IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MUSSON BROTHERS, INC.,

OPINION AND ORDER

Plaintiff,

12-cv-941-bbc

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND, CHARLES A. WHOBREY, JERRY YOUNGER, GEORGE J. WESTLEY, MARVIN KROPP, ARTHUR H. BUNTE, JR., GARY F. CALDWELL, RONALD DESTEFANO, GREG R. MAY and TEAMSTERS GENERAL UNION LOCAL 662,

Defendants.

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In this action under 28 U.S.C. § 2201 for declaratory judgment and injunctive relief, plaintiff Musson Brothers, Inc. seeks a declaration that it does not owe contributions to defendant Central States, Southeast and Southwest Areas Health and Welfare Fund, a multi-employer benefit plan, on behalf of seven of its employees under agreements that it entered with defendant Teamsters General Union Local 662. Plaintiff maintains that the employees are classified as exempt from contributions under the parties' 2007 participation agreement. On January 23, 2013, the plan trustees, defendants Charles A. Whobrey, Jerry Younger, George J. Westley, Marvin Kropp, Arthur H. Bunte, Jr., Gary F. Caldwell, Ronald Destefano and Greg R. May, determined that the employees are not exempt and that plaintiff owed

$330,213.40 in contributions plus interest. Plaintiff seeks a declaratory judgment that it does not owe these contributions and an injunction preventing defendants from commencing a collection action.

Before the court is defendants' motion to dismiss the first amended complaint or in the alternative to transfer venue. Dkt. #9. Defendants contend that venue is improper because a forum-selection clause incorporated in the 2007 participation agreement states that venue is appropriate only in the United States District Court for the Northern District of Illinois. Plaintiff argues that the forum-selection clause is invalid because this suit arises under the Employment Retirement Income Security Act of 1974 and ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) governs the choice of venue. Defendant contends that ERISA § 502(e)(2) is inapplicable because plaintiff's action does not "arise under" ERISA.

I will deny defendants' motion to dismiss the first amended complaint but grant their motion to transfer venue under 28 U.S.C. § 1404(a). Plaintiff's declaratory judgment suit arises under ERISA but defendants have met their burden of showing that the Northern District of Illinois, Eastern Division, is the more convenient venue because the parties agreed to a valid forum selection clause and enforcing that clause does not contravene the policies underlying ERISA and its venue provision.

DISCUSSION

A. "Arising Under" ERISA

The parties dispute whether this action arises under ERISA because ERISA's venue

provision would affect the venue analysis. However, the parties' disagreement raises a more fundamental problem. If defendants are correct that this case does not arise under ERISA, then it is not clear why this court has subject matter jurisdiction over the case. Accordingly, I must resolve whether this case "arises under" ERISA to determine both whether ERISA's venue provision applies and whether this court has subject matter jurisdiction.

Federal district courts have original jurisdiction over actions "arising under" ERISA, 29 U.S.C. § 1132(e)(1), and such actions "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides." 29 U.S.C. § 1132(e)(2). Plaintiff's suit does not arise directly under ERISA § 502(a)(3)(B)(ii) because plaintiff is an employer and that provision states that a civil action may be brought by "a participant, beneficiary, or fiduciary . . . to enforce any provisions of this subchapter or terms of the plan." 29 U.S.C. § 1132(a)(3). However, plaintiff contends that its declaratory judgment suit under 28 U.S.C. § 2201 "arises under" ERISA because plaintiff would be the "natural defendant" of a suit to enforce the provisions of ERISA or the plan terms and defendants had threatened such an enforcement suit.

Relying on Franchise Tax Board of California v. Construction Laborers Vacation Trust of Southern California, 463 U.S. 1 (1983), defendants argue that an action by a non-enumerated party such as plaintiff cannot arise under ERISA, even if the non-enumerated party would be the natural defendant of an enforcement action and therefore a proper plaintiff under the declaratory judgment act. In Franchise Tax Board, a California state agency sued to collect unpaid state income taxes from a trust covered by ERISA. The

plaintiff filed suit in state court under California law seeking damages for past unpaid taxes and a declaratory judgment that defendants were legally obligated to pay all future levies. Defendants removed the case to federal court under 28 U.S.C. § 1441(a), arguing that ERISA preempted the California law.

