

FILED

MAR 06 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 307115

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

ENERGYSOLUTIONS, LLC,

Respondent.

v.

ABW TECHNOLOGIES, INC.,

Appellant,

BRIEF OF APPELLANT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In 2009, *EnergySolutions*, LLC (“*EnergySolutions*”) and ABW Technologies, Inc. (“ABW”) entered into a third-tier contract under which ABW agreed to manufacture “Gloveboxes” for a nuclear-waste processing system that *EnergySolutions* designed for the Savannah River Nuclear Site, near Aiken, South Carolina. During the course of performance of that contract, *EnergySolutions* made substantial changes to its design for the Gloveboxes, delaying delivery and increasing costs for ABW. As a result of these changes, the costs now exceed the contract value by more than \$3 million.

In June of 2011, *EnergySolutions* filed suit against ABW alleging that ABW (and *EnergySolutions*) should be held liable for the delivery delay and cost increases caused by the design changes that *EnergySolutions* requested. *EnergySolutions* filed this lawsuit in Benton County Superior Court, Washington, even though the contract, which *EnergySolutions* drafted and ABW accepted, chooses South Carolina as the forum for resolving all disputes.

On November 8, 2011, ABW filed a Motion to Dismiss for Improper Venue under CR 12(b)(3). On December 9, 2011, after opposition from *EnergySolutions*, and after conducting a hearing on the

motion, the trial court denied ABW's motion.¹ On February 13, 2012, it likewise denied ABW's Motion for Reconsideration under CR 59(a)(7). On March 29, 2012, ABW filed a Motion for Discretionary Review with this Court, which was granted by the Commissioner on October 18, 2012. In so ruling, the Commissioner found that the trial court "committed obvious or probable error" in denying ABW's Motion. *Id.*

As appealed here, the Court's denial of ABW's Motion to Dismiss for Improper Venue (and the subsequent denial of the Motion for Reconsideration) was in error in two fundamental respects:

First, the trial court applied an incorrect test to the South Carolina forum-selection clause, declining to enforce it because it found litigating in South Carolina does not make any "practical sense," and finding instead that Washington is the "logical" forum. But courts must enforce forum-selection clauses, unless the *challenging party* establishes that enforcement would be so "gravely difficult and inconvenient that he will for all practical purposes be *deprived of his day in court.*" *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 812 (Utah 1993) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)) (emphasis

¹ The trial court ruled from the bench, RP 31-34, and subsequently issued a signed order. CP 201-02.

added);² *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 618, 937 P.2d 1158 (1997) (same). The trial court committed error when it failed to apply this rigorous test to the parties' forum-selection clause.

Second, the trial court improperly shifted the burden on enforceability of the forum-selection clause from the party opposing enforcement (*EnergySolutions*) to the party seeking enforcement (ABW). In its oral ruling, the trial court weighed the reasons ABW presented for enforcing the forum-selection clause against those *EnergySolutions* presented. But ABW does not bear this burden. Rather, the party opposing enforcement bears the "heavy burden" of establishing that litigating in the chosen forum would deprive it of its day in court. *See Prows*, 868 P.2d at 812; *Voicelink*, 86 Wn. App. at 618 (quoting *M/S Bremen*, 407 U.S. at 17). The trial court committed error when it shifted this burden to ABW.

ABW respectfully requests that this Court (1) reverse the trial court's ruling on the enforceability of the South Carolina forum selection clause; and (2) remand this matter with instructions to the trial court to enter an order dismissing this lawsuit for improper venue.

² In its December 9 ruling from the bench, the trial court concluded Utah law applies to the parties' dispute. As noted below, ABW does not seek review of that determination at this time.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying ABW's Motion to Dismiss for Improper Venue under CR 12(b)(3). (CP 201-02).
2. The trial court erred in denying ABW's Motion for reconsideration. (CP 234-36).

III. STATEMENT OF ISSUES

1. Whether the Court should enforce the Parties' contractual agreement requiring that all actions under that contract be brought in Aiken County, South Carolina.
2. Whether the trial court erred when it (1) applied a "practicality" or "logical place" test to the South Carolina forum-selection clause instead of the stringent unreasonable or unjust test; and (b) declined to enforce the clause under the appropriate test.
3. Whether the trial court improperly shifted the burden of enforceability to ABW, the party seeking to enforce the forum-selection clause, rather than holding *EnergySolutions* to its heavy burden of establishing that enforcement would be unreasonable or unjust.

IV. STATEMENT OF THE CASE

A. Factual Background.

For over 100 years, ABW has manufactured custom metal products for the nuclear, aerospace, defense, and energy industries. CP 25-26

(¶ 3). The family-owned company specializes in the fabrication, machining, precision inspection, and assembly of metal products for both private and public ventures. *Id.* ABW maintains its headquarters and exclusive manufacturing facilities in Arlington, Snohomish County, Washington. *Id.*³

EnergySolutions is a nuclear waste services company headquartered in Utah, with offices and facilities in South Carolina, including in Aiken. CP 35 (¶ 7).

This case arises out of ABW's manufacture and delivery as a third-tier subcontractor of portions of a nuclear-waste processing and storage system (i.e. "Gloveboxes") to the Savannah River Nuclear Site (the "Site"), near Aiken, South Carolina. CP 26 (¶ 4), CP 37-71 (Exhs. A-B). The Site, run by the U.S. Department of Energy ("DOE"), is a 60-year-old nuclear facility that focuses on "environmental management and cleanup." CP 34 (¶ 3).

DOE contracts with the Westinghouse Savannah River Company LLC ("WSRC") (now Savannah River Nuclear Solutions, LLC ("SRNS")) to operate and maintain the Site. *Id.* In or about 2008, WSRC in turn contracted with EnergySolutions to design and fabricate the item at issue

³ At the time of the commencement of this action, ABW had a small facility in Richland, Washington. ABW has recently closed this facility, and currently has no physical presence in Richland.

in this matter, the Gloveboxes. *Id.* In turn, in 2009, EnergySolutions entered into a contract with ABW to manufacture and deliver those Gloveboxes, and it is this contract (the “Contract”) that is at issue in this lawsuit.⁴ CP 26 (¶ 5).

Relevant to this matter, ABW won the contract to manufacture the Gloveboxes (for \$3.4 million) as part of a competitive bidding process. *Id.* (¶ 6). As the successful bidder, ABW had to accept the terms EnergySolutions proposed. *Id.* (¶ 7). EnergySolutions included the forum-selection clause at issue in this case in the contract *it drafted* and imposed on all bidders, and ABW accepted it. *Id.* The forum-selection clause reads:

(1) Any litigation shall be brought and prosecuted *exclusively* in Federal District Court, with venue in the United States District Court for the District of South Carolina, Aiken Division.

(2) Provided, however, that in the event the requirements for jurisdiction in Federal District Court are not present, such litigation shall be brought in State Court in Aiken County, South Carolina.

CP 62 (¶ 2.B) (emphasis added). The forum-selection clause is a “flowdown” provision from the second-tier agreement between

⁴ The Gloveboxes are a complex system. CP 26 (¶ 4). They convey 55-gallon drums into an enclosed unit, mix nuclear waste with a type of cement, pour the mixture into the drums, and then seal the drums for long-term storage. *Id.* The Gloveboxes protect the entire process from human contact. *Id.*

EnergySolutions and WSRC/SRNS; EnergySolutions expressly incorporated the clause by reference into the Contract with ABW. CP 48 (¶ III.3 (“Flowdown Requirements for Savannah River Site” expressly including the “General Terms and Conditions for Commercial Purchases,” form number BMS-PMM-2001-00005, Revision 6)).⁵

Although EnergySolutions chose, and ABW agreed, to resolve all disputes in South Carolina, EnergySolutions filed this breach of contract action against ABW in Benton County Superior Court. The underlying dispute arises out of numerous substantial changes EnergySolutions made to its design for the Gloveboxes, delaying delivery and increasing costs. CP 26-27 (¶¶ 9-10). As a result of these changes, the costs now exceed the contract value by more than \$3 million. CP 27 (¶ 10).

On March 16 and 19, 2012, after the trial court entered its orders denying ABW’s Motion to Dismiss for Improper Venue and Motion for Reconsideration, ABW shipped the Gloveboxes to the Savannah River Site, in South Carolina. Declaration of Betty Hanley in Support of Motion

⁵ The flowdown provision containing the South Carolina forum-selection clause also includes a South Carolina choice-of-law provision. Although the trial court ruled that the South Carolina forum-selection clause is “more specific” than the dispute resolution clause in another part of the parties’ Contract, *see* RP 32:14-22, neither party has argued that South Carolina law applies to this contract dispute. Regardless, however, and as explained below, South Carolina law applies the same test to the enforceability of the forum selection clause at issue here.

for Discretionary Review (“Hanley Decl.”) ¶ 2. On March 27, 2012, ABW learned the Gloveboxes had arrived in Aiken, South Carolina, on or around March 26, 2012. *Id.*

B. Procedural Background.

EnergySolutions filed its Complaint in June 2011. CP 1-5. On November 8, 2011 (having yet to be served with the Complaint), ABW filed a Motion to Dismiss for Improper Venue under CR 12(b)(3). CP 8-24. ABW argued that under Washington law, the trial court must enforce the forum-selection clause because EnergySolutions could not meet its “heavy burden” of showing that enforcing the clause would be so “unreasonable or unjust” as to deprive EnergySolutions of its day in court. *Id.* ABW explained that EnergySolutions has offices in South Carolina, the project site is in South Carolina, the Gloveboxes would be transferred to South Carolina, critical third-party witnesses and documents are in South Carolina, and the first- and second-tier contracts involve parties in South Carolina. *Id.*⁶

In opposition, EnergySolutions primarily argued that the South Carolina forum-selection clause did not apply to the parties’ dispute,

⁶ ABW also argued the trial court should enforce the forum-selection clause because it was not induced by fraud and does not violate public policy. CP 17-18. EnergySolutions did not challenge those arguments below, the trial court did not address them, and they are not at issue in this appeal.

contending it applied only to the prime contractor, WSRC/SRNS, and that a Utah choice-of-law provision applied. CP 81-87. Also, *EnergySolutions* argued that litigating in South Carolina “makes little sense” because the parties have offices in Washington and executed the contract in Washington, ABW built the Gloveboxes in Washington, *EnergySolutions* primarily managed the project from its Richland office, and documents and seven potential witnesses are in Washington. CP 86-87. And *EnergySolutions* contended that the trial court should not enforce the parties’ forum-selection clause because the Gloveboxes were in Washington, and *EnergySolutions* might request injunctive relief. CP 87.

In its December 9 ruling from the bench, the trial court concluded the South Carolina forum-selection clause and the Utah choice-of-law provision both apply to the parties’ dispute. RP 32:4-13. But the court found that litigating in South Carolina “would not make any practical sense,” and that instead, Washington was the “logical place” to litigate the parties’ dispute. RP 34:17-22. The court appeared to have come to this conclusion on the basis that *EnergySolutions* and ABW have offices in Washington, some witnesses and documents are in Washington, ABW built the Gloveboxes in Washington, and the court believed litigating in South Carolina would increase litigation costs. RP 33:25-34:16.

On December 19, 2011, ABW filed a Motion for Reconsideration,

arguing the trial court applied the wrong standard to the forum-selection clause and shifted the burden on enforceability to ABW. CP 203-10 In opposition, *EnergySolutions* advanced one main argument for nonenforcement: it argued the Gloveboxes were still in Washington, and if the court dismissed the case, *EnergySolutions* would have to pursue proceedings in South Carolina and in Washington to obtain and enforce an injunction to get the Gloveboxes. CP 217-20.

On February 13, 2012, the trial court denied the Motion for Reconsideration. CP 213. ABW timely filed a Notice of Discretionary Review of the Order Denying Defendant's Motion to Dismiss for Improper Venue, and the Order Denying Defendant's Motion for Reconsideration. CP 237-245. On March 29, 2012, ABW filed a Motion for Discretionary Review with this Court, which was granted by the Commissioner on October 18, 2012. In so ruling, the Commissioner found as follows:

[B]eing of the opinion that given the forum-selection clause of the contract, the test with regard to application of forum-selection clauses set forth in *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809, 812 (Utah 1993) quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) (“[I]t 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*”), and *Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn.

App. 613, 618, 937 P.2d 1158 (1997), the trial court committed obvious or probable error . . .”

Id. (emphasis added).

V. ARGUMENT

A. Standard of Review.

A trial court’s decision on the enforceability of a forum selection clause is generally subject to an abuse of discretion standard. *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). Where a trial court rules based on an erroneous view of the law, or applies an incorrect legal analysis, “it necessarily abuses its discretion.” *Id.*, citing *State v. Kinneman*, 155 Wn.2d 272, 289, ¶ 35, 119 P.3d 350 (2005) and *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

B. Choice of Law.

As noted above, ABW moved to dismiss *EnergySolutions* Complaint for Improper Venue under a Washington forum-selection clause analysis. CP 1-5. In denying that Motion, the trial (from the bench) ruled that (1) the parties’ contract was governed by a Utah choice-of-law provision, and (2) Utah law applied to the issue of enforceability of the parties’ forum selection clause. RP 31:11-13, 32:4-8.

