

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

MYLAN PHARMACEUTICALS INC.,

Civil Action No. 1:02 CV 88
(Judge Keeley)

Plaintiff,

v.

AMERICAN SAFETY RAZOR COMPANY; MEGAS
BEAUTY CARE, INC., D/B/A PERSONNA MEDICAL;
BBA U.S. HOLDINGS, INC.; BBA NONWOVENS
SIMPSONVILLE, INC.; AND INTERNATIONAL
PAPER COMPANY, INDIVIDUALLY AND D/B/A
VERATEC,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT
INTERNATIONAL PAPER COMPANY'S MOTION TO DISMISS OR, IN THE
ALTERNATIVE, TRANSFER THE CROSS-CLAIM OF DEFENDANTS BBA U.S.
HOLDINGS, INC. AND BBA NONWOVENS SIMPSONVILLE, INC.**

Defendant International Paper Company ("International Paper") hereby moves to dismiss the cross-claim filed by Defendants BBA U.S. Holdings, Inc. and BBA Nonwovens Simpsonville, Inc. (collectively "the BBA Defendants" or "BBA") in the Northern District of West Virginia on August 2, 2002 (the "BBA Cross-Claim") for: (1) lack of subject matter jurisdiction; (2) improper venue; (3) lack of personal jurisdiction; or (4) failure to state a claim, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6). In the alternative, International Paper respectfully requests that the BBA Cross-Claim be transferred to the Southern District of New York pursuant to 28 U.S.C. §§ 1404(a).

I. PRELIMINARY STATEMENT

In this action, plaintiff Mylan Pharmaceuticals, Inc. (“Mylan”) alleges that it purchased defective cotton from defendant American Safety Razor Company (“ASR”) through its division, defendant Megas Beauty Care, Inc., d/b/a Personna Medical (“Megas/Personna”). (Am. Compl. at ¶¶ 4, 46, 50, 57, 70.) Mylan further alleges that ASR and Megas/Personna obtained the allegedly defective cotton from Veratec, formerly a division of International Paper, and/or from BBA. (Am. Compl. at ¶¶ 10, 36.)

BBA has now filed a cross-claim against International Paper, alleging that it is entitled to indemnification and contribution should BBA be found liable to Mylan.¹ (BBA Answer and Cross-Cl. at ¶ 85.) This claim appears to be (and could only be) based upon an Amended and Restated Purchase Agreement (“Agreement”) entered into in April of 1998. Pursuant to this Agreement, International Paper sold Veratec to a group of entities including BBA Nonwovens Simpsonville, Inc.² (A true and correct copy of the Agreement is attached hereto as Exhibit A.)³

¹ BBA contends: “If it is proven and determined that BBA is liable to any party, which liability is specifically denied, then International Paper Company, individually and d/b/a Veratec, is jointly and severally liable with BBA by way of indemnification and, in the alternative, it is liable over to BBA by way of contribution for any and all sums which may be recovered in this action by any party for any and all costs which may be incurred.” (BBA Answer and Cross-cl. at ¶ 85.)

² The other members of the group included Guthrie North America, Inc., BBA Overseas Holding Limited, and BBA Nonwovens Canada Ltd.

³ Because the Agreement underlies the BBA Cross-Claim it is deemed to be a part of the pleadings and may be judicially noticed on a motion to dismiss. Hammonds v. Builders First Source-Atlantic Group, No. Civ.A. 3:01CV00023, 2002 WL 535071, at *2 (W.D. Va. Mar. 28, 2002). See also Evans v. B.F. Perkins, Co., 166 F.3d 642, 647 (4th Cir. 1999) (court may evaluate matters outside the pleadings to determine jurisdiction); Acciai Speciali Terni USA, Inc. v. M/V BERANE, 181 F. Supp. 2d 458, 462 (D. Md. 2002) (relying on Evans to go beyond the pleadings to determine the validity of a forum selection clause).

In the Agreement, the parties expressly agreed to litigate any disputes arising out of the Agreement exclusively in the courts of New York:

Section 9.9. Jurisdiction and Consent to Service

Seller and each Member of Buyer Group⁴ (a) agree that any suit, action or proceeding arising out of or relating to this Agreement shall be brought solely in the state or federal courts of New York; (b) consents to the exclusive jurisdiction of each such court in any suit action or proceeding relating to or arising out of this Agreement; (c) waives any objection which it may have to the laying of venue in any such suit, action or proceeding in any such court; and (d) agrees that service of any court paper may be made in such manner as may be provided under applicable laws or court rules governing service of process.

(Agreement, p. 54 (emphasis added).) The Agreement also provides that:

This Agreement will be governed by, and construed and enforced in accordance with, the laws of the State of New York (regardless of the laws that might otherwise govern under applicable principles of conflicts of laws thereof) as to all matters, including but not limited to matters of validity, construction, effect, performance and remedies.