Eventually the Supreme Court held the removal improper because the district court lacked subject matter jurisdiction. Id. The right to relief arose under state law and did not require resolution of a substantial federal question. The declaratory judgment action "pose[d] a more difficult problem." Id. at 14. The state agency could not bring its action directly under ERISA because it was not an enumerated party under § 502(a)(3). However, the cause of action fit within the traditional theory for federal jurisdiction over declaratory judgment actions. The Court recognized that "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." Id. at 19. Under this theory, federal jurisdiction would have existed because the defendant trustees could have filed an action to clarify their rights under the ERISA plan under § 502(a)(3) and the only controversy between the parties was whether ERISA preempted the state income tax. Id. at 19-20.

Nevertheless, the Court held that the state agency's declaratory judgment action did not arise under ERISA. Congress had specified who could bring suit under ERISA and the Court declined to use the declaratory judgment act to expand those limits.

> The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties . . . as to whom Congress presumably determined that a right to enter

> federal court was necessary to further the statute's purposes. It did not go so far as to provide that any suit against such parties must also be brought in federal court when they themselves did not choose to sue. The situation presented by a State's suit for a declaration of the validity of state law is sufficiently removed from the spirit of necessity and careful limitation of district court jurisdiction that informed our statutory interpretation in *Skelly Oil* and *Gully* [cases considering the scope of "arising under" jurisdiction] to convince us that, until Congress informs us otherwise, such a suit is not within the original jurisdiction of the United States district courts.

Id. at 21-22 (citation omitted) (internal quotations omitted). This broad language would appear to foreclose plaintiff's declaratory judgment suit.

However, plaintiff cites a more recent decision from the Court of Appeals for the Seventh Circuit, NewPage Wisconsin System Inc. v. United Steel Workers, 651 F.3d 775 (7th Cir. 2011), in which the court held that federal courts have original jurisdiction under ERISA over a declaratory judgment suit brought by a non-enumerated party, if a "mirror-image" action by the defendant would necessarily present a federal question. Id. at 778. In that case an employer sought a declaratory judgment about the legality of its retiree health plan violated ERISA's provisions. This court held that it did not have subject matter jurisdiction over the claim because § 502 of ERISA did not authorize the relief plaintiffs sought.

The court of appeals reversed, holding that jurisdiction is not dependent on the relief authorized by statute but on whether the claim arises under federal law:

> To decide whether a declaratory-judgment action comes within federal jurisdiction, a court must dig below the surface of the complaint and look at the underlying controversy. If a well-pleaded complaint by the defendant (the "natural" plaintiff) would have arisen under federal law, then the court has jurisdiction when the "natural" defendant brings a declaratory-judgment suit.

Id. at 777-78 (citations omitted). Because the defendant could have brought suit under §

502(e), the plaintiff's mirror-image suit was also within federal jurisdiction. Id. at 778. The court of appeals did not discuss Franchise Tax Board.

At first glance, NewPage appears to conflict with Franchise Tax Board of California, but a closer look shows that they can co-exist. Contrary to defendants' interpretation of Franchise Tax Board of California, in that case the Court did not hold that *only* an enumerated party can bring a declaratory judgment action under ERISA. As another district court has held, the Court's holding was "that the controversy presented in the complaint—a dispute about the validity of a state tax-levying regulation—was not within the carefully circumscribed ambit of federal jurisdiction" under ERISA. Boeing Co. v. Marsh, 656 F. Supp. 2d 837, 844 (N.D. Ill. 2009) (interpreting Franchise Tax Board, 463 U.S. 1).

Moreover, the Court's decision rested in part on public policy concerns specific to declaratory judgment actions by states.

> States are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation. They have a variety of means by which they can enforce their own laws in their own courts, and they do not suffer if the preemption questions such enforcement may raise are tested there.

Franchise Tax Board, 463 U.S. at 21. Despite this broad language, the Court did not reach the question whether other non-enumerated parties, like employers, can bring "mirror-image" declaratory actions against enumerated parties.