ABW does not presently seek review of the Court’s *choice-of-law* (as opposed to its *venue*) determination: For purposes of this appeal,

ABW analyzes the enforceability of the forum selection clause under Utah authority and principles.⁷ Regardless, the trial court's ruling on choice of law is immaterial: No conflict of laws exists between Utah and Washington law. Both Utah and Washington apply the same majority rule in analyzing the enforcement of forum-selection clauses, and the result is the same under the laws of both states. *Compare Kysar v. Lambert*, 76 Wn. App. 470, 484, 887 P.2d 431 (1995) (Washington requires enforcement of forum selection clauses unless they are "unreasonable and unjust) with *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 812 (Utah 1993) (A forum-selection clause "***will be given effect*** unless it is unfair or unreasonable."); *see also Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 618, 937 P.2d 1158 (1997) (generally discussing majority rule).

C. The Court Must Give Effect to a Forum Selection Clause Unless Unfair or Unreasonable.

Utah (like Washington) follows the majority rule: A forum-selection clause "***will be given effect*** unless it is unfair or unreasonable." *Prows*, 868 P.2d at 812 (quoting RESTATEMENT (SECOND) OF CONFLICT OF

⁷ For ease of reference, a copy of Utah authority cited in this brief is attached as Appendix A. For citation of unpublished Utah authority, *see* Washington GR 14.1(b) and Utah Rule of Appellate Procedure 30(f) ("[U]npublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State.").

LAWS § 80 (Supp. 1988)) (emphasis added); *Coombs v. Juice Works Dev., Inc.*, 81 P.3d 769, 773 (Utah Ct. App. 2003) (forum-selection clauses are “prima facie valid and should be enforced” unless resisting party shows enforcement to be “unreasonable under the circumstances”) (quoting *M/S Bremen*, 407 U.S. at 10). See also *Voicelink Data Servs. v. Datapulse, Inc.*, 86 Wn. App. 613, 617, 937 P.2d 1158 (1997) (Washington law “requires enforcement of forum selection clauses unless they are ‘unreasonable and unjust.’”); *Dix*, 160 Wn.2d at 834 (citation omitted) (“[A] forum-selection clause is presumptively valid and enforceable and the party resisting it has the burden of demonstrating that it is unreasonable.”).⁸

The rationale for this rule is straightforward. Courts should generally enforce forum selection clauses to “give[] effect to the ‘legitimate expectations of the parties, manifested in their freely negotiated agreement.’” *Prows*, 868 P.2d at 811 n.4 (quoting *M/S Bremen*, 407 U.S. at 12); see also *Coombs*, 81 P.3d at 774 (same). This is particularly true in the commercial context, where “the enforcement of forum selection clauses serves the salutary purpose of enhancing

⁸ South Carolina also follows this majority rule test. See, e.g., *Republic Leasing Co. v. Haywood*, 495 S.E.2d 804, 806-07 (S.C. App. 1998) (following *M/S Bremen* and enforcing forum-selection clause), *vacated on other grounds* 516 S.E.2d 441 (1999).

contractual predictability.” *Voicelink*, 86 Wn. App. at 617, citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516, 94 S.Ct. 2449, 2455–56, (1974). Such clauses also “reduce the costs of doing business, thus resulting in reduced prices to consumers,” *Dix*, 160 Wn.2d at 834.

Unreasonableness “requires *more* than a conclusion that trial in the forum would be *more* convenient than the chosen state.” *Voicelink*, 86 Wn. App. at 619 n.3 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 cmt. c (rev. 1989)) (first emphasis added). Instead, a party seeking to avoid enforcement of a forum selection bears the heavy burden of establishing that litigating in the chosen forum would “be [so] gravely difficult and inconvenient that he will for all practical purposes be *deprived of his day in court.*” See *Coombs*, 81 P.3d at 774, quoting *Prows*, 868 P.2d at 812 (emphasis added); *Voicelink*, 86 Wn. App. at 618 (quoting *M/S Bremen*, 407 U.S. at 17) (“the party claiming unreasonableness should bear a *heavy burden* of proof.”)

To satisfy this test, a party must “present evidence to justify its nonenforcement.” *Voicelink*, 86 Wn. App. at 618. See also *M/S Bremen*, 407 U.S. at 15 (challenging party must “clearly show that enforcement would be unreasonable and unjust”). Mere allegations are insufficient to meet this burden. *Voicelink*, 86 Wn. App. at 619 (court will not consider allegations of fact without support in the record).

D. The Trial Court Erred By (1) Applying a “Convenience” Test in Evaluating the Enforceability of the Forum Selection Clause; and (2) Inappropriately Shifting the Burden of Proof of Enforceability of the Forum Selection Clause to ABW.

The trial court erred in refusing to enforce the parties’ forum selection clause in two fundamental respects: *First*, the court applied the wrong test in applying a “convenience” or “practicality” test to the forum selection issue. The test, however, is not whether the contractually-agreed upon forum is “convenient” for EnergySolutions, but whether enforcing the forum selection clause would deprive EnergySolutions of its day in court. *Second*, the trial court erred by shifting the burden of proof of enforceability of the forum selection clause to ABW. EnergySolutions, as the party seeking to avoid enforcement of the forum selection clause, bears the *heavy burden* of establishing that it cannot litigate this matter in South Carolina, which it did not (and cannot) do.

1. The Trial Court Erroneously Applied a “Convenience” Analysis; Under the Proper Test, the Forum Selection Clause is Plainly Enforceable.

As a core matter, enforcement of the South Carolina forum selection clause is objectively fair and reasonable. The contract between ABW and EnergySolutions concerns items (*i.e.* the Gloveboxes) that were intended to be manufactured for delivery to a facility under construction in

South Carolina. *See* CP 34-35 (¶ 4 and Ex. B (Contract notes WSRC)); CP 26 (¶ 4). *EnergySolutions* itself has multiple offices in South Carolina. CP 35 (¶ 7). *EnergySolutions* agreed to the South Carolina forum in its contracts with the general contractor (WSRC) and with ABW. CP 62 (¶ 2.B).⁹ And, *EnergySolutions* has presented no evidence to suggest that it is somehow prevented from bringing suit in this matter in South Carolina. *Id.*

EnergySolutions cannot therefore reasonably claim that litigation of this matter in South Carolina would be so difficult that it will for all practical purposes be *deprived of its day in court*. On the contrary, its essential argument—which was adopted in whole by the trial court—is that litigation in South Carolina would be *less convenient* than Washington.¹⁰ That is not the test, and the law is clear: “[I]nconvenience

⁹ *EnergySolutions* argued below that its contract with ABW does not incorporate the South Carolina forum selection clause, despite the plain language of the contract and its pass-through provisions. The trial court held that the contract did incorporate the South Carolina forum selection clause, *see* RP 32:21-22. *EnergySolutions* did not appeal this determination.

¹⁰ In the briefing below, *EnergySolutions*’ primary argument was that enforcing the forum-selection clause would require *EnergySolutions* to pursue two actions in two jurisdictions to obtain and enforce an injunction to get the Gloveboxes, which at the time were located in Washington. Regardless of the merits of that argument, it is now moot: On March 16 and 19, 2012, ABW shipped the Gloveboxes to South Carolina, rendering moot that argument. Hanley Decl. ¶ 2. And on March 27, ABW learned the Gloveboxes had arrived in Aiken, South Carolina, on or around March

to a party is an insufficient basis to defeat an otherwise enforceable forum selection clause.” *Coombs*, 81 P.3d at 775 n.5 (quoting *M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d 750, 753 (8th Cir. 1999)).

The trial Court, in ruling on the enforceability of the forum selection clause, stated as follows:

So in looking at all those factors in conjunction, this Court finds that it would not make any practical sense, and would likely substantially increase the cost of this litigation if the Court were to enforce the provision requiring this case to be heard in South Carolina.

RP 34:17-22. In support of this ruling, the trial court cited four separate factors, as follows:

First, the trial court noted that certain witnesses and documents might be in Washington. App. A68-A69, A107-A108. Witness location, however, does not warrant disregarding the parties’ forum-selection clause. For instance, in *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn. App. 927, 147 P.3d 610 (2006), the court enforced a forum-selection clause despite the distant location of 19 witnesses because the challenging party had not shown such “witness inconvenience would be so great as to deprive [it] of an opportunity to present [its] case; *the requisite*

26, 2012. *Id.* Under EnergySolutions’ own logic, then, it now *must file suit in South Carolina*—the selected forum—to obtain and enforce an injunction. CP 217-18.

level of hardship necessary.” *Id.* at 933-34 (challenging party’s reliance on forum non conveniens factors was “misplaced”) (emphasis added). *See also Zions First Nat’l Bank v. Allen*, 688 F. Supp. 1495, 1499 (D. Utah 1988) (witness location not dispositive because party could introduce witness testimony by deposition; enforcing contractual consent to jurisdiction).

Second, the trial court noted that the parties have offices in Washington, and that ABW does not have a South Carolina office. RP 33:25-34:16. As an initial matter, the location of the parties does not justify ignoring contractual forum-selection clause. As the Utah Court of Appeals noted in rejecting this same rationale, this “argument disregards the legal test for whether a forum selection clause should be enforced: whether suit in the contracted-for venue would be ‘unfair or unreasonable’ or whether enforcing the clause would in effect deny Plaintiffs their day in court.” *Coombs*, 81 P.3d at 774 (quoting *Prows*, 868 P.2d at 812). More importantly, the argument simply flips the proper analysis on its head. The proper test is whether *EnergySolutions* (and not ABW) would be deprived of its day in Court if forced to litigate in South Carolina; *EnergySolutions—which has several offices and facilities in South Carolina*—cannot make that showing.

Third, the trial court suggested that it should not enforce the

forum-selection clause because the parties executed the contract in Washington, ABW built the Gloveboxes in Washington, and allegedly, EnergySolutions “primarily” managed the project in Washington. RP 34:6:-11. “The place of contract performance is *not* dispositive in this analysis,” however. *Voicelink*, 86 Wn. App. at 619 n.3 (emphasis added). Here, the fact that some of the contract was performed in Washington has no bearing on whether EnergySolutions cannot as an effective matter bring suit in South Carolina. It very plainly can, and the trial court’s reliance on this factor to decline to enforce the parties’ forum-selection clause was in error.

Finally, the trial court found litigating in South Carolina “would likely substantially increase the cost of this litigation.” RP 34:17-22. This conclusion again misstates the test. For litigation costs to support nonenforcement, EnergySolutions must present evidence that litigating in South Carolina would be so cost prohibitive as to deny EnergySolutions its day in court. *See Ventura Assocs., L.L.C. v. HBH Franchise Co.*, 2012 WL 777270, at *4 (D. Utah. Mar. 7, 2012). EnergySolutions presented no such evidence, and the trial court committed obvious or probable error when it nevertheless cited cost as a reason to not enforce the forum-selection clause. *Id.* (enforcing forum-selection clause where, among other things, plaintiff “put forth no facts to support its contention that

litigation in Georgia would be significantly more expensive such that it would essentially deprive [plaintiff] of its opportunity to pursue its claims against [defendant]”); *see also C-A-R Leasing, Inc. v. Precise Pay, Inc.*, 2004 WL 2610445, at *1 (Utah App. Nov. 18, 2004) (enforcing forum-selection clause over plaintiff’s arguments concerning litigation costs).

In no respect did the trial court apply the appropriate test under Utah law: Whether the forum is so “gravely difficult and inconvenient” that the litigant will for all practical purposes be *deprived of its day in court*. The trial court instead identified several factors, which *at most* (and even if true) simply suggest South Carolina is a somewhat less convenient forum than Washington. Even if these assertions are true, they cannot form the basis for invalidating an agreed-upon forum selection clause, and the Court’s ruling to the contrary was in error. ABW respectfully requests that this Court reverse the trial court’s ruling on this basis.

2. The Trial Court Erred When It Shifted the Burden on Enforceability to ABW.

Under Utah law, *EnergySolutions* alone bears the “heavy burden” of establishing that litigating in South Carolina would deprive it of its day in court. *Prows*, 868 P.2d at 812; *Voicelink*, 86 Wn. App. at 618 (quoting *M/S Bremen*, 407 U.S. at 17). In the trial court, ABW explained that

critical third-party witnesses and documents are in South Carolina, where the owner and first-tier contractor (DOE and WSRC/SRNS) are located, and where *EnergySolutions* has offices and facilities. CP 35 (¶¶ 6-7); RP 5:23-25. ABW also explained that failing to enforce the forum-selection clause will require it to file another lawsuit in federal court to bring its Miller Act claims. RP 12:12-22. The trial court weighed this showing against *EnergySolutions*' claim that seven potential witnesses are in Washington, and that the parties have offices in Washington. RP 33:17-34:16. And the trial court concluded, based at least in part on this weighing, that Washington is the logical forum. RP 33:22-24.

As a matter of law, ABW does not bear the burden of presenting evidence to support enforcing the forum-selection clause, or of defending the forum the parties selected as being more logical than other jurisdictions. Rather, the forum-selection clause is presumptively enforceable, unless *EnergySolutions* meets *its* "heavy burden" of presenting evidence establishing that enforcing the clause would deprive it of its day in court. *EnergySolutions* did not do so, and the trial court's application of a straightforward balancing test to the forum selection clause was in error. ABW respectfully requests that this Court reverse its ruling on this basis.

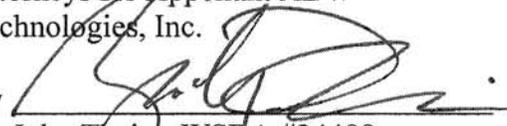
VI. CONCLUSION

For the foregoing reasons, ABW respectfully requests that this Court (1) reverse the trial court's ruling on the enforceability of the South Carolina forum selection clause; and (2) remand this matter with instructions to the trial court to enter an order dismissing this lawsuit for improper venue.

RESPECTFULLY SUBMITTED this 4th day of March, 2013.

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Technologies, Inc.

By



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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2013, I caused the document to which this certificate is attached to be filed with the Clerk of the above-entitled Court and served upon counsel of record for Respondent

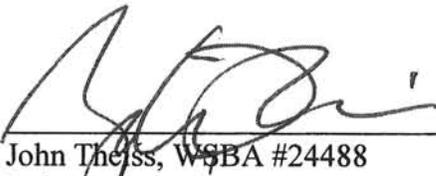
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DATED this 4th day of March, 2013.

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Appendix

MAR 11 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

C

West's Utah Code Annotated Currentness

State Court Rules

☐ Utah Rules of Appellate Procedure (Refs & Annos)

☐ Title V. General Provisions

→ → **RULE 30. DECISION OF THE COURT: DISMISSAL; NOTICE OF DECISION**

(a) **Decision in civil cases.** The court may reverse, affirm, modify, or otherwise dispose of any order or judgment appealed from. If the findings of fact in a case are incomplete, the court may order the trial court or agency to supplement, modify, or complete the findings to make them conform to the issues presented and the facts as found from the evidence and may direct the trial court or agency to enter judgment in accordance with the findings as revised. The court may also order a new trial or further proceedings to be conducted. If a new trial is granted, the court may pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case.

(b) **Decision in criminal cases.** If a judgment of conviction is reversed, a new trial shall be held unless otherwise specified by the court. If a judgment of conviction or other order is affirmed or modified, the judgment or order affirmed or modified shall be executed.

(c) **Decision and opinion in writing; entry of decision.** When a judgment, decree, or order is reversed, modified, or affirmed, the reasons shall be stated concisely in writing and filed with the clerk. Any justice or judge concurring or dissenting may likewise give reasons in writing and file the same with the clerk. The entry by the clerk in the records of the court shall constitute the entry of the judgment of the court.

(d) **Decision without opinion.** If, after oral argument, the court concludes that a case satisfies the criteria set forth in Rule 31(b), it may dispose of the case by order without written opinion. The decision shall have only such effect as precedent as is provided for by Rule 31(f).

(e) **Notice of decision.** Immediately upon the entry of the decision, the clerk shall give notice to the respective parties and make the decision public in accordance with the direction of the court.

(f) **Citation of decisions.** Published decisions of the Supreme Court and the Court of Appeals, and unpublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State. Other unpublished decisions may also be cited, so long as all parties and the court are supplied with accurate copies at the time all such decisions are first cited.

CREDIT(S)

[Amended effective October 1, 1992; November 1, 2003; November 1, 2005; April 1, 2007.]

Current with amendments received through 12/1/2012

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Not Reported in P.3d, 2004 WL 2610445 (Utah App.), 2004 UT App 427
(Cite as: 2004 WL 2610445 (Utah App.))

C

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Utah.
C-A-R LEASING, INC., Plaintiff and Appellant,
v.
PRECISE PAY, INC.; John Carrell; and John Does
I-V, Defendants and Appellees.

No. 20040680-CA.
Nov. 18, 2004.

Third District, Salt Lake Department; The Honorable
J. Dennis Frederick.
James C. Swindler, Draper, for Appellant.

Mark O. Morris and James D. Gardner, Salt Lake City,
for Appellees.

Before Judges BENCH, DAVIS, and ORME.

MEMORANDUM DECISION (Not For Official
Publication)

PER CURIAM.

*1 C-A-R Leasing, Inc. (CAR) appeals the trial court's order granting Appellees' motion to dismiss for improper venue. This case is before the court on its own motion for summary disposition.

CAR alleges tort and contract claims against Precise Pay, Inc., and a claim against Carrell as an agent of Precise Pay, Inc. Each of these claims relate to a contract executed in June 2002. The contract includes a forum selection clause that states: "[V]enue for any action to enforce or construe this Agreement shall be proper only in the County of Santa Clara, California." This clause was the basis for Appellees' motion to dismiss.

This court reviews a trial court's dismissal based on a forum selection clause for abuse of discretion. Coombs v. Juice Works Dev., Inc., 2003 UT App 388, ¶ 5, 81 P.3d 769. Utah courts give effect to a forum selection clause "unless it is unfair or unreasonable."

"*Id.* at ¶ 9 (quoting Prows v. Pinpoint Retail Sys., 868 P.2d 809, 812 (Utah 1993)). A party who brings an action in violation of a choice-of-forum provision bears the burden of proof on this issue. *See id.* To meet this burden, a party who seeks to overcome a forum selection clause "must demonstrate that the chosen state would be so seriously an inconvenient forum that to require the plaintiff to bring suit there would be unjust." *Id.* (quotations and citation omitted).

The trial court ruled that the forum selection clause rendered dismissal without prejudice appropriate. We agree. "A primary reason for forum selection clauses is to protect a party ... from having to litigate in distant forums all over the nation.... Such provisions should be enforced when invoked by the party for whose benefit they are intended." *Id.* at ¶ 15. Appellees invoked the forum selection clause, and the trial court found nothing unfair or unreasonable about its terms.

CAR's arguments concerning its failure to read the small print language now at issue, the costs of litigation in another forum, or the difference between tort and contract actions do not invalidate an otherwise reasonable forum selection clause. *See Coombs*, 2003 UT App 388 at ¶¶ 12-15. CAR fails to show that suit in Santa Clara County would be unjust, or that enforcing the clause would in effect deny CAR its day in court. *See id.* at ¶ 15. CAR's remaining arguments are without merit.

Accordingly, we affirm the trial court's order.

Utah App., 2004.
C-A-R Leasing, Inc. v. Precise Pay, Inc.
Not Reported in P.3d, 2004 WL 2610445 (Utah App.),
2004 UT App 427

END OF DOCUMENT

81 P.3d 769, 486 Utah Adv. Rep. 52, 2003 UT App 388
(Cite as: 81 P.3d 769)

C

Court of Appeals of Utah.

Anthony H. COOMBS, an individual; Scott Haslam,
an individual; Judith M. Haslam, an individual; and
HASCO, LLC, a Utah limited liability company,
Plaintiffs and Appellants,

v.

JUICE WORKS DEVELOPMENT, INC., an Arkan-
sas corporation; TCBY Systems, Inc., an Arkansas
corporation; Mrs. Fields Original Cookies, Inc., a
Delaware corporation; Mrs. Fields, Inc.; Mrs. Fields
Brand, Inc.; Mrs. Fields Holding Company, Inc.; and
Mrs. Fields Famous Brands, Defendants and Appel-
lees.

No. 20020720-CA.
Nov. 14, 2003.

Background: Franchisees brought action against franchisors for breach of contract, fraud, concealment, breach of fiduciary duty, and negligence. Franchisors filed motion to dismiss based on forum selection clause in franchise agreement naming Arkansas as forum state. The Third District Court, Salt Lake Department, Michael K. Burton, J., granted the motion to dismiss. Franchisees appealed.

Holdings: The Court of Appeals, Greenwood, J., held that:

- (1) Franchisees could not prevail on argument that forum selection clause was invalid due to their failure to read franchise agreement;
- (2) franchisees could not prevail on claim that suit should be permitted in Utah, despite forum selection clause, because franchise at issue was located in Utah and franchisors had significant presence in Utah; and
- (3) trial court did not improperly focusing on franchisees' financial ability to maintain suit in Arkansas when determining whether forum selection clause was valid.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪919

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k915 Pleading

30k919 k. Striking Out or Dismissal.

Most Cited Cases

In reviewing a motion to dismiss based on improper forum, the Court of Appeals views the facts and construes the complaint in the light most favorable to the plaintiff and indulges all reasonable inferences in his favor. Rules Civ.Proc., Rule 12(b)(3).

[2] Appeal and Error 30 ↪960(1)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k960 Rulings on Motions Relating to Pleadings

30k960(1) k. In General. Most Cited

Cases

The Court of Appeals reviews a trial court's dismissal based on a forum selection clause for abuse of discretion. Rules Civ.Proc., Rule 12(b)(3).

[3] Appeal and Error 30 ↪172(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k172 Grounds of Action or Relief

30k172(1) k. In General; Asserting New or Inconsistent Grounds. Most Cited Cases

Franchisees argued for the first time during oral argument before the Court of Appeals that franchise agreement's forum selection clause should not be enforced because it would bifurcate their claims, and thus Court of Appeals declined to address issue.

[4] Contracts 95 ↪206

81 P.3d 769, 486 Utah Adv. Rep. 52, 2003 UT App 388
(Cite as: 81 P.3d 769)

95 Contracts

95I Construction and Operation

95II(C) Subject-Matter

95k206 k. Legal Remedies and Proceedings.

Most Cited Cases

Forum selection clause in franchise agreement which expressly provided that "any action arising out of or relating to this Agreement" shall be brought in forum state's court covered both tort and contract issues, and thus dismissal of franchisees' action would not bifurcate their claims by allowing tort claims to remain while forcing contract claims into forum state's courts.

[5] Appeal and Error 30 ↪169

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k169 k. Necessity of Presentation in General. Most Cited Cases

The Court of Appeals will not address any new arguments raised for the first time on appeal.

[6] Judgment 228 ↪183

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k183 k. In General. Most Cited Cases

Motions to dismiss for improper venue are not converted into motions for summary judgment simply because they include some affirmative evidence relating to the basis for the motion. Rules Civ.Proc., Rule 12(b).

[7] Contracts 95 ↪127(4)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k127 Ousting Jurisdiction or Limiting Powers of Court

95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

Contracts 95 ↪141(1)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k141 Evidence

95k141(1) k. Presumptions and Burden of Proof. Most Cited Cases

It is 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. Rules Civ.Proc., Rule 12(b)(3).

[8] Constitutional Law 92 ↪3968

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3968 k. Consent; Forum-Selection Clauses. Most Cited Cases (Formerly 92k305(4.1))

If a forum selection clause is obtained through freely negotiated agreements and is not unreasonable and unjust, its enforcement does not offend due process. U.S.C.A. Const.Amend. 14.

[9] Contracts 95 ↪127(4)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k127 Ousting Jurisdiction or Limiting Powers of Court

95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

Franchisees could not prevail on argument that forum selection clause in franchise agreement was invalid due to their failure to read franchise agreement; franchisees did not claim that clause was unfair, and did not claim that it was product of fraud or overreaching. Rules Civ.Proc., Rule 12(b)(3).

[10] Contracts 95 ↪127(4)

81 P.3d 769, 486 Utah Adv. Rep. 52, 2003 UT App 388
(Cite as: 81 P.3d 769)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k127 Ousting Jurisdiction or Limiting Powers of Court

95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

Franchisees could not prevail on claim that suit should be permitted in Utah, despite forum selection clause selecting Arkansas as forum, because franchise at issue was located in Utah and franchisors had significant presence in Utah; purpose of forum selection clause was to protect franchisors from litigating in distant forums, and there was no evidence as to why franchisors should not be entitled to benefit of their bargained-for clause. Rules Civ.Proc., Rule 12(b)(3).

[11] Contracts 95  127(4)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k127 Ousting Jurisdiction or Limiting Powers of Court

95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

The legal test for determining whether a forum selection clause should be enforced is whether suit in the contracted-for venue would be unfair or unreasonable or whether enforcing the clause would in effect deny plaintiffs their day in court.

[12] Contracts 95  127(4)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k127 Ousting Jurisdiction or Limiting Powers of Court

95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

Trial court did not improperly focus on franchisees' financial ability to maintain suit in Arkansas

when determining whether forum selection clause in franchise agreement naming Arkansas as forum state was valid, although court allowed limited discovery on franchisees' financial resources; trial court's decision stated that franchisees failed to meet their burden to establish that suit in Arkansas would be so gravely difficult and inconvenient that they would be deprived of their day in court.

[13] Contracts 95  127(4)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k127 Ousting Jurisdiction or Limiting Powers of Court

95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

Inconvenience to a party is an insufficient basis to defeat an otherwise enforceable forum selection clause.

*771 Conrad B. Houser, Salt Lake City, for Appellants.

Deno G. Himonas, Jones Waldo Holbrook & McDonough, Salt Lake City, for Appellees.

Before JACKSON, P.J., BENCH, and GREENWOOD, JJ.

OPINION

GREENWOOD, Judge:

¶ 1 Anthony Coombs, Scott Haslam, Judith Haslam, and HASCO, LLC (collectively, Plaintiffs) appeal the trial court's grant of a motion to dismiss brought by Juice Works Development, Inc., TCBY Systems, Inc., and Mrs. Fields Original Cookies, Inc. (collectively, Defendants).^{FNI} Defendants brought the motion to dismiss based on a forum selection clause in a contract between franchisee Plaintiffs and franchisor Juice Works. Based on the forum selection clause, the trial court granted Defendants' motion. We affirm.

^{FNI}. Although the caption of this case lists Mrs. Fields, Inc., Mrs. Fields Brand, Inc., Mrs. Fields Holding Company, Inc., and Mrs. Fields Famous Brands as defendants in

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(Cite as: 81 P.3d 769)

this action, these entities were never served. Therefore, the only participating defendants in this action are Juice Works Development, Inc., TCBY Systems, Inc., and Mrs. Fields Original Cookies, Inc.

BACKGROUND ^{FN2}

^{FN2}. "In reviewing a motion to dismiss under rule 12(b)(3) of the Utah Rules of Civil Procedure, we view the facts and 'construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor.'" *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 810 (Utah 1993) (quoting *Munteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991)).

[1] ¶ 2 Anthony Coombs, Scott Haslam, and Judith Haslam were doing business through HASCO Synergetics, LLC, and were awarded a Juice Works franchise. HASCO and Juice Works entered into the Juice Works Franchise Agreement (the Agreement) on June 5, 1997. The Agreement contains a forum selection clause, which states,

F. EXCLUSIVE JURISDICTION

FRANCHISEE and the COMPANY agree that any action arising out of or relating to this Agreement (including, without limitation, the offer and sale of the franchise rights) shall be instituted and maintained only in a state or federal court of general jurisdiction in Pulaski County, Arkansas, and FRANCHISEE irrevocably submits to the jurisdiction of such court and waives any objection FRANCHISEE may have either to the jurisdiction or venue of such court.

G. BINDING EFFECT

This agreement is binding upon the parties hereto and their respective executors, administrators, heirs, assigns, and successors in interest, and shall not be modified except by written agreement signed by both FRANCHISEE and the COMPANY.

After the Agreement was signed, Plaintiffs opened a Juice Works store in Salt Lake *772 City, Utah. They closed their franchise in March 2000, and

subsequently filed suit in Utah state court, claiming breach of contract, fraud, concealment, breach of fiduciary duty, and negligence.

¶ 3 Defendants filed a Motion to Dismiss for improper venue, based on the forum selection clause in the Agreement. The clause expressly provides that "any action arising out of or relating to this Agreement" shall be brought only in Arkansas courts. (Emphasis added.) Despite this provision, Plaintiffs claim suit should be permitted in Utah. They maintain that they have never been to Arkansas, the contract was not negotiated or entered into in Arkansas, and that they have only exchanged a few phone calls with individuals in Arkansas. Plaintiffs' complaint alleges that Juice Works, an Arkansas corporation, was in some manner purchased by TCBY Systems, Inc., which is owned or operated by Mrs. Fields Original Cookies, Inc. Because Mrs. Fields's corporate business offices are in Utah, Plaintiffs argue suit should be permitted in Utah.

¶ 4 After oral argument on Defendants' Motion to Dismiss, the trial court allowed limited discovery on the financial impact that litigating in Arkansas would have on Plaintiffs. Based on this discovery, Defendants argued that Plaintiffs have sufficient funds to maintain suit in Arkansas. In response, Plaintiffs argued that Defendants overstated Plaintiffs' assets, and that the test for venue entails more than whether they can afford to litigate in a distant forum. The Motion to Dismiss was renewed and subsequently granted, based on the trial court's holding that Plaintiffs had not met their burden of establishing that the forum selection clause should not be enforced. Plaintiffs appeal.

ISSUE AND STANDARD OF REVIEW

[2] ¶ 5 Plaintiffs claim on appeal that the trial court erred when it granted Defendants' Motion to Dismiss under Utah Rule of Civil Procedure 12(b)(3). This court reviews a trial court's dismissal based on a forum selection clause for abuse of discretion. See *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 810 (Utah 1993); see also *O'Brien Eng'g Co., Inc. v. Continental Machs., Inc.*, 738 So.2d 844, 846 n. 2 (Ala.1999) (listing Utah among courts that apply abuse of discretion standard "in reviewing a lower court's order dismissing a case because of a forum selection clause").

ANALYSIS

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(Cite as: 81 P.3d 769)

[3][4][5] ¶ 6 Plaintiffs argue that the trial court improperly granted Defendants' Motion to Dismiss, which was based on a clause designating Arkansas as the sole forum for any actions arising out of or relating to the Agreement. Plaintiffs maintain they should be permitted to bring suit in Utah, despite the forum selection clause, because the clause was not negotiated, the franchise was in Utah, and Defendants have a significant presence in Utah. Plaintiffs also argue that the trial court abused its discretion by narrowly focusing on Plaintiffs' financial ability to litigate in Arkansas.^{FN3}

FN3. Additionally, Plaintiffs argued for the first time during oral argument before this court that the forum selection clause should not be enforced because it would bifurcate their claims. Plaintiffs argued that because the complaint enumerates both tort and contract claims, if the clause is enforced they will be required to litigate the contract claims in Arkansas and the tort claims in Utah. "We will not address any new arguments raised for the first time on appeal." *Smith v. Four Corners Mental Health Ctr., Inc.*, 2003 UT 23, ¶ 19, 70 P.3d 904 (quoting *Treff v. Hinckley*, 2001 UT 50, ¶ 9 n. 4, 26 P.3d 212 (other citation omitted)). A review of the record and the briefs in this case reveals that Plaintiffs did not previously argue this theory.

In any event, the Agreement expressly provides that "any action arising out of or relating to this Agreement" shall be brought in Arkansas courts. (Emphasis added.) This language appears to account for both tort and contract claims that arise out of or relate to the Agreement. Plaintiffs' claims in this action all arise out of Defendants' alleged misrepresentations or failures to perform under the Agreement.

[6] ¶ 7 Before reviewing the trial court's dismissal, we briefly discuss what may be considered in our review. Defendants' motion to dismiss for improper venue was brought under rule 12(b)(3) of the Utah Rules of Civil Procedure. Accordingly, this court may consider facts alleged outside the complaint, as did the trial court. *773 Rules 12(b)(1) to-(5) motions are not converted "into motions for summary judgment

simply because they include some affirmative evidence relating to the basis for the motion." *Wheeler v. McPherson*, 2002 UT 16, ¶ 20, 40 P.3d 632 (quoting *Spoons v. Lewis*, 1999 UT 82, ¶ 5, 987 P.2d 36). One reason a motion to dismiss for improper venue is not converted into a motion for summary judgment is because a party is not required to state facts in the complaint sufficient to establish "that there is no contract that precludes the plaintiff from proceeding in the forum it has chosen." *Simon v. Navellier Series Fund*, No. 17734, 2000 WL 1597890, 2000 Del. Ch. LEXIS 150 (Del. Ch. Oct. 19, 2000), at *13 (adopting flexibility allowed in addressing motions under Federal Rules of Civil Procedure 12(b)(1) to-(5)).

¶ 8 In this case, the parties submitted affidavits and the court granted limited discovery on the motion to dismiss. Similarly, in *Salt Lake Tribune Publishing Co. v. Memmott*, 2001 UT 83, 40 P.3d 575, the trial court "granted limited discovery on the facts relating to venue, creating a record in addition to the allegations in the complaint." *Id.* at ¶ 4. In reviewing the question of venue, the court relied on facts alleged in the complaint, "supplemented where appropriate by the materials obtained through discovery." *Id.* So too in this case, this court relies on the complaint, affidavits, and the limited record created through discovery.

¶ 9 The Utah Supreme Court first considered the validity of a forum selection clause such as the one at issue in this case in *Prows v. Pinpoint Retail Systems*, 868 P.2d 809 (Utah 1993). In *Prows*, the court specifically adopted "section 80 of the Second Restatement of Conflict of Laws: 'The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable.'" *Id.* at 812 (quoting *Restatement (Second) of Conflict of Laws § 80 (Supp.1988)*). The court stated,

Under this section, a plaintiff who brings an action in violation of a choice-of-forum provision bears the burden of proving that enforcing the clause is unfair or unreasonable.

To meet this burden, a plaintiff must demonstrate that the "chosen state would be so seriously an inconvenient forum that to require the plaintiff to bring suit there would be unjust."

Id. (citations and footnote omitted).

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[7][8] ¶ 10 In defining the weight of this burden, the *Prows* court looked to *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). See *Prows*, 868 P.2d at 811. “[I]t 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.” *Id.* at 812 (alterations in original) (quoting *M/S Bremen*, 407 U.S. at 18, 92 S.Ct. at 1917). The *M/S Bremen* court also stated that 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.” *Id.* at 10, 92 S.Ct. at 1913 (footnote omitted).^{FN4} Finally, where a forum selection clause is “obtained through ‘freely negotiated’ agreements and [is] not ‘unreasonable and unjust,’ [its] enforcement does not offend due process.” *Phone Directories Co., Inc. v. Henderson*, 2000 UT 64, ¶ 15 n. 9, 8 P.3d 256 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n. 14, 105 S.Ct. 2174, 2182 n. 14, 85 L.Ed.2d 528 (1985) (other citations omitted)).

FN4. Although *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) was an admiralty case, its principles have been generally applied in domestic forum selection cases. See, e.g., *Prows*, 868 P.2d at 811-13; *Gilman v. Wheat. First Sec., Inc.*, 345 Md. 361, 377-78, 692 A.2d 454 (1997) (listing non-admiralty Supreme Court cases applying principles of *M/S Bremen*).

¶ 11 Plaintiffs in this case attempt to meet this heavy burden of showing that the forum selection clause is either unfair or unreasonable. As previously noted, Plaintiffs argue that: (1) the forum selection clause was not negotiated and therefore should not be enforced; (2) because Defendants have a significant presence in Utah, suit should be permitted in Utah; and (3) the trial court *774 improperly relied on Plaintiffs' financial ability to litigate in Arkansas.

[9] ¶ 12 Plaintiffs first claim that the Agreement was not freely negotiated and therefore they should not be subject to it. Plaintiffs argue that they did not read the forty page Agreement and that there was no opportunity to discuss or alter any of the terms in the Agreement. However, the United States Supreme

Court has noted that a forum selection clause in a non-negotiated form contract is valid, so long as it is not fundamentally unfair. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S.Ct. 1522, 1528, 113 L.Ed.2d 622 (1991) (upholding forum selection clause included in three page form attached to cruise ship ticket); accord *M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d 750, 753 (8th Cir.1999) (enforcing forum selection clause in franchise agreements).

¶ 13 Moreover, Plaintiffs do not argue that the forum selection clause was unfair, only that they did not read it. They do not argue that the clause was invalid for reasons such as fraud or overreaching, see *Prows*, 868 P.2d at 812 n. 5, nor do they offer any other legitimate reason that the court should not “give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement.” *M/S Bremen*, 407 U.S. at 12, 92 S.Ct. at 1914. Accordingly, we reject Plaintiffs' argument.

[10] ¶ 14 Next, Plaintiffs argue that suit should be permitted in Utah because the franchise at issue was located in Utah and Defendants have a significant presence through related entities in Utah. The complaint alleges that although Juice Works is an Arkansas corporation, Plaintiffs believe Juice Works was in some manner purchased or acquired by TCBY Systems, Inc., a company owned and run by Mrs. Fields Original Cookies, Inc. Because Mrs. Fields is headquartered in Utah, Plaintiffs assert suit should be allowed in Utah.

[11] ¶ 15 Plaintiffs' argument disregards the legal test for whether a forum selection clause should be enforced: whether suit in the contracted-for venue would be “unfair or unreasonable” or whether enforcing the clause would in effect deny Plaintiffs their day in court. *Prows v. Pinpoint Retail Sys.*, 868 P.2d 809, 812 (Utah 1993). Further, even when we “view the facts and ‘construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor,’ ” *id.* at 810 (citation omitted), Plaintiffs' argument fails. Ownership or management of Juice Works is not relevant to the forum selection clause which was accepted and signed by both parties to the Agreement. A primary reason for forum selection clauses is to protect a party, in this case Juice Works, from “‘having to litigate in distant forums all over the nation.... [S]uch provisions should be enforced when invoked by the party for whose benefit

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they are intended.' " Medical Legal Consulting Serv., Inc. v. Covarrubias, 648 F.Supp. 153, 155 (D.Md.1986) (citation omitted). Further, Plaintiffs do not demonstrate why Defendants should not be entitled to "the benefit of [their] bargain which includes the forum selection clause," *id.*, even if ownership of Juice Works has changed.

[12][13] ¶ 16 Lastly, Plaintiffs maintain the trial court abused its discretion by improperly focusing on their financial ability to maintain suit in Arkansas.^{FN5} This argument misconstrues the trial court's holding. While the trial court did allow limited discovery on Plaintiffs' financial resources, it did not dismiss the suit merely because Plaintiffs appear financially able to manage the increased costs of litigating in a distant forum. Rather, the trial court's Memorandum Decision states that Plaintiffs failed to meet their burden to establish that suit in Arkansas would be "[so] gravely difficult and inconvenient that [Plaintiffs] will for all practical purposes be deprived of [their] day in court." See Prows, 868 P.2d at 812 (first alteration in original) (quotations and citation omitted). The facts of this case are significantly different*775 from those in Prows, where enforcement of the forum selection clause would have required suits in two forums and the impossible burden of proving conspiracy absent one of the two alleged conspirators. See *id.* at 813. Accordingly, the court's dismissal in this case was based on more than the financial impact of litigating in Arkansas, contrary to Plaintiffs' argument.

FN5. Additionally, Plaintiffs maintain that despite the limited discovery which was conducted, litigating in Arkansas would be a severe financial burden for them. "[I]nconvenience to a party is an insufficient basis to defeat an otherwise enforceable forum selection clause." M.B. Rests., Inc. v. CKE Rests., Inc., 183 F.3d 750, 753 (8th Cir.1999).

CONCLUSION

¶ 17 The trial court's grant of Defendants' Motion to Dismiss was not an abuse of discretion. Plaintiffs failed to meet their burden of demonstrating that the forum selection clause contained in the parties' Agreement was unfair or unreasonable, or that enforcement of the clause would deny Plaintiffs their day in court. We affirm.

¶ 18 WE CONCUR: NORMAN H. JACKSON, Presiding Judge and RUSSELL W. BENCH, Judge.

Utah App.,2003.

Coombs v. Juice Works Development Inc.

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▷

Supreme Court of Utah.
Tracy PROWS and Kolob Computer dba Computer-
land of Ogden, Plaintiffs,
v.
PINPOINT RETAIL SYSTEMS, INC., a corporation,
and Flying J, Inc., a corporation, Defendants and Pe-
titioner,
v.
The Honorable Timothy R. HANSON, Respondent.

No. 920573.
Dec. 23, 1993.
Rehearing Denied Feb. 14, 1994.

Defendant appealed from order of the Third Dis-
trict Court, Salt Lake County, Timothy R. Hanson, J.,
which denied motion to dismiss for lack of venue. The
Supreme Court, Howe, Associate C.J., held that court
properly declined to enforce forum selection clause in
contract.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪949

30 Appeal and Error 30XVI Review

30XVI(H) Discretion of Lower Court
30k949 k. Allowance of remedy and matters
of procedure in general. Most Cited Cases

Trial court's decision that venue is proper despite
forum selection clause to the contrary will not be
reversed absent abuse of discretion.

[2] Contracts 95 ↪127(4)

95 Contracts

95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting
Powers of Court

95k127(4) k. Agreement as to place of
bringing suit; forum selection clauses. Most Cited
Cases

Where state designated in forum selection clause
had no interest in determination of case, which in-
volved suit by Utah plaintiff against a Utah defendant
and a Canadian defendant, with the agreement to be
formed in Utah, court was not bound by choice of
forum provision in the agreement.

[3] Contracts 95 ↪141(1)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k141 Evidence

95k141(1) k. Presumptions and burden
of proof. Most Cited Cases

Plaintiff who brings action in violation of choice
of forum provision bears burden of proving that en-
forcing the clause is unfair or unreasonable by
demonstrating that the chosen state would be so seri-
ously an inconvenient forum that to require plaintiff to
bring suit there would be unjust, by showing that
choice of forum provision was obtained by fraud,
duress, abuse of economic power or other uncon-
scionable means, or that courts of the chosen state
would be closed to suit or would not handle it effec-
tively or fairly.

[4] Contracts 95 ↪127(4)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k127 Ousting Jurisdiction or Limiting
Powers of Court

95k127(4) k. Agreement as to place of
bringing suit; forum selection clauses. Most Cited
Cases

It would be unfair or unreasonable to enforce
choice of forum clause in contract between Utah
plaintiff and Canadian defendant, where that clause
called for litigation in New York, where New York

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had no connection to the action, and where enforcement would require the plaintiff to maintain its action against the Canadian defendant in New York while litigating the same case against a Utah defendant in Utah.

*809 Edward M. Garrett, Salt Lake City, for plaintiffs.

John Knapp Baird, Mark J. Morrise, Charlotte K. Wightman, Salt Lake City, for petitioner.

HOWE, Associate Chief Justice:

Defendant Pinpoint Retail Systems, Inc., appeals from the district court's denial of its motion to dismiss for lack of venue. Utah R.Civ.P. 12(b)(3). We granted this appeal from an interlocutory order under Utah Rule of Appellate Procedure 5.

Plaintiff Tracy Prows is principal owner and president of Kolob Computer Corporation, doing business as Computerland of Ogden.^{FN1} Flying J is a Utah corporation in the business of oil refining and operating truck stops, restaurants, motels, and convenience stores. In early 1987, Flying J expressed to Prows dissatisfaction with its point-of-sale computers. These devices were used at Flying J truck stops to compute sales of fuel, food, and other items and to compile accounting data. Flying J requested Prows' assistance in developing a new point-of-sale computer.

FN1. Because the two plaintiffs in this action are so closely related, we will refer to them collectively as "Prows."

*810 Prows contacted Pinpoint Retail Systems, Inc., a Canadian corporation he had come in contact with at a trade show in Las Vegas. Pinpoint markets and sells its computer products throughout the United States, but its principal place of business is in Ontario, Canada. Throughout 1987 and part of 1988, Prows met with personnel at Flying J and Pinpoint to develop a computer that would meet Flying J's specific needs. He worked without compensation on the project but had agreed with Pinpoint to act as its value added reseller. This meant that Pinpoint would provide the newly developed computers at wholesale price to Prows, who would in turn sell them to Flying J at Pinpoint's recommended retail price. This agreement ensured Prows a reasonable profit for his services. On July 14, 1988, Prows entered into Pinpoint's standard

"Value Added Reseller Agreement" (the "VAR" agreement).

After the new point-of-sale computers were developed, Prows and Pinpoint submitted a proposal to Flying J, which agreed to the purchase price and committed to buy a substantial number of the computers. However, prior to entering into a final contract, Richard Peterson of Flying J went to Pinpoint's manufacturing plant to ensure that Pinpoint had the capability of manufacturing the new computers and software. After he returned to Utah, Peterson contacted Prows and told him that "his presence in this purchase and sale agreement would no longer be necessary" because Flying J had decided to buy the computers directly from Pinpoint. Some time later, Flying J purchased at least 200 new point-of-sale computers.

On April 16, 1992, Prows commenced this suit against Pinpoint in third district court, alleging breach of contract and quantum meruit. Pinpoint moved to dismiss for improper venue. Utah R.Civ.P. 12(b)(3). The motion was based on section 13.8 of the VAR agreement, which reads:

13.8 *Forum and Venue*

This agreement shall be construed and interpreted in accordance with and governed by the laws of the State of New York and the federal laws of the United States applicable therein. The VAR [Prows] consents and agrees that all legal proceedings relating to the subject matter of this Agreement shall be maintained in courts sitting in the Borough of Manhattan, in the City of New York, in the State of New York and the VAR [Prows] consents and agrees that jurisdiction and venue for such proceedings shall lie exclusively with such courts.

Thereafter, Prows filed an amended complaint, adding Flying J as a defendant and alleging several business torts including interference with contract, interference with prospective economic relations, and conspiracy. The district court denied Pinpoint's motion to dismiss for improper venue, and we granted its subsequent petition for interlocutory appeal.^{FN2}

FN2. Flying J also moved to dismiss for improper venue, but it argued that venue should be transferred from Salt Lake to Box Elder County. The court denied the motion, ruling

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that venue in Salt Lake County should not be disturbed. We denied Flying J's petition for a writ of mandamus and its untimely petition for intermediate appeal.

[1] In reviewing a motion to dismiss under rule 12(b)(3) of the Utah Rules of Civil Procedure, we view the facts and “construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor.” Mounteer v. Utah Power & Light Co., 823 P.2d 1055, 1058 (Utah 1991) (ruling on rule 12(b)(6) motion to dismiss for failure to state a claim). The trial court's decision that venue is proper, despite a forum-selection clause to the contrary, will not be reversed absent an abuse of discretion. Eads v. Woodmen of the World Life Ins., 785 P.2d 328, 330-31 (Okla.Ct.App.1989); Personalized Mktg. Serv., Inc. v. Stotler & Co., 447 N.W.2d 447, 451 (Minn.Ct.App.1989) (holding that court abuses its discretion in enforcing forum-selection clause where clause is “so unreasonable that its enforcement would be ... against both logic and the facts on the record”).

Before deciding the principal issue in this case, it is necessary to address two preliminary matters. First, the parties argue at length about whether New York courts would have subject matter jurisdiction over this case and personal jurisdiction over Pinpoint.*811 It is not necessary for us to decide this question. We will simply assume for purposes of this appeal that New York courts would have jurisdiction over the case and the parties.

Second, the parties agreed that their contract would be “interpreted in accordance with and governed by the laws of the State of New York.” Pinpoint argues that under New York law, “prelitigation forum-selection clauses” must be enforced and that this rule does not “contravene any strong public policies of the State of Utah.” In the absence of such a conflict, the argument continues, this court must apply New York law and enforce the forum-selection provision. We disagree.

[2] The Second Restatement of Conflict of Laws provides:

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit pro-

vision in their agreement directed to that issue, unless ...

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties [sic] choice....

Restatement (Second) Conflict of Laws § 187(2)(a) (Supp.1988). On its face, the rule appears to support Pinpoint's position. While New York has no “substantial relationship” to the parties or the transaction, there is a “reasonable basis” for Pinpoint's choosing New York law to govern the VAR agreement—Pinpoint wants to “limit the number of forums in which it may be required to bring or defend an action.”

The existence of that “reasonable basis,” however, is without effect. The comments to section 187 state that the rule of subsection (2) “applies only when two or more states have an interest in the determination of the particular issue”; it does not apply “when all contacts are located in a single state and when, as a consequence, there is only one interested state.” *Id.* at cmt. d. New York has no interest in the determination of this case. A Utah plaintiff brought this suit against a Utah defendant and a Canadian defendant. The VAR agreement was to be performed in Utah. It was signed in Utah, and the alleged breach and tortious conduct occurred here. All relevant “contacts” occurred in Utah, and as a consequence, Utah is the only state with an interest in the action.

For this reason, we are not bound by New York law in determining the validity of the choice-of-forum provision in section 13.8 of the VAR agreement. Rather, we decide the question under Utah law, which until this time has been virtually silent on the issue.^{FN3}

FN3. Both parties cite Petersen v. Ogden Union Railway & Depot, 110 Utah 573, 175 P.2d 744, 747 (1946). In Petersen, an injured railway worker accepted an advance of \$500 from his employer. In the receipt for the advance, the worker agreed to bring suit only in the federal district court of Utah, northern division. This court refused to enforce the forum-selection clause, stating, “Generally speaking, venue is a privilege which may be waived, but it may not be contracted away in the face of a specific statute which prohibits

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such contracting, as does section 5 of the Employers' Liability Act under consideration." *Id.* 175 P.2d at 747. In the instant case, we must decide the validity of a forum-selection clause that does not conflict with a statutory provision. This is a question of first impression.

Traditionally, courts held forum-selection clauses invalid on the ground that it violated public policy to "permit such clauses to 'oust' a court other than the chosen court of jurisdiction invested in it by law." Eugene F. Scoles & Peter Hay, *Conflict of Laws* 353 (1984); see also Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court In Which Action May Be Brought*, 31 A.L.R.4th 404, § 3 (1984). However, during the 1950s and 1960s, the ouster theory began to erode as courts sought to "effectuat[e] the intent of the parties on notions akin to the doctrine of forum non conveniens." Scoles & Hay at 353. Still, it was not until the Supreme Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), that the "ouster theory" was permanently laid to rest.^{FN4} In *Bremen*, the Supreme Court wrote:

^{FN4}. In *Bremen*, Unterweser, a German corporation, agreed by contract to tow Zapata's off-shore drilling rig from Louisiana to the Adriatic Sea. The contract contained a forum-selection clause providing that "any dispute arising must be treated before the London Court of Justice." *Bremen*, 407 U.S. at 2, 92 S.Ct. at 1909, 32 L.Ed.2d at 516. Four days after Unterweser's deep sea tug left Louisiana, a severe storm struck, damaging the rig. Zapata ignored the forum-selection clause and brought suit against Unterweser in the United States district court in Tampa, Florida, seeking damages for negligent towage and breach of contract. The district court refused to enforce the clause, and the court of appeals affirmed. The United States Supreme Court, however, reversed, holding that the district court should have given effect to the "legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause." *Id.* at 12, 92 S.Ct. at 1914, 32 L.Ed.2d at 521-22.

The Court has not limited the scope of *Bremen* to "freely negotiated international agreement[s], unaffected by fraud, undue influence or overweening bargaining power." *Id.* at 12, 92 S.Ct. at 1914, 32 L.Ed.2d at 522. In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991), the Court upheld a forum-selection clause in a form ticket contract between a private individual and the cruise line corporation. That decision has been criticized. Edward A. Purcell, *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rhenquist Court*, 40 UCLA L.Rev. 423 (1992).

*812 The argument that [forum-selection] clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial [sic] legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. *Id.* at 12, 92 S.Ct. at 1914, 32 L.Ed.2d at 521. In short, the Court concluded, "No one seriously contends in this case that the forum-selection clause 'ousted' the District Court of jurisdiction." *Id.*

[3][4] The modern view adopted by a majority of courts and which we adopt today is set forth in section 80 of the Second Restatement of Conflict of Laws:

The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable.

Restatement (Second) of Conflict of Laws § 80 (Supp.1988). Under this section, a plaintiff who brings an action in violation of a choice-of-forum provision bears the burden of proving that enforcing the clause is unfair or unreasonable. *Id.* § 80 cmt. c.

To meet this burden, a plaintiff must demonstrate that the "chosen state would be so seriously an inconvenient forum that to require the plaintiff to bring suit there would be unjust." ^{FN5} *Id.* On this point, the United States Supreme Court stated, "[I]t should be

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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, 407 U.S. at 18, 92 S.Ct. at 1917, 32 L.Ed.2d at 525. While this is a heavy burden, it is not insurmountable. See Validity of Contractual Provision Limiting Place or Court In Which Action May Be Brought, 31 A.L.R.4th 404, § 4[c] (1984) (listing cases where courts found choice-of-forum provisions unreasonable). After careful consideration of the record, we conclude that Prows met this burden of proof.

FN5. A party might also show that (1) the choice-of-forum provision was "obtained by fraud, duress, the abuse of economic power, or other unconscionable means"; or (2) the courts of the chosen state "would be closed to the suit or would not handle it effectively or fairly." Restatement (Second) of Conflict of Laws § 80, cmt. c (Supp.1988).