(Agreement, p. 54 (§ 9.10).) Any claim by BBA for indemnification or contribution necessarily “arises out of or relates to” the Agreement, which comprehensively governs International Paper’s and BBA’s obligations towards each other with regard to the Veratec transaction. Indeed, the Agreement contains express assumptions of liabilities and indemnification provisions with regard to any post-transaction claims. (See Agreement, pp. 5-6, 42-45 (§§ 1.4; 7.1-7.4).) Bringing this claim in this Court is therefore a direct breach of the Agreement.

⁴ BBA Nonwovens Simpsonville, Inc., BBA Overseas Holding Limited, and BBA Nonwovens Canada Ltd., are each defined as a “Member of the Buyer Group” in the Agreement. (Agreement, pp. 1.)

II. FEDERAL COURTS ROUTINELY ENFORCE FORUM SELECTION CLAUSES

Because no existing procedural mechanism precisely matches a motion to dismiss based on a forum selection clause, the circuit courts have adopted several different approaches for enforcing them. See e.g., Silva v. Encyclopedia Britannica Inc., 239 F.3d 385, 387 (1st Cir. 2001) (treating such motions under 12(b)(6)); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1290 (11th Cir. 1998) (analyzing under 12(b)(3)). Neither the Fourth nor the Second Circuit has decided which procedural vehicle is appropriate. See Bryant Elec. Co., Inc. v. City of Fredericksburg, 762 F.2d 1192, 1196 (4th Cir. 1985) (motion to dismiss on the basis of a forum selection clause decided under 12(b)(1)); Nizam's Inst. of Med. Scis. v. Exch. Techs. Inc., 28 F.3d 1210, 1994 WL 319187, at *3 (4th Cir. 1994) (enforcing a forum selection clause under 12(b)(3)); New Moon Shipping Co. Ltd. v. MAN B&W Diesel AG, 121 F.3d 24, 28-29 (2d Cir. 1997) (recognizing lack of agreement on procedure). As discussed below, regardless of the procedural approach taken, the forum selection clause in the Agreement is fully enforceable and the BBA Cross-Claim should not be litigated in this Court.

A. The BBA Cross-Claim Should be Dismissed.

Federal courts have embraced forum selection clauses as valid mechanisms for eliminating uncertainty regarding the location of potential litigation between contracting parties. See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) (enforcing forum selection clause requiring that litigation be brought in London, England); Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp., 696 F.2d 315, 317 (4th Cir. 1982) (“Undoubtedly parties may agree in advance to submit controversies arising out of their contract to the jurisdiction of a given court”); Seward v. Devine, 888 F.2d 957, 962 (2d Cir. 1989) (affirming dismissal of breach of contract claims on the basis of a forum selection clause). Under Bremen, forum selection clauses are prima facie valid. 407 U.S. at 10. To avoid application of the parties’ forum selection

clause, BBA must satisfy a “heavy burden of proof,” demonstrating that enforcement of the clause would be “unreasonable’ under the circumstances.” Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991); see also Bremen, 407 U.S. at 15 (requiring a “strong showing that the [the forum selection clause] should be set aside”); Seward, 888 F.2d at 962 (forum selection clauses are enforceable unless unreasonable or unjust). The strong federal policy endorsing freely negotiated forum selection clauses is inescapable.

There can be no dispute that the BBA defendants entered into a contract containing a mandatory forum selection clause providing for resolution of their present claim exclusively in New York’s state and federal courts. The express choice-of-venue provision requires that “any suit, action or proceeding arising out of or relating to this Agreement **shall** be brought **solely** in the state or federal courts of New York.”⁵ (Agreement, p. 54 (§ 9.9) (emphasis added).) The use of the words “shall” and “solely” emphasizes the mandatory nature of the clause. See Berry v. Soul Circus, Inc., 189 F. Supp. 2d 290, 294 (D. Md. 2002); Seward, 888 F.2d at 962 (construing clause using the word “shall” as mandatory); Sterling Forest Assocs., Ltd. v. Barnett-Range Corp., 840 F.2d 249, 251-52 (4th Cir. 1988) (clause is enforceable when mandatory venue language is employed). The forum selection clause further specifies that the parties consent “to the exclusive jurisdiction” of New York’s state and federal courts.

(Agreement, p. 54 (§ 9.9).) See Cent. Coal Co. v. Phibro Energy, Inc., 685 F. Supp. 595, 596-98

⁵ The parties expressly elected to have New York law apply to both the Agreement as a whole and the forum selection clause in particular. (Agreement, p.54 (§ 9.10.)) However, even if this Court were to conclude that West Virginia law applies, both states apply Bremen to evaluate forum selection clauses. See Mercury Coal, 696 F.2d at 317-18 (recognizing that both New York and West Virginia apply the same test); Seward, 888 F.2d at 962 (applying Bremen). And like New York, West Virginia enforces contractual choice of law provisions. Allen v. Lloyd’s of London, 94 F.3d 923, 928-930 (4th Cir. 1996) (enforcing foreign choice of law and forum provisions); Nutter v. Rents, Inc., 945 F.2d 398, 1991 WL 193490, at *5-6 (4th Cir. Oct. 1, 1991) (discussing West Virginia’s enforcement of choice of law provisions).

(W.D. Va. 1988) (forum selection clause was mandatory when parties consented to the exclusive jurisdiction of New York). In addition, the parties agreed to waive any objection to venue in New York and consented to service of process under New York's rules. Id.

The fact that BBA drafted its cross-claim to avoid directly mentioning the Agreement is of no import. See Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1360 (2d Cir. 1993) ("solemn promise" to arbitrate in a foreign forum cannot "be defeated by artful pleading"). The Agreement provides the only possible basis for BBA's claims, as it comprehensively governs the sale of Veratec. (Agreement, p. 52 (§ 9.3).) The broad forum selection clause, which reflects the parties' intent that all claims relating to the Agreement be brought in New York, applies to the BBA Cross-Claim for indemnity. TMC Co., Ltd. v. M/V Mosel Bridge, 2002 WL 1880722, at *1-2 (S.D.N.Y. Aug. 15, 2002) (granting motion to dismiss cross-claim for indemnity on the basis of a forum selection clause); U.S. Fid. & Guar. Co. v. Petroleo Brasileiro, 2001 WL 300735, at *16 (S.D.N.Y. Mar. 27, 2001) (dismissing cross-claims based on a forum selection clause); Envirolite Enters., Inc. v. Glastechnische Industrie Peter Lisec Gesellschaft M.B.H., 53 B.R. 1007, 1012-14 (S.D.N.Y. 1985) (enforcing Austrian forum selection clause written in German in a form contract against a debtor under bankruptcy court protection).

Enforcement of the clause is also eminently reasonable. The Agreement was freely negotiated at arms length by sophisticated parties represented by counsel. It was the product of extensive negotiations. The parties elected a domestic forum in a major metropolitan center with ease of accessibility as the forum for any potential disputes between them. New York is neither impractical nor inconvenient. International Paper is a New York corporation whose principal place of business was in New York at the time of contracting. Counsel for both parties were located in New York and virtually all of the contract negotiations, including the

closing, occurred in New York. There is no basis for concluding that requiring BBA to litigate its cross-claim in New York would impose a grave, or even measurable, inconvenience. See Bremen, 407 U.S. at 18 (inconvenience must “effectively deprive [a] party of his day in court”); Mercury Coal, 696 F.2d at 317 (party challenging the clause must demonstrate “that the specified forum is so seriously inconvenient that he would be deprived of an opportunity to participate in the adjudication”). Furthermore, both New York and West Virginia have strong public policies that favor enforcing forum selection clauses and the courts of both states regularly enforce them. See Roby, 996 F.2d at 1361 (“strong public policy in favor of forum selection and arbitration clauses”); Int’l Minerals & Res., S.A. v. Pappas, 96 F.3d 586, 592 (2d Cir. 1996) (same); Nat’l Sch. Reporting Servs. v. Nat’l Schs. of CA, Ltd., 924 F. Supp. 21, 24 (S.D.N.Y. 1996) (plaintiff’s contention that the forum selection clause was not freely negotiated and that they were under duress did not overcome presumption of validity); 2001 WL 300735, at *17 (no strong policy against enforcing forum selection clause when parties chose to resolve their cross-claims elsewhere). See also Regency Photo & Video, Inc. v. America Online, Inc., -- F. Supp. 2d --, 2002 WL 1791130, at *3 (E.D. Va. June 7, 2002) (enforcing forum selection clause despite inconvenience to plaintiff and discrepancy in bargaining power); Bryant Elec. Co., Inc. v. City of Fredericksburg, 762 F.2d 1192, 1196-97 (1985) (enforcing forum selection clause contained in form contract which was the product of little negotiation). Whatever inconvenience BBA would suffer by being forced to litigate in the contractual forum was clearly foreseeable at the time of contracting and cannot serve as a basis for ignoring the forum selection clause. Bremen, 407 U.S. at 17-18; Key Motorsports, Inc. v. Speedvision Network, L.L.C., 40 F. Supp. 2d 344, 348 (M.D.N.C. 1999). Accordingly, the BBA Cross-Claim should be dismissed.

