id.* at 16.) Notably, this provision also states that the insurer will "abide by the final decision of such Court." (*Id.*); *see City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13, 15 (5th Cir. 1991) (concluding that a "Service of Suit" provision "plainly require[d] that the insurer submit to the jurisdiction of any court of the policyholder's choosing" when the insurer agreed to

"submit to the jurisdiction of any court," and to "abide by the final decision of such court").

"When interpreting almost identical language in other service of suit provisions, federal courts have consistently found such language unambiguously permits the insured to choose which forum to bring suit." *Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.*, 88 F. Supp. 3d 1156, 1162 (S.D. Cal. 2015). This is for good reason. The 2020 Policy's "Choice of Law and Jurisdiction" provision states that it may be altered by agreement to other terms in writing. The "Service of Suit" provision then provides such an alteration for situations when the insured brings an action, like the one here, due to the failure of the insurer to "pay any amount claimed to be due." *See Tri-Union Seafoods*, 88 F. Supp. 3d at 1164; *Kashama v. Century Ins. Grp.*, 2009 WL 1312940, at *2 (N.D. Cal. May 12, 2009) (concluding that "[t]he service of suit provision is a forum selection clause" and that "[u]nder the service of suit provision, defendant consented to the jurisdiction of any court of competent jurisdiction requested by plaintiff"). Thus, interpreting the 2020 Policy to require Plaintiff to file its claims in New York would disregard the plain and clear wording of the Policy and render the "Service of Suit" provision meaningless.[2]

[2] The Insurance Policies here are distinguishable from the contracts in other cases where courts have held that the forum-selection clause governed rather than the service-of-suit clause. For example, in *Dornoch Ltd. ex rel. Underwriting Members of Lloyd's Syndicate 1209 v. PBM Holdings, Inc.*, the New York district court held that "the 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 . . . courts of New York." 666 F. Supp. 2d 366, 370 (S.D.N.Y. 2009). But in *Dornoch*, the service-of-suit clause provided that the insurer "will submit to the jurisdiction of *a Court* of competent jurisdiction within the United States," rather than "any" court of competent jurisdiction. The use of "any" in this case indicates that Defendants consented to Plaintiff's choice of venue in whichever court the action was filed. *See Tri-Union Seafoods*, 88 F. Supp. 3d at 1162 (interpreting a clause with "any court" in this manner); *Rembrandt Enters., Inc. v. Illinois Union Ins. Co.*, 129 F. Supp. 3d 782, 786 (D. Minn. 2015) (same). The Insurance Policies are also distinguishable from the contract in *Connor Grp. v. Certain Underwriters at Lloyds, London*, because there, the forum-selection clause followed the service-of-suit clause and expressly stated that it changed the policy. 2018 WL 2937443, at *3 (S.D. Ohio June 12, 2018).

2. The 2021 Policy

The plain language of the 2021 Policy also permits the insured to choose its preferred forum. The language of the 2021 Policy is similar to the 2020 Policy with one key difference: the "Choice of Law and Jurisdiction" provision makes no mention of the word "exclusive." (Dkt. 30-2 Ex. B [hereinafter "2021 Policy"] at 5–6.) It states only that "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." (*Id.*) Consequently, the text of this provision is permissive and does not "preclude a party from bringing suit [] elsewhere." *See Calisher & Assocs., Inc. v. RGCMC, LLC*, 2008 WL 4949041, at *3 (C.D. Cal. Nov. 17, 2008).

"Ninth Circuit precedent requires that the court pay careful attention to whether the language in a forum selection clause is mandatory or permissive." *Id.* "If the language is mandatory, the clause must be enforced and venue will lie in the designated forum only." *Id.* "If, however, the language of the forum selection clause is permissive, the clause will not preclude a party from bringing suit [] elsewhere." *Id.* "A forum selection clause is permissive when the parties merely consent to bestow jurisdiction on a court without stating that the court has exclusive jurisdiction to hear their disputes." *Id.*; *see Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989) For example, in *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, the Ninth Circuit held that a forum-selection clause was permissive when it provided, "Buyer and Seller expressly agree that . . . [t]he courts of California, County of Orange, shall have jurisdiction over the parties in any action." 817 F.2d 75, 76 (9th Cir. 1987). The court reasoned that because the contract "says nothing about the Orange County courts having exclusive jurisdiction . . . , [t]he effect of the language is merely that the parties consent to the jurisdiction of the Orange County courts." *Id.* Similarly here, the 2021 Policy does not indicate that New York's jurisdiction is exclusive and it does not mention venue. *Docksider*, 875 F.2d at 764

("When only jurisdiction is specified [and not venue] the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive."). Thus, the 2021 "Choice of Law and Jurisdiction" provision is permissive and it does not prohibit "a party from bringing suit [] elsewhere." *Calisher*, 2008 WL 4949041, at *3. Indeed, Defendants do not even argue that the provision is mandatory. (*See* Opp. at 12, 14.)

Moreover, the 2021 Policy also contains a "Service of Suit" provision identical to that of the 2020 Policy. It states, "It is agreed that . . . at the request of the [] Insured," the insurer "will submit to the jurisdiction of any Court of competent jurisdiction within the United States" and "abide by the final decision of such Court." (2021 Policy at 21–22.) Accordingly, as in the 2020 Policy, the "Service of Suit" provision expressly authorizes Plaintiff to bring a suit outside of New York. *See Tri-Union Seafoods*, 88 F. Supp. 3d at 1163 (concluding that a similar service-of-suit clause "unambiguously provide[d] for Plaintiff, as the policy holder, to choose the forum to bring suit").

In sum, neither the 2020 Policy nor the 2021 Policy designate New York's courts as the exclusive forum for this dispute. As a result, the Court must conduct the traditional transfer analysis under § 1404(a).

B. The § 1404(a) Factors

The Court must make two findings to transfer the case: (1) the transferee district court "is one where the action might have been brought," and (2) "the convenience of the parties and witnesses in the interest of justice favor transfer." *Hatch*, 758 F.2d at 414. Here, neither party disputes that the case could have been brought in the Southern District of New York. The Court's decision therefore turns on whether the convenience of the parties and witnesses and the interests of justice favor transfer. Plaintiff argues that

Defendants have not carried their burden of demonstrating that transfer is appropriate based on the relevant public and private interest factors. *See Jones*, 211 F.3d at 498–99. The Court agrees.

Defendants only argue that two of these factors—convenience of the parties and governing law—weigh in favor of transfer. Defendants either do not address the remaining factors or they contend that they are merely neutral. Defendants first argue that New York is the more convenient forum because Plaintiff's headquarters is located there. But Plaintiff maintains two offices in California with nearly 100 total employees, and both Insurance Policies were executed in California. Consequently, many of Plaintiff's witnesses and any relevant physical evidence is likely located in California as well. Defendants next argue that because the Insurance Policies state that New York law governs this action, the governing law factor favors transfer. While this factor does slightly favor transfer, it does not weigh heavily because "federal courts are deemed capable of applying the substantive law of other states." *Cohen v. Versatile Studios, Inc.*, 2013 U.S. Dist. LEXIS 198767, *15 (C.D. Cal. Nov. 15, 2013). Defendants' cursory and incomplete analysis addressing the § 1404 factors is insufficient to demonstrate that transfer is appropriate.

V. CONCLUSION

For the foregoing reasons, Defendants' motion to transfer this case to the Southern District of New York is **DENIED**.

DATED: May 26, 2021

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE