IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

HY CITE CORPORATION, JAMES CANTRELL, CYNTHIA CANTRELL, KENNETH KNEZEK, JAMES CAMPIDILLI, ROBERT BEAN, MIKE SMITH and LAUNA SMITH,

Plaintiffs,

v.

ADVANCED MARKETING INTERNATIONAL, INC.,

Defendant.

MEMORANDUM AND ORDER

05-C-722-S

Plaintiffs Hy Cite Corporation, James and Cynthia Cantrell, Kenneth Knezek, James Campidilli, Robert Bean, Mike and Launa Smith commenced this declaratory judgment action against defendant Advanced Marketing International, Inc. seeking a declaration that: (1) non-compete covenants contained within plaintiffs' distributor agreements are illegal and unenforceable; (2) plaintiffs did not breach non-solicitation clauses contained within their distributor agreements and said clauses are illegal and unenforceable; (3) liquidated damages clauses contained within plaintiffs' distributor agreements are unenforceable penalties; and (4) plaintiff Hy Cite Corporation has not tortiously interfered with plaintiffs' distributor agreements. Jurisdiction is based on 28 U.S.C. § 1332(a)(1). The matter is presently before the Court on defendant's motion to dismiss for improper venue and failure to state a claim upon which relief can be granted pursuant to Federal

Rules of Civil Procedure 12(b)(3) and 12(b)(6). The following facts relevant to defendant's motion to dismiss are undisputed.

BACKGROUND

Defendant Advanced Marketing International, Inc. is engaged in the business of selling kitchen equipment such as stainless steel and waterless cookware through a distributorship system. Plaintiff Hy Cite Corporation (hereinafter Hy Cite) is a direct competitor of defendant. Plaintiffs James and Cynthia Cantrell, Kenneth Knezek, James Campidilli, Robert Bean, Mike and Launa Smith (hereinafter individual plaintiffs) entered into distributor agreements (hereinafter agreements) with defendant under which they sold its kitchen equipment and products. Each agreement contained a choice of law and venue provision which stated as follows:

> Choice of Law and Venue. The validity, interpretation and performance of this agreement shall be controlled by and construed under the laws of the State of Florida. Both parties agree that any objections to venue be waived and that venue shall be in the Circuit Court for Lake County, Florida.

In 2005 each individual plaintiff entered into distributor agreements with plaintiff Hy Cite. On July 26, 2005 defendant sent plaintiff Hy Cite a cease and desist letter. Accordingly, on August 31, 2005 plaintiffs Hy Cite, Knezek, James and Cynthia Cantrell and other former distributors of defendant filed a declaratory judgment action against defendant with the United States District Court for the Central District of California. On

December 19, 2005 the district court issued a written order dismissing plaintiffs' action for improper venue as it concerned plaintiffs Hy Cite, Knezek, James and Cynthia Cantrell.

However, the California action simply marked the beginning of litigation between the parties. On September 20, 2005 and October 6, 2005 defendant filed complaints against plaintiff Hy Cite and four of its former distributors (who are not parties to this action) with the Circuit Court for the Fifth Judicial District in and for Lake County, Florida (hereinafter Lake County Circuit Court) seeking damages. Plaintiff Hy Cite and its co-defendants removed said actions to the United States District Court for the Middle District of Florida. However, on February 1, 2006 and February 2, 2006 Magistrate Judge Jones recommended that the actions be remanded to the Lake County Circuit Court because of the forum selection clause contained within various agreements.

Additionally, on December 9, 2005 plaintiffs filed their complaint in this action. Further, on December 27, 2005 defendant filed an additional complaint with the Lake County Circuit Court against plaintiffs Hy Cite, Knezek, Bean, Campidilli, James and Cynthia Cantrell and other former distributors seeking damages. Plaintiffs (defendants in said Florida action) removed the action to the United States District Court for the Middle District of Florida where it is currently pending. Finally, in either January or February of 2006 (the exact date is unclear from the record) plaintiffs Hy Cite and Bean filed a declaratory judgment action

against defendant with the United States District Court for the Southern District of California. Said action is currently pending.

MEMORANDUM

Defendant asserts language contained within individual plaintiffs' forum selection clauses manifest a clear intent to "lay venue for all disputes over the [a]greements" with the Lake County Circuit Court. Additionally, defendant asserts the forum selection clause applies to plaintiff Hy Cite because: (1) it acquiesced in the forum selection clause by voluntarily joining individual plaintiffs in filing suit against defendant under the agreements; and (2) it became foreseeable that plaintiff Hy Cite would be bound by the forum selection clause because its claim is closely related to the agreements. Finally, defendant asserts plaintiffs cannot overcome the strong presumption favoring enforcement of the forum selection clause. Accordingly, defendant argues plaintiffs' second amended complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(3) for improper venue. Additionally, defendant argues plaintiffs' second amended complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted based on the doctrine of issue preclusion. Defendant asserts the United States District Court for the Central District of California already adjudicated the venue issue.

Plaintiffs assert the first-to-file rule applies to this action and mandates that litigation proceed in this forum because defendant cannot establish that extraordinary circumstances exist which rebut application of said rule. Additionally, plaintiffs assert the forum selection clause cannot be enforced because: (1) plaintiff Hy Cite is not a party to the agreements; and (2) conflicting rulings from multiple courts will likely result if the forum selection clause is enforced against individual plaintiffs. Accordingly, plaintiffs argue defendant's motion to dismiss for improper venue should be denied. Additionally, plaintiffs assert their claims are not precluded under the doctrine of issue preclusion because they are not identical to the claims at issue in the California action. Accordingly, plaintiffs argue defendant's motion to dismiss for failure to state a claim upon which relief can be granted should be denied.

A. Defendant's motion to dismiss for improper venue

A threshold question concerning defendant's motion to dismiss for improper venue is whether federal or state law governs the issue of validity of a forum selection clause when a motion to transfer venue pursuant to Section 1404(a) is not involved. IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc., 437 F.3d 606, 608 (7th Cir. 2006). Several of the federal circuits have concluded that federal law governs validity of forum selection clauses in all diversity suits. *See* Id. at 609 (*citing* Jumara v. State Farm Ins.

Co., 55 F.3d 873, 877-878 (3rd Cir. 1995); Jones v. Weibrecht, 901 F.2d 17, 19 (2nd Cir. 1990); Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 513 (9th Cir. 1988)). However, the Seventh Circuit has not yet conclusively determined which law governs such situations. *See* Id. at 611. Defendant asserts federal law governs the validity and effect of plaintiffs' forum selection clause. Plaintiffs do not dispute said assertion. Accordingly, because the parties are permitted to designate what law shall control their case, validity and enforcement of plaintiffs' forum selection clause will be decided under federal law. *See* Nw. Nat'l. Ins. Co. v. Donovan, 916 F.2d 372, 374 (7th Cir. 1990)(citations omitted).

A forum selection clause is treated like any other contractual provision and it will be enforced unless it is subject to any infirmity such as fraud or mistake. Id. at 375. Additionally, a forum selection clause is prima facie valid and enforceable unless enforcement is shown by the resisting party to be unreasonable or unjust under the circumstances. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S.Ct. 1907, 1913, 32 L.Ed.2d 513 (1972)(citations omitted). Such approach accords with ancient concepts of freedom of contract and absent some compelling and countervailing reason a forum selection clause should be honored by parties and enforced by courts. Id. at 11-12, 92 S.Ct. at 1914. However, a contractual forum selection clause will be unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought "whether declared by statute or by

judicial decision." Id. at 15, 92 S.Ct. at 1916 (citation omitted). Additionally, a forum selection clause will not be enforced if trial in the contractual forum will be so "gravely... inconvenient that [a party] will for all practical purposes be deprived of [its] day in court." Id. at 18, 92 S.Ct. at 1917.

Plaintiffs assert venue for their declaratory judgment action is proper in this forum pursuant to the first-to-file rule and dismissing the action in favor of a Florida forum would merely shift the inconvenience of litigating in a distant forum from defendant to plaintiffs. The purposes of declaratory judgments are to "clarify[] and settl[e] the legal relations at issue" and to "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Tempco Elec. Heater Corp. v. Omega Eng'g., Inc., 819 F.2d 746, 749 (7th Cir. 1987)(*quoting* Borchard, *Declaratory Judgments* 299 (2nd ed. 1941)). Accordingly, declaratory judgment actions serve an important role because they permit prompt settlement of actual controversies and establish the legal rights and obligations that will govern the parties' relationship in the future. Hyatt Int'l. Corp. v. Coco, 302 F.3d 707, 711 (7th Cir. 2002)(*citing* Edwin Borchard, *Declaratory Judgments* 107 (1934)).

However, declaratory judgments are not tools with which potential litigants may secure a delay or choose the forum. Schumacher Elec. Corp. v. Vector Prods., Inc., 286 F.Supp.2d 953, 955 (N.D.Ill. 2003)(citations omitted). Accordingly, while the

general rule favors the forum of the first-filed suit, Warshawsky & Co. v. Arcata Nat. Corp., 552 F.2d 1257, 1263 (7th Cir. 1977), the Seventh Circuit does not rigidly adhere to a first-to-file rule instead holding that in the interests of justice a second-filed action may proceed. Tempco Elec. Heater Corp., at 749-750 (citations omitted). The interests of justice mandate that the first-to-file rule should not be applied to plaintiffs' action because of the forum selection clause contained within individual plaintiffs' agreements.

The forum selection clause contained within individual plaintiffs' agreements reads as follows:

> Choice of Law and Venue. The validity, interpretation and performance of this agreement shall be controlled by and construed under the laws of the State of Florida. Both parties agree that any objections to venue be waived and that venue shall be in the Circuit Court for Lake County, Florida.

The phrase "shall be" coupled with language "in the Circuit Court for Lake County, Florida" clearly manifests an intent to make venue compulsory and exclusive because said language is obligatory. Paper Express, Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 756 (7th Cir. 1992). Additionally, individual plaintiffs' agreed to waive any objections to venue when they signed their agreements. A person who signs a contract is presumed to know its terms and consents to be bound by such terms. Id. at 757 (citations omitted). Accordingly, plaintiffs had notice that if any disputes arose under their agreements such disputes were to be resolved by the Lake County Circuit Court.

Plaintiffs argue dismissing this action in favor of a Florida forum would merely shift the inconvenience of litigating in a distant forum from defendant to plaintiffs. However, from society's point of view it is essentially irrelevant which party bears the expense of litigating in a distant forum because someone must. Tempco Elec. Heater Corp., at 749. Additionally, plaintiffs did not assert that trial in the contractual forum will be so gravely inconvenient that they will for all practical purposes be deprived of their day in court. M/S Bremen, at 18, 92 S.Ct. at 1917. Further, plaintiffs have not asserted that the forum selection clause was the product of fraud, mistake, overreaching or any other contractual infirmity. Accordingly, plaintiffs' are obligated to be bound by the terms of their agreements even if their declaratory judgment was the first-filed action.[1] *See* Paper Express, Ltd., at 757 (citations omitted).

Concluding that the first-to-file rule is not applicable does not end the Court's analysis because plaintiffs assert the forum selection clause does not apply to either plaintiff Hy Cite (because it is not a party to the agreements) or plaintiff Bean (because the California district court ruled the forum selection clause is unenforceable against California residents as a violation of public policy.) However, plaintiffs indicate that plaintiff

[1]Considering the voluminous litigation history between the parties as well as the variety of individuals named as plaintiffs and defendants in said litigation it is unclear whether plaintiffs' action in this district even constitutes the first-filed action.

Bean "will seek to be voluntarily dismissed from this case" because he filed a declaratory judgment action with the United States District Court for the Southern District of California. Accordingly, validity and enforcement of the forum selection clause concerning plaintiff Bean is moot.

When an action involves contract law the general rule is a party who does not enter into a contract with another does not owe any contractual obligations to that party. *See* Chicago Coll. of Osteopathic Med. v. George, 719 F.2d 1335, 1344 (7th Cir. 1983). Accordingly, to bind a non-party to a forum selection clause said party must be closely related to the dispute such that it becomes foreseeable that it will be bound. Hugel v. Corp. of Lloyd's, 999 F.2d 206, 209 (7th Cir. 1993)(citations omitted). Third-party beneficiaries of a contract by definition satisfy the closely related and foreseeability requirements. Id. at 209 n. 7 (citations omitted). However, third-party beneficiary status is not required. Id.

Plaintiff Hy Cite seeks a declaration that it did not tortiously interfere with individual plaintiffs' agreements. Individual plaintiffs seek a declaration that their agreements are illegal and unenforceable. Accordingly, the sole basis for the controversy between the parties concerns enforceability of individual plaintiffs' agreements which renders plaintiff Hy Cite's claim entirely dependent on the agreements. Indeed, plaintiff Hy Cite concedes that its claim is inextricably intertwined with

individual plaintiffs' claims. Because plaintiff Hy Cite's claim is both inextricably intertwined with individual plaintiffs' claims and entirely dependent on individual plaintiffs' agreements it satisfies the closely related and foreseeability requirements.

Finally, plaintiffs argue that multiple and conflicting rulings will likely result if the forum selection clause is enforced. However, their argument hinges on the Court deciding that plaintiff Hy Cite is not subject to defendant's forum selection clause. Should the Court find in such a manner plaintiff Hy Cite's action would proceed in this forum and individual plaintiffs' claims would proceed in the Florida forum. However, as previously indicated, the Court determined that plaintiff Hy Cite is bound by the forum selection clause contained within individual plaintiffs' agreements. Accordingly, judicial economy is served by having all issues related to the agreements decided in a single forum which pursuant to the mandatory forum selection clause should be the Lake County Circuit Court. Enforcing the forum selection clause is the clearest way to avoid the multiple and conflicting rulings plaintiffs' fear will occur.

A forum selection clause is prima facie valid and enforceable unless enforcement is shown by the resisting party to be unreasonable or unjust under the circumstances. M/S Bremen, at 10, 92 S.Ct. at 1913 (citations omitted). Plaintiffs failed to demonstrate that enforcing the forum selection clause would be either unreasonable or unjust under the circumstances. Plaintiffs

did not argue that enforcement of the forum selection clause would violate Wisconsin public policy. Additionally, plaintiffs did not assert that trial in the contractual forum would be so gravely inconvenient that they would for all practical purposes be deprived of their day in court. Id. at 18, 92 S.Ct. at 1917. Accordingly, the forum selection clause should be enforced. Such enforcement accords with ancient concepts of freedom of contract. Id. at 11, 92 S.Ct. at 1914. Defendant's motion to dismiss plaintiffs' second amended complaint for improper venue is granted.

B. Defendant's motion to dismiss for failure to state a claim

Because the Court dismissed plaintiffs' second amended complaint for improper venue it need not decide defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

ORDER

IT IS ORDERED that defendant's motion to dismiss for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3) is GRANTED.

IT IS FURTHER ORDERED that defendant's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) is DENIED as moot.

Entered this 10TH day of April, 2006.

BY THE COURT:
S/

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JOHN C. SHABAZ
District Judge