Prows argues that if the forum-selection clause is enforced, he will be in the "position of trying the case in Utah against Flying J and in New York against Pinpoint." This result, according to Prows, would be "chaotic and prohibitively expensive." The trial court was appropriately troubled by the prospect of requiring Prows to litigate the same case in two different forums. It stated:

To require the plaintiff to go to New York to litigate where Flying J cannot be a part of a lawsuit, because clearly you can't get Flying J there unless there's personal jurisdiction on some basis we haven't talked about, then this entire issue can't be resolved in one case, we're going to have to try part of it here, part of it in New York, and that assuming the State of New York will take it.

*813 Requiring a bifurcated trial on the same issues contravenes the "objective of modern procedure," which is to "litigate all claims in one action if that is possible." Dyersburg Machine Works, Inc. v. Rentenbach Eng'g Co., 650 S.W.2d 378, 380-81 (Tenn.1983) (court refused to enforce a forum selection clause because of the likelihood that the chosen forum had jurisdiction over only two of three defendants). It also increases the cost of litigation. Increased costs and policy considerations aside, however, requiring Prows to litigate against Pinpoint in

New York and Flying J in Utah would twice impose on him the onerous burden of proving a "conspiracy" between two defendants, only one of whom is present at each trial. Forcing Prows to shoulder this heavy burden of proof, standing alone, is unjust and for all practical purposes denies him his day in court.

We therefore affirm the denial of Pinpoint's motion to dismiss for lack of venue. Schedule "C" of the VAR agreement grants Pinpoint the right to collect attorney fees "incurred ... in enforcing its rights under this Agreement." Pinpoint has no right under the VAR agreement to have this dispute litigated exclusively in New York; therefore, it is not entitled to attorney fees.

HALL, C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

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(Cite as: 2012 WL 777270 (D.Utah))

C

Only the Westlaw citation is currently available.

United States District Court,
D. Utah,
Central Division.
VENTURA & ASSOCIATES, L.L.C., a Utah limited
liability company, Plaintiff,
v.
HBH FRANCHISE COMPANY, LLC, a Georgia
limited liability company; and Dolphin Winder LLC
d/b/a Winder Farms, a Utah limited liability company,
Defendant.

No. 2:11cv631.
March 7, 2012.

Blake T. Ostler, C. Christian Thompson, Thompson
Ostler & Olsen, Salt Lake City, UT, for Plaintiff.

Robert S. Clark, Parr Brown Gee & Loveless, Scott S.
Bell, Spencer E. Austin, Parsons Behle & Latimer,
Salt Lake City, UT, for Defendant.

MEMORANDUM DECISION AND ORDER

PAUL M. WARNER, United States Magistrate Judge.

*1 All parties in this case have consented to having United States Magistrate Judge Paul M. Warner conduct all proceedings in the case, including entry of final judgment, with appeal to the United States Court of Appeals for the Tenth Circuit.^{FN1} See 28 U.S.C. § 636(c); Fed.R.Civ.P. 73. Before the court is HBH Franchise Company, LLC's ("HBH") motion to dismiss for improper venue.^{FN2} On September 27, 2011, the court held a hearing on the motion. At the hearing, Ventura & Associates, L.L.C. ("Ventura") was represented by Blake T. Ostler and C. Christian Thompson, and HBH was represented by Robert Clark. Before the hearing, the court carefully considered the motion, memoranda, and other materials submitted by the parties. At the hearing, the court took the motion under advisement and ordered additional briefing. After considering the arguments of counsel, as well as the additional materials submitted by the parties, the court renders the following memorandum decision and order.

FN1. See docket no. 12 & 33.

FN2. See docket no. 19.

BACKGROUND

In August 2003, Ventura entered into a franchise agreement ("Agreement") with HBH to own and operate a HoneyBaked Ham and Cafe franchise. The Agreement provided Ventura a protected territory that encompassed all of Washington County, Utah ("Exclusive Territory"). Under the Agreement, HBH was entitled to sell HoneyBaked Ham products only to (1) existing customers of HBH or its affiliates located within the Exclusive Territory as of the effective date of the Agreement and (2) new customers developed by HBH or its affiliates' sales department within the Exclusive Territory after the effective date.

Ventura alleges, inter alia, that HBH breached the Agreement by allowing others to encroach on the Exclusive Territory. Specifically, Ventura contends that in 2008, HBH contracted with Dolphin Winder LLC d/b/a Winder Farms ("Winder") to sell HoneyBaked Ham products within Ventura's Exclusive Territory.

On June 6, 2011, Ventura filed this lawsuit in Third District Court, State of Utah, against HBH. Ventura alleges the following five causes of action against HBH: breach of contract, breach of the covenant of good faith and fair dealing, fraud, negligent misrepresentation, and tortious interference with contractual relations and prospective economic benefits. Specifically, Ventura asserts that HBH exploits its franchisees by (1) "charging exorbitant fees and markups on required purchases, and forcing franchisees to accept coupons from customers for free or highly discounted food items for which franchisees receive no reimbursement from HBH and which therefore benefit HBH by increasing its sales"; (2) "deliberately poaching the franchisee's customers through direct sales"; and (3) "selling products within the franchisee's protected territory through alternative channels of distribution and alternative distributors."^{FN3}

FN3. Docket no. 13 at 3-4.

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On July 6, 2011, HBH removed this case to the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1441(a). On July 29, 2011, Ventura amended its complaint to add Winder as a party, as well as a claim for tortious interference against Winder. On August 12, 2011, HBH filed the instant motion to dismiss.

DISCUSSION

*2 HBH moves this court to dismiss this action for improper venue. Specifically, HBH argues that the Agreement contains a mandatory forum selection clause that requires Ventura to litigate any claims against HBH in Georgia. Section 20.7 of the Agreement provides, in relevant part:

[Ventura] may bring an action only in state court for the county where HBH's principal place of business is located at the time the action is brought or in any federal court of the district where HBH's principal place of business is located at the time the action is brought. [Ventura] submits and irrevocably consents to the exclusive jurisdiction of such courts and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to such jurisdiction or venue.^{FN4}

FN4. Docket no. 14 at 17.

HBH contends that because its principal place of business is in Norcross, Georgia, Ventura was required to file this case in Georgia as set forth in the Agreement.

"A motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue" under rule 12(b)(3) of the Federal Rules of Civil Procedure. Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir.1992). "Mandatory 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.'" Brahma Group, Inc. v. Benham Constructors, LLC, No. 2:08-CV-970TS, 2009 WL 1065419, at *3 (D. Utah April 20, 2009) (quoting Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342, 1346 (10th Cir.1992)). "A forum selection clause may be unreasonable if it contravenes a strong public policy of the forum, 'whether declared by statute or by judicial decision.'" Id. (quoting M/S

Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)). The United States Supreme Court has held that "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." M/S Bremen, 407 U.S. at 18. Furthermore, "[i]f [Ventura] seek[s] to avoid the choice of venue provision based upon fraud or overreaching [it] must show that the inclusion of 'that clause in the contract was the product of fraud or coercion.'" See Wood v. World Wide Ass'n of Specialty Programs and Sch., Inc., No. 2:06-CV708 TS, 2008 WL 4328819, at *1 (D.Utah Sept. 16, 2003) (quoting Riley, 969 F.2d at 956).

Ventura alleges that the forum selection clause is unreasonable and should not be enforced on the following grounds. First, Ventura asserts that because Winder is an indispensable party not subject to jurisdiction in Georgia, enforcement of the forum selection clause would require it to pursue the same claims against HBH and Winder in separate forums. Ventura explains that public policy discourages bifurcation of related claims and, wherever possible, requires analogous issues to be heard in the same forum. Second, Ventura argues that it would be cost prohibitive for it to pursue its claims against HBH in Georgia such that it would essentially deprive Ventura of its day in court. And finally, Ventura asserts that the forum selection clause was procured by fraud and is therefore invalid. The court will address each of Ventura's arguments in turn.

(1) Public Policy

*3 Ventura argues that enforcing the forum selection clause would contravene the strong public policy of litigating all claims in one action before the same tribunal. Specifically, Ventura asserts that because a Georgia court could not obtain personal jurisdiction over Winder, enforcing the forum selection clause would bifurcate this case, thereby violating the public policy of litigating related claims in one action. Ventura relies heavily on a Utah Supreme Court case for this proposition. See Prows v. Pinpoint Retail Sys., Inc., 868 P.2d 809, 813 (Utah 1994).^{FN5}

FN5. As noted by Ventura, some courts have held that the parties' choice of law governs the determination of whether the forum selection clause is valid. See, e.g., Yavuz v. 61

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MM, Ltd., 465 F.3d 418, 421 (10th Cir.2006) (holding that a forum selection clause in an international agreement is interpreted under the law chosen by the parties); Brahma Group, Inc., 2009 WL 1065419, at *6 (applying the law chosen by the parties to determine the validity of a forum selection clause). However, other courts have held that the validity of the forum selection clause is a question of venue, which is procedural in nature, and therefore is governed by the law of the forum. See, e.g., Wong v. Partygaming Ltd., 589 F.3d 821, 827-28 (6th Cir.2009) (noting that a majority of circuits apply the law of the forum to determine the validity of a forum selection clause); Wood, 2008 WL 4328819 at *2 (applying federal law of the forum to determine the validity of a forum selection clause although South Carolina law was the law chosen by the parties). The laws are similar because they all are derived directly from the United States Supreme Court's decision in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). Furthermore, the parties apparently do not dispute the governing choice of law as both have relied upon Tenth Circuit and Utah cases and neither have cited to the Eleventh Circuit or Georgia cases. As such, the court applies the law in accordance with the parties' briefs.

The plaintiff in *Prows* was the principal owner and president of a Utah-based company that brought claims against two companies, one a Utah corporation and the other a Canadian company. See *id.* at 812. The plaintiff filed suit in Utah against both defendants, and the Canadian company moved to dismiss on the grounds that a forum selection clause contained in a contract between it and the plaintiff required all claims arising from that contract to be litigated in New York. See *id.* The plaintiff argued that if the forum selection clause was enforced, he would have to try the case in two forums: once in Utah against the Utah corporation and once in New York against the Canadian company. See *id.* The Utah Supreme Court held that "[r]equiring a bifurcated trial on the same issues contravenes the objective of modern procedure, which is to litigate all claims in one action if that is possible." *Id.* at 813 (quotations and citation omitted). Ultimately, the *Prows* court held that requiring the plaintiff to litigate a claim of conspiracy against both defendants in separate trials was unjust and would essentially deny him

his day in court. See *id.*

Ventura argues that the instant case is nearly identical to *Prows*. Ventura urges this court to follow *Prows* and conclude that judicial economy necessitates a trial of all claims against HBH and Winder in the same forum. While at first glance this case and *Prows* appear to be analogous, there are some critical differences. The State of New York, the chosen forum in *Prows*, had no interest in the outcome of the case. See *id.* at 811. None of the parties were citizens of New York, the contract at issue was to be performed in Utah, the contract was executed in Utah, and the alleged breach and tortious activity all occurred in Utah. See *id.* In fact, the court noted, "Utah is the only state with an interest in the action." *Id.*; see also Phone Directories Co., Inc. v. Henderson, 8 P.3d 256, 262 (Utah 2000) ("We held [in *Prows*] that [the forum selection clause] was unfair and unreasonable because none of the parties had any connection with New York." (Howe, C.J., concurring)). Conversely, in the instant case, Utah is not the only state with an interest in the outcome of the lawsuit; Georgia has a considerable interest in this case. That is, HBH is a Georgia corporation, the parties agreed that Georgia law would govern their disputes, the Agreement was executed in Georgia, and HBH's alleged wrongful conduct took place in Georgia.

*4 Furthermore, while the court appreciates the public policy against piecemeal litigation, it cannot conclude that judicial economy trumps the mandatory forum selection clause in this case. Although Ventura's claims against HBH and its claim against Winder are based on the same set of facts, none of the causes of action are alleged against both HBH and Winder. In *Prows*, the plaintiff asserted a claim for conspiracy against both defendants, and the court held that requiring him to twice prove a conspiracy between two defendants in two different forums was an unjustly onerous burden. See Prows, 868 P.2d at 813. Enforcing the forum selection clause in this matter will require Ventura to shoulder the burden of litigating its claims against two defendants in separate forums. The court, however, does not find the burden to be unjust or unreasonable. Additionally, because none of the claims are alleged against both defendants, bifurcation of this case should be more easily manageable than in *Prows*.

Lastly, Ventura argues that Winder is an indis-

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pensable party. Ventura asserts that if it is required to pursue its claims against HBH in Georgia, HBH will likely move to dismiss the Georgia case on the grounds that Ventura failed to join an indispensable party. The court does not find this argument to be persuasive. It does not appear that Winder is an indispensable party as Ventura has not demonstrated that it cannot get complete relief in the absence of Winder. *See, e.g., Salt Lake Tribune Publ'g Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1097 (10th Cir.2003). Furthermore, it is likely that HBH would be estopped from making that argument before a Georgia court in light of the arguments it has made before this court.

Ventura has not demonstrated that judicial economy considerations should prevail over the mandatory forum selection clause agreed to by the parties. As such, the court concludes that Ventura's public policy argument fails.

(2) Due Process

Second, Ventura argues that like the plaintiff in *Prows*, enforcement of the forum selection clause would deprive Ventura of its day in court. In particular, Ventura asserts that the forum selection clause is unfair and unreasonable because Ventura cannot afford to litigate its claims in Georgia. Ventura states that nearly all of its witnesses reside in Utah and contends that it would be cost prohibitive to pay the expenses for these witnesses to testify in Georgia.