Therefore, I conclude that NewPage Wisconsin System Inc. and not Franchise Tax Board determines whether plaintiff's claim arises under ERISA. Although plaintiff is not an enumerated party, plaintiff would be the "natural defendant" for any suit brought by

defendants to clarify the terms of the participation agreements or to seek contributions. Therefore, plaintiff's declaratory judgment suit arises under ERISA and this court has original jurisdiction under ERISA § 502(e) and 28 U.S.C. § 1331.

B. Enforceability of Forum Selection Clause

Because this case arises under ERISA, its venue provision applies. That provision provides that venue is appropriate "where the plan is administered, where the breach took place, or where a defendant resides." 29 U.S.C. 1132(e)(2). Plaintiff argues that venue is proper in the Western District of Wisconsin because the breach occurred at plaintiff's corporate office in Rhinelander, Wisconsin, and because plaintiff is the natural defendant and resides in Wisconsin.

Defendants respond by asserting that ERISA's venue provision is trumped by the forum selection clause in the parties' 2007 participation agreement, which incorporates the Central States Trust Agreement. Cpt. Ex. 3, dkt. #1-3, at ¶ 1.

> Any lawsuit brought by an Employer . . . challenging an action or decision of the Trustees of any nature, including . . . suits challenging a contribution billing . . . must be filed only in the United States District Court for the Northern District of Illinois, Eastern Division, and it is agreed that said forum is the most convenient forum for the lawsuit.

Trust Agmt., dkt. # 22-2, at 23. Relying on this forum selection clause, defendants request dismissal for improper venue under Fed. R. Civ. P. 12(b)(3) or transfer pursuant to 28 U.S.C. § 1404(a). A defendant may challenge venue on the basis of a forum selection clause by bringing a motion to dismiss the complaint under 12(b)(3). Muzumdar v. Wellness

International Network, Ltd., 438 F.3d 759, 760 (7th Cir. 2006). In this case, I will not address defendants' motion to dismiss, but will consider only defendants' motion to transfer because plaintiff would almost certainly re-file the action in the proper venue if I dismissed the case. A transfer would save time and promote efficient use of judicial resources.

Under 28 U.S.C. § 1404(a), a court may transfer a case from one proper venue to another "[f]or the convenience of the parties and witnesses" and "in the interest of justice." This is a flexible inquiry that requires an "individualized, case-by-case consideration of convenience and fairness." Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988) (quoting Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)). The existence of a forum selection clause is "a significant factor that figures centrally in [this] calculus." Id. at 29. A forum selection clause affects the considerations of both convenience, because parties have already "expressed preference for that venue," and of fairness because the clause may implicate "public-interest factors of systemic integrity and fairness." Id. at 29, 30. The forum selection clause "should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a)." Id. at 31. The forum selection clause is not dispositive because "only one of § 1404(a)'s factors—convenience of the parties—is within the parties' power to waive." Heller Financial, Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1293 (7th Cir 1989). A court "still must consider whether the 'interest[s] of justice' or the 'convenience of . . . witnesses' require transferring a case." Id.

As an threshold matter, I must determine whether the particular forum selection

clause in the 2007 participation agreement is enforceable. This is a two-fold inquiry. First, whether the clause remains valid in light of ERISA § 502(e)(2), and if it does, enforcement of the clause is "unreasonable under the circumstances." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (internal quotations omitted).

In the commercial arena, forum selection clauses are presumptively valid. Id.; Carnival Cruise Lines, Inc. v.Shute, 499 U.S. 585, 595 (1991); Heller Financial, Inc., 883 F.2d at1290-91 (in the "commercial context . . . a forum-selection clause should control unless there is a strong showing that it should be set aside") (citation omitted) (internal quotations omitted). However, the fact that this is an ERISA case adds another wrinkle. ERISA exists to "protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). A forum selection clause might thwart this purpose by limiting the access of participants and beneficiaries to a convenient forum.

Plaintiff argues that the forum selection clause should be unenforceable in light of this express policy of ERISA and ERISA's definition of the appropriate venues. No court of appeals has decided this issue and the district courts appear to be split. A "substantial majority" of district courts have upheld forum selection clauses in plan documents. Coleman v. Supervalu, Inc. Short Term Disability Program,___ F. Supp. ___, 