B. Alternatively, Transfer is Warranted under 28 U.S.C. § 1404(a)

The federal venue transfer statute, 28 U.S.C. § 1404(a), provides that:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

In Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988), the Supreme Court discussed the interrelation of a § 1404 transfer motion and a forum selection clause. Id. at 29-31. The existence of a forum selection clause figures centrally in a court's analysis under § 1404. Id. at 29; Brock v. Entre Computer Ctrs., Inc., 933 F.2d 1253, 1257-58 (4th Cir. 1991) (recognizing and applying Stewart in a § 1404(a) forum selection clause case); Charleston West-76 Auto/Truckstop Inc., et al. v. Nat'l Auto/Truckstops, Inc., et al., No. 3:97-CV-25, 1997 WL 528491, at *9 (W. Va. May 21, 1997) (interests of justice served by transfer). In considering a transfer, the party opposing the transfer must show that enforcement of the clause would be unreasonable. Weiss v. Columbia Pictures Television, Inc., 801 F. Supp. 1276, 1278 (S.D.N.Y. 1992) (“[O]nce a mandatory choice of forum clause is deemed valid, the burden shifts to the plaintiff to demonstrate exceptional facts explaining why he should be relieved from his contractual duty”); Meade v. Future Med. Publ'g, Inc., No. 1:98CV00554, 1999 WL 1939256, at *3 (M.D.N.C. Feb. 22, 1999) (burden shifted to plaintiff because it failed to show that the forum selection clause was invalid).⁶

⁶ Additional factors which some courts in this Circuit have looked at beyond the forum selection clause include: (1) ease of access to sources of proof; (2) the convenience of the parties and witnesses; (3) the cost of obtaining the attendance of witnesses; (4) the availability of compulsory process; (5) the possibility of a view (i.e., seeing the scene of an accident); (6) the interest in having local controversies decided at home; and (7) the interests of justice. See P.M. Enters. v. Color Works, Inc., 946 F. Supp. 435, 440 (S.D. W.Va. 1996) (citing cases which did not involve forum selection clauses); BHP Int'l Inv. v. Online Exch., 105 F. Supp. 2d 493, 498 (E.D. Va. 2000) (citing same factors and also relying on cases in which there was no forum selection clause). Factors four through six are inapplicable here. None of the other factors

As discussed above, International Paper is a New York corporation with offices located there. The forum selection was the product of a heavily negotiated contract between parties of relatively equal bargaining strength. See McNeill v. Int'l Precious Metals Corp., 872 F.2d 418, 1989 WL 27443, at *2 (4th Cir. 1989) (unequal bargaining power insufficient to defeat forum selection clause).⁷ Moreover, the BBA defendants are both Delaware corporations and they specifically denied that they regularly conduct business in West Virginia. (Am. Compl. at ¶¶ 5-6; BBA Answer and Cross-Cl. at ¶¶ 5, 6, 72.) The BBA defendants can easily access the Southern District of New York. See Byrd v. Int'l Transtech Corp., 870 F.2d 654, 1989 WL 21452, at *2 (4th Cir. 1989) (“plaintiffs are not entitled to insist upon their preferences in the face of the forum selection clause”).

BBA’s election of this Court as the forum in which to bring its cross-claim is to not entitled to deference.⁸ The law is clear that where, as here, the parties contractually resolved where to bring any dispute, plaintiff’s forum choice is not entitled to deference. In re Ricoh, 870 F.2d 570, 573 (11th Cir. 1989); Meade, 1999 WL 1939256, at *5 n.8. Moreover, enforcing the clause will permit a New York court to decide questions of New York law. See Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991) (holding that among the facts that a court should consider in transferring a case is “the advantage of having a local court weigh against enforcing the forum selection clause, as the BBA Cross-Claim is a purely contractual dispute.

⁷ In evaluating the relevance of unequal bargaining power to determine the enforceability of a forum selection clause, the court in McNeill noted that in the analogous context of arbitration clauses, the Fourth Circuit has enforced such clauses in favor of a large investment company even though the plaintiff was “a widowed housewife with no business or financial expertise.” 1989 WL 27443 at *2 quoting Newcome v. Esrey, 862 F.2d 1099, 1100 (4th Cir. 1988) (*en banc*).

⁸ BBA was not compelled to bring its cross-claim in this action here, as there are no mandatory cross-claims under Federal procedure. Westwood v. Fronk, 177 F. Supp. 2d 536, 540 (N.D. W. Va. 2001) quoting 3 James Wm. Moore, et al., Moore’s Federal Practice, §§ 13.60-13.70 (3d ed. 1997 & Supp. 2001) (“all cross-claims are permissive”); Fed. R. Civ. P. 13(h).

determine questions of local law”). If this Court concludes that dismissal is unwarranted, it should transfer the case to the Southern District of New York as the parties reasonably agreed to resolve any dispute regarding their relationship in that forum.

III. CONCLUSION

Because this is not the proper forum for the BBA Cross-Claim, this Court should dismiss the claim or, in the alternative, transfer it to the Southern District of New York.

Dated: September 6, 2002

INTERNATIONAL PAPER COMPANY

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