The court is not persuaded that enforcing the forum selection clause is so unfair and unjust that it would deprive Ventura of its day in court. Ventura has put forth no facts to support its contention that litigation in Georgia would be significantly more expensive such that it would essentially deprive Ventura of its opportunity to pursue its claims against HBH. *See Wood*, 2008 WL 4328819, at *4 (rejecting the plaintiffs' argument that litigation in the chosen forum would be too expensive when there was "no actual information, as opposed to argument, that it would be so prohibitively expensive ... that it would effectively deny [the plaintiffs] their day in court"); *see also Daley v. Gulf Stream Coach, Inc.*, No. 2:99CV534C, 2000 WL 33710836, at *3 (D.Utah March 3, 2000) (holding that the plaintiffs' "conclusory statements" that it would be more expensive to litigate out of state were insufficient to invalidate a forum selection clause). Although Ventura claims to have contacted lawyers in Georgia, it has not provided names, rates,

or estimated costs. Furthermore, a Georgia venue would not change the place of depositions, as they would be taken where the deponents are, nor would it alter the place for document production. In addition, federal courts utilize e-filing, which reduces the role and, therefore, cost of local counsel. Likely, the only significant cost difference would be the trial, assuming the case is resolved through a trial. However, because Ventura has provided only conclusory statements regarding the cost difference, it has not demonstrated that enforcing the forum selection clause would effectively deny it its day in court. As such, the court concludes that this argument is likewise unpersuasive.

(3) Fraud

*5 Third, Ventura asserts that the forum selection clause is overreaching and fraudulent and should not be enforced. Specifically, Ventura contends that the forum selection clause is a contract of adhesion because it obligates only Ventura to sue in a limited area; the same restrictions are not placed on HBH. Ventura further argues that the forum selection clause is fraudulent because HBH knew that its unfair business practices would drive Ventura out of business leaving it financially unable to pursue its claims against HBH in Georgia.

The court is not persuaded by this argument for the following reasons. There is no evidence that Ventura was forced into the Agreement or that it had no other alternatives. "[S]imply because the terms of a contract are embodied in written form developed by one of the parties does not automatically render it either a contract of adhesion or unenforceable." "*Wade v. Meridias Capital, Inc.*, No. 2:10CV998 DS, 2001 WL 997161, at *2 (D.Utah March 17, 2011) (quoting *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 906 n. 1 (Utah Ct.App.1995) (other quotations and citation omitted)); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (holding that a forum selection clause in the fine print contained on a cruise ticket, a non-negotiated form contract, is valid so long that it is not fundamentally unfair).

Furthermore, Ventura was on notice of the existence of the forum selection clause. In the Uniform Franchise Offering Circular that HBH provided to Ventura prior to executing the Agreement, HBH disclosed the following on the first page:

THE FRANCHISE AGREEMENT AND THE

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AREA DEVELOPMENT AGREEMENT PERMIT YOU TO SUE ONLY IN THE STATE WHERE HBH'S PRINCIPAL PLACE OF BUSINESS IS LOCATED (CURRENTLY GEORGIA) AT THE TIME YOU FILE SUIT. OUT-OF-STATE LITIGATION MAY FORCE YOU TO ACCEPT A LESS FAVORABLE SETTLEMENT FOR DISPUTES. IT MAY ALSO COST MORE TO SUE IN GEORGIA THAN IN YOUR HOME STATE.^{FN6}

IT IS SO ORDERED.

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 Ventura & Associates, L.L.C. v. . HBH Franchise Co.,
 LLC
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END OF DOCUMENT

FN6. Docket no. 23 at 6.

Notice of the forum selection clause also appears in the provision regarding litigation issues, along with a cross-reference to the actual contract provision. Thus, HBH expressly disclosed the existence of the forum selection clause and the potential risks of entering into the Agreement should a dispute arise. Moreover, George G. Ventura, a member of Ventura, is an attorney experienced in corporate matters. As such, Mr. Ventura should have understood that by executing the Agreement, Ventura was committing to litigate any claims against HBH in Georgia. Based on the foregoing, Ventura has failed to demonstrate that the Agreement or its forum selection clause was either overreaching or procured by fraud.

CONCLUSION

Because Ventura has failed to demonstrate that the forum selection clause is fundamentally unreasonable under the circumstances or that it deprives Ventura of its day in court, the court concludes that the forum selection clause is valid and enforceable. "A primary reason for forum selection clauses is to protect a party ... from having to litigate in distant forums all over the nation.... [S]uch provisions should be enforced when invoked by the party for whose benefit they are intended." *Coombs v. Juice Works Dev. Inc.*, 81 P.3d 769, 774 (Utah Ct.App.2003) (quotations and citation omitted) (second alteration in original). HBH is "entitled to the benefit of its bargain which includes the forum selection clause." *Id.* (quotations and citation omitted).

*6 Based on the foregoing, HBH's motion to dismiss ^{FN7} for improper venue is **GRANTED**. The clerk of court is instructed to dismiss HBH from this case.

FN7. See docket no. 19.

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C

United States District Court, D. Utah, Central Division.

ZIONS FIRST NATIONAL BANK, Plaintiff,
v.

Audrey ALLEN, et al., Defendants.

Civ. No. C-88-14W.
June 16, 1988.

Bank brought action against limited partners to collect on notes. Motions were brought to dismiss for lack of personal jurisdiction and to stay proceedings pending resolution of California actions between some of same parties. The District Court, Winder, J., held that: (1) by signing subscription document that incorporated by reference terms of partnership agreement, limited partners agreed to be bound by partnership agreement's forum selection clause; (2) limited partners' alleged right to rescind under California law did not preclude enforcement of forum selection clause; and (3) Court would not stay action pending resolution of related California actions.

Motions denied.

West Headnotes

[1] Federal Courts 170B**170B Federal Courts****170BII Venue****170BII(A) In General****170Bk96 k. Affidavits and Other Evidence.****Most Cited Cases**

On defendant's motion to dismiss for lack of personal jurisdiction, plaintiff need only make out prima facie case that defendant consented to jurisdiction.

[2] Contracts 95**95 Contracts****95II Construction and Operation**

95II(A) General Rules of Construction
95k166 k. Matters Annexed or Referred to as Part of Contract. Most Cited Cases

Contracting parties may incorporate by reference other documents and make documents incorporated by reference part of contract.

[3] Contracts 95**95 Contracts****95II Construction and Operation****95II(C) Subject-Matter****95k206 k. Legal Remedies and Proceedings.****Most Cited Cases**

By signing subscription document that incorporated by reference terms of partnership agreement, limited partners agreed to be bound by partnership agreement's forum selection clause, even though they never signed partnership agreement.

[4] Contracts 95**95 Contracts****95I Requisites and Validity****95I(F) Legality of Object and of Consideration****95k127 Ousting Jurisdiction or Limiting Powers of Court****95k127(4) k. Agreement as to Place of Bringing Suit. Most Cited Cases**

One party's fraudulent inducement of another to enter into contract does not render contract's forum selection clause invalid unless party charged with fraud also fraudulently induced other party to accept forum selection clause.

[5] Contracts 95**95 Contracts****95I Requisites and Validity****95I(F) Legality of Object and of Consideration****95k127 Ousting Jurisdiction or Limiting Powers of Court****95k127(4) k. Agreement as to Place of**

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Bringing Suit. Most Cited Cases

Even if sellers of partnership interests violated California's blue sky laws in not registering partnership interests and subscribers had right to rescind under California law, forum selection clause of partnership agreement was still enforceable against subscribers, absent showing that sellers' alleged fraudulent or illegal acts were directly related to subscribers' agreement to litigate disputes in Utah. West's Ann.Cal.Civ.Code § 1689(b)(5).

[6] Contracts 95 ↪ 127(4)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k127 Ousting Jurisdiction or Limiting

Powers of Court

95k127(4) k. Agreement as to Place of

Bringing Suit. Most Cited Cases

Alleged inconvenience caused to limited partners'/physicians' patients did not preclude enforcement of forum selection clause in partnership agreement; no serious risk would be created for patients.

[7] Contracts 95 ↪ 127(4)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k127 Ousting Jurisdiction or Limiting

Powers of Court

95k127(4) k. Agreement as to Place of

Bringing Suit. Most Cited Cases

Forum selection clause in partnership agreement was enforceable, even though some witnesses would be beyond subpoena power of court; testimony of unavailable witnesses could be introduced by deposition. Fed.Rules Civ.Proc.Rule 32, 28 U.S.C.A.

[8] Contracts 95 ↪ 127(4)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k127 Ousting Jurisdiction or Limiting

Powers of Court

95k127(4) k. Agreement as to Place of
Bringing Suit. Most Cited Cases

Forum selection clause in partnership agreement, requiring limited partners to litigate disputes in large corporation's home forum, was not invalid on grounds of overreaching; limited partners had substantial assets, claimed that they at least occasionally dealt in securities and could be expected to read and understand what they were signing.

[9] Action 13 ↪ 69(5)

13 Action

13IV Commencement, Prosecution, and Termination

13k67 Stay of Proceedings

13k69 Another Action Pending

13k69(5) k. Nature and Subject Matter
of Actions in General. Most Cited Cases

Federal district court in Utah would not stay note collection suit pending resolution of related California actions alleging violation of California's blue sky laws, even though there was substantial overlap of parties and issues; parties had agreed pursuant to forum selection clause in partnership agreement to litigate disputes in Utah, Utah law applied to collection issues involving notes, Utah action had been filed first, California actions were not yet consolidated, and trying cases in separate forums would not unduly interfere with efficient judicial administration. Securities Act of 1933, § 22, 15 U.S.C.A. § 77v.

*1496 W. Waldan Lloyd, Jeffrey L. Shields, John P. Mullen, Lynda Cook, Salt Lake City, Utah, for Zions First Nat. Bank.

Rex E. Madsen, Ryan E. Tibbitts, Salt Lake City, Utah, for Anthony J. Hadeed.

Thomas Crowther, Roger Hoole, Salt Lake City, Utah, Christopher Ashworth, Lorraine Anderson, Los Angeles, Cal., for Audrey Allen, Steven D. Fisher and Barry J. Wolstan.

Richard D. Burbidge, Salt Lake City, Utah, for Joseph I. King.

*1497 MEMORANDUM DECISION

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WINDER, District Judge.

This matter is before the court on: (1) defendant Allen's, Fisher's, Wolston's, Kang's, and Hadeed's motion to dismiss for lack of personal jurisdiction, and (2) defendant Hadeed's, Allen's, Fisher's, and Wolston's motions to stay these proceedings. The court heard oral arguments on June 11, 1988. John P. Mullen and Lynda Cook represented the plaintiff Zions First National Bank. Richard D. Burbidge represented defendant Kang. Thomas N. Crowther and Roger H. Hoole represented defendants Allen, Fisher, and Wolston. Rex E. Madsen and Ryan E. Tibbitts represented defendant Hadeed. Prior to the hearing the court had read all papers submitted by the parties. After the hearing the court took the matters under advisement. After further consideration the court now renders this memorandum decision.

Jurisdiction Over the Defendants

The first issue before the court is whether the defendants consented to jurisdiction in Utah and if so whether that consent can now be challenged.

Consent

The plaintiff argues that the defendants consented to jurisdiction in a Utah court when the defendants agreed to be bound by the partnership agreement. The applicable portion of the partnership agreement provides:

Each Partner hereby agrees that any suit, action or proceeding with respect to the Obligations may be brought in the state courts of, or the federal courts in, the State of Utah, and hereby irrevocably consents and submits to the jurisdiction of such courts for the purpose of any such suit, action or proceeding. Each Partner hereby agrees that service of process on such Partner in any such suit, action or proceeding may be made by registered or certified mail, postage prepaid, to such partner's address as set forth in the records of the Partnership. Each Partner hereby waives, and agrees not to assert against the Partnership (or any assignee thereof), by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, (a) any claim that it is not personally subject to the jurisdiction of the above-named courts or that its property is exempt or immune from setoff, execution or attachment, either prior to judgment or in aid of execution, and (b) to the extent permitted by applicable law, any claim that such suit, action or proceeding is brought in an

inconvenient forum or that the venue of such suit, action or proceeding is improper or that the Obligations may not be enforced in or by such courts.

Parties to a contract can consent to litigate disputes in a particular forum by inserting a forum selection clause into their contract. *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964); *Williams v. Life Savings & Loan*, 802 F.2d 1200, 1202 (10th Cir.1986).

The defendants acknowledge that they were limited partners. However, the defendants contend that they never signed the partnership agreement and thus are not bound by the partnership agreement's forum selection clause.

[1] The plaintiff has the burden of establishing jurisdiction over the defendants. However, on a motion to dismiss plaintiff need only make out a prima facie case that the defendants consented to jurisdiction. *Frontier Federal Savings & Loan Association v. National Hotel Corporation*, 675 F.Supp. 1293, 1295-96 (Utah 1987).

The plaintiff has not produced copies of the partnership agreement signed by the defendants. However, the plaintiff has produced documents entitled "CFS Sans Souci, Ltd. Subscription documents for Purchasers of Limited Partnership Interests" ("Subscription document") signed by all five defendants.

The subscription documents are identical except for the signature pages and the pages reserved for the defendants' personal*1498 information. The subscription document states, on page D1, in the first paragraph:

The partnership is to be operated in accordance with an Agreement of Limited Partnership (the "Partnership Agreement"), a copy of which is included in the Private Offering Memorandum of the Partnership dated November 5, 1984 (the "Memorandum"), a copy of which has been furnished to the undersigned herewith:

On page D4 in the paragraph labeled (d) the subscription document states:

He (the person signing the document) has received

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and carefully read or reviewed with his Purchaser Representative, if any, and is familiar with the *Partnership Agreement*, the Memorandum, this Agreement and the Secured Promissory Investor Note, and he confirms that all documents, records and other information pertaining to his investment in the Partnership and requested by him or his Purchaser Representative have been made available or delivered to him and/or his Purchaser Representative. (Emphasis added)

[2][3] Contracting parties can incorporate by reference other documents and make the documents incorporated by reference part of the contract. *Cf. USF & G v. West Point Construction Company, Inc.*, 837 F.2d 1507 (11th Cir.1988); *Armstrong v. Federal National Mortgage Association*, 796 F.2d 366 (10th Cir.1986). Prior to joining as limited partners in a partnership which was to be operated in accordance with the partnership agreement, the defendants acknowledged that they had received a copy of the partnership agreement and had reviewed the partnership agreement.

Since each defendant signed the subscription document which incorporated by reference the terms of the partnership agreement, the defendants are bound by the partnership agreement's forum selection clause. Accordingly, the court concludes that the plaintiff has met its burden of showing that the defendants consented to jurisdiction in Utah.

Enforceability of the Consent

The opposing party must clearly show that enforcement of the forum selection agreement is unreasonable under the circumstances. *The Bremen v. Zapata Offshore Company*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513 (1972). In order to show that the forum selection clause is unreasonable the moving party must clearly show either that: (1) the forum selection clause is invalid for fraud or overreaching or; (2) forcing the moving party to proceed in the selected forum will be so gravely difficult and inconvenient that the clause, for all practical purposes, will deprive the moving party of his or her day in court. *The Bremen v. Zapata Offshore Company*, 407 U.S. at 15, 18, 92 S.Ct. at 1916, 1917.

The defendants argue that both of the exceptions in the *Zapata* case are applicable.

Defendants' Rescission Argument

[4][5] The defendants claim that the failure to register the partnership sale in California violated California law. In California, rescission is a remedy available to an injured party when a contract violates state law. See *California Civil Code § 1689(b)(5)*. Plaintiff argues that the right to rescind an illegal contract is grounds to ignore a forum selection clause contained in that contract. However, this court is of the opinion that the right to rescind a contract at some future date is not grounds to ignore a forum selection clause.

Plaintiff's argument regarding rescission is similar to a claim that an entire contract can be rescinded because of fraud. While the United States Supreme Court in *Bremen* held that fraud could be grounds to avoid enforcement of a forum selection clause, later Supreme Court decisions have made clear that the fraud complained of must be specifically related to the inclusion of the forum selection clause. See *Scherk v. Alberto-Culver Company*, 417 U.S. 506, 519 n. 14, 94 S.Ct. 2449, 2457 n. 14, 41 L.Ed.2d 270 (1974).

*1499 Thus, in cases where one party fraudulently induces another to enter into a contract, the forum selection clause is still valid unless the party charged with fraud also fraudulently induces the other party to accept the forum selection clause. *Giordano v. Witzer*, 558 F.Supp. 1261, 1264 (E.D.Pa.1983); *Hoffman v. Burroughs Corp.*, 571 F.Supp. 545, 549 (N.D.Tex.1982); *Crowson v. Sealaska Corp.*, 705 P.2d 905, 911 (Alaska 1985).

This is based on sound policy. Forum selection clauses are agreements by the parties concerning where disputes are to be resolved. A suit for fraud is just one of many disputes that might arise. Absent proof that the forum selection clause is the product of fraud the parties should litigate all claims, including fraud claims, in the agreed on forum.

The registration requirement is part of California's Blue Sky laws. Blue Sky laws are primarily designed to prevent fraud in the state security market. Even if the sellers of the partnership interest somehow committed what can be considered a fraudulent or illegal act in not registering the partnership interests those fraudulent or illegal acts are not directly related to the defendants' agreement to litigate disputes in Utah. Accordingly, the information presently before

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the court shows that the forum selection clause is valid and enforceable notwithstanding the defendants' argument based on rescission.

The Defendants' Convenience Argument

[6][7][8] The defendants must show that a trial in Utah would be so gravely difficult and inconvenient that the defendants for all practical purposes will be deprived of their day in court. *The Bremen v. Zapata Offshore Company*, 407 U.S. at 18, 92 S.Ct. at 1917.

The defendants argue that trying this case in Utah will be difficult for them. Four of the five defendants are medical doctors. Dr. Kang has argued that his patients will be at risk if he is not there to serve their needs. While the court is sensitive to such an argument, it believes that the additional time in litigation that will be required of Dr. Kang by reason of the case going forward in Utah will not create any serious risk for his patients. Dr. Kang further argues that some of the witnesses will be beyond the subpoena power of this court. While this may be true, Federal Rules of Civil Procedure 32 allows testimony of unavailable witnesses to be introduced by deposition. Thus, the court will not be entirely deprived of their testimony.

All of the defendants join in an argument to the effect that unsophisticated individuals should not be forced to litigate in a big corporation's home forum. The court finds this argument unpersuasive. Each of these defendants filled out an individual purchaser questionnaire. All of these defendants certified that they had substantial assets. Further, each of the defendants claimed that they at least occasionally dealt in securities. As already mentioned, four of the five defendants are medical doctors. The defendant who is not a doctor is married to a doctor. Even though doctors do not learn about investing strategy in medical school, the court is convinced that given their educational background, the defendants can, at least, be expected to read and understand what they are signing.

The defendants must show an extreme inequality in bargaining position before this court can hold that the forum selection clause is invalid because of overreaching. The defendants have not met their burden.

Defendants' Motion for a Stay

[9] The second issue before this court is whether this court should stay this action pending resolution of actions presently pending in California between some

of the parties.

On January 8, 1988 Zions brought this action against six defendants. Four of those six defendants have filed motions to stay this action pending the outcome of cases which are now proceeding in California. The defendants either brought suit in *1500 California or named Zions as a party in pending California actions after Zions filed their complaint in this court. The four California actions are pending before different judges. The actions in California and Utah have some similarities: the defendants are bringing the California action attempting to rescind notes payable to Zions for San Souci's and Zions' alleged violation of California Blue Sky laws; Zions is bringing this action attempting to collect the notes which the defendants are attempting to hold invalid.

Even though the claims in Utah and California are different there is a substantial overlap of parties and issues such that it would be more efficient to litigate the entire dispute in one forum. Further, neither the California case nor this case has proceeded very far. One final consideration is that the defendants have agreed to litigate disputes in Utah.

Given this background the court must determine whether it should stay this action under the analysis set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

In *Colorado River* the United States Supreme Court allowed a district court to stay federal proceedings pending the outcome of parallel state proceedings in the interest of efficient judicial administration. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). However, abstention is contrary to the general rule that a federal court must exercise the jurisdiction which Congress has given the court. *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246. Thus, before a court can abstain the court must balance the duty to decide disputes properly within the court's jurisdiction against the need to encourage efficient judicial administration. The balance is heavily weighted in favor of exercising jurisdiction. *Moses H. Kone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 16, 103 S.Ct. 927, 937, 74 L.Ed.2d 765 (1983).

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The following are some of the factors that a court must consider: (1) inconvenience of the forum; (2) the desirability of avoiding piecemeal litigation; (3) the order of filing, giving preference to the first action filed; (4) the avoidance of obstructionist tactics; (5) the applicable law that must be applied; (6) the stage of the litigation (federal courts should abstain when parallel state courts actions have been substantially completed); (7) is the state court exercising jurisdiction over a res which is the subject matter of the suit; (8) comity between state and federal courts. Colorado River, 424 U.S. at 818, 96 S.Ct. at 1246 (factors 1, 2, 3 and 7); State Farm Mutual Auto Insurance Company v. Scholes, 601 F.2d 1151 (10th Cir.1979) (factors 4 and 8); Moses H. Kone Memorial Hospital, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (factors 5 and 6).

Not all of these factors are applicable in this case. The following are some of the factors this court finds persuasive.

Convenience of the Federal Forum

Either the defendants or the plaintiff is going to have to proceed in an out-of-state forum. However, Utah and California are only a short flight apart. Therefore, neither forum is extremely inconvenient.

Further, the defendants are seeking to have this court stay an action in the forum in which they agreed to litigate. When a party seeks to avoid litigating in the forum selected by the parties that party bears a tremendous burden. The Bremen v. Zapata Offshore Company, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); Aloha Leasing v. Craig Germain Company, 644 F.Supp. 561, 566 (N.D.N.Y.1986). For the reasons discussed earlier the forum selection clause weighs strongly in favor of finding that Utah, as the agreed upon forum, is the more convenient forum.

Desirability of Avoiding Piecemeal Litigation

Zions is bringing one action in Utah to collect notes allegedly due from six defendants.*1501 The California actions are pending in four different California courts. The defendants claim that the California actions can be consolidated if this court abstains. However, it is not certain that consolidation will occur in the California actions. In any event, the effort to consolidate all the cases in California is unnecessary since the cases are presently consolidated in Utah.

Defendants claim that the overlapping issues involving Sans Souci's and Zions' alleged violation of California's Blue Sky laws and Zions' action to collect the notes should be litigated in the same forum has some merit. However, even if the plaintiff prevails against San Souci, Zions may still prevail in its attempt to collect on the notes. While the court is of the opinion that it would be more efficient to try all the issues in one forum, the issues and claims of the parties are sufficiently different that trying the cases separately will not unduly interfere with efficient judicial administration.

Order of Filing

Zions filed its action first. This factor cannot be mechanically applied. Moses H. Kone Memorial Hospital, 460 U.S. at 21-22, 103 S.Ct. at 939-940. However, when neither action has substantially progressed this factor is of some significance.

The Applicable Law

The defendants argue that their action is based on California law and thus the case should be tried in California. It is true that California's Blue Sky laws will be applicable in determining a significant portion of the defendants' claim. However, the parties agreed that Utah law would apply in disputes between the parties. Thus, even though California law will apply on securities issues, Utah law will apply on the collection issues involving the notes.

Comity

The defendants rely on Ingersoll-Rand Financial Corporation v. Callison, 844 F.2d 133 (3rd Cir.1988) in support of their comity argument. The Callison case is similar in some respects to this case. In Callison, the parties had a forum selection clause selecting New Jersey as the forum for resolving disputes. Plaintiff brought an action in Texas state court for rescission of limited partnership agreements based on Texas Blue Sky laws and federal security laws. The Texas action had progressed to a judgment in Ingersoll-Rand's favor, and only a formal order had to be signed to dispose of the case. Defendants then brought an action in New Jersey to collect the notes which plaintiff had signed. The Texas plaintiffs brought an action to dismiss the New Jersey action claiming that the issues were being decided in Texas. The New Jersey court, based on comity principles, dismissed the New Jersey action. The Third Circuit upheld the district court's decision to abstain.^{FNI}

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FN1. The Third Circuit overruled the trial judge's decision to dismiss because at the end of the Texas case there were still issues which needed to be resolved in the federal courts.

The comity principle that was of pre-eminent importance in *Ingersoll* was Congress' decision to allow plaintiffs in federal security fraud cases the choice of a state or federal forum. See 15 U.S.C. § 77v.^{FN2} The court felt that the defendants filing suit on the notes in New Jersey after plaintiff had filed in Texas was a disguised attempt to remove the Texas action from state to federal court.

FN2. 15 U.S.C. § 77v prohibits a defendant from removing a federal securities claim brought in state court to a federal forum.

This case is significantly different. First, in *Ingersoll*, the Texas case was, for all intents and purposes, finished when *Ingersoll-Rand* filed suit in New Jersey. The Texas court was about to enter a judgment on the state security fraud claims in *Ingersoll-Rand's* favor. Presumably, the Texas judgment would either prevent the Texas plaintiff from challenging the obligations covered by the note, or the Texas judgment would bar any further claims by *Ingersoll-Rand* to collect the notes on the theories of res judicata or collateral estoppel. In any event the Texas judgment would substantially simplify the collection suit.

Further, in *Ingersoll* the plaintiff filed their federal security claim in state court first. Thus, the court's concern with allowing the state court action to proceed without interference was an important factor especially in light of 15 U.S.C. § 77v. In this case, Zions filed its action first. Thus, deference to a previously filed state action is not a consideration.

Further, the vague references to violation of federal law in the California complaints probably do not state claims for federal security fraud under either California or federal law.^{FN3} Therefore, this action in no way interferes with a federal security claim pending in state court. Thus, the comity concerns of 15 U.S.C. § 77v are not a consideration in this case.

FN3. Under California law fraud must be pled with particularity. *Committee on Children's Television, Inc. v. General Foods Corporation*, 35 Cal.3d 197, 197 Cal.Rptr. 783, 673 P.2d 660 (1983). Actions based on the federal security laws anti fraud provisions must be pled with particularity. *In re Longhorn Securities Litigation*, 573 F.Supp. 255 (D.Okl.1983).

After weighing all of the factors the court is of the opinion that this court should exercise jurisdiction. Accordingly, defendants' motion for a stay is denied.

Conclusion

Defendants' motions to dismiss, to change venue, and to stay this proceeding are denied. This Memorandum Decision will serve as the order of the court and counsel need not submit an order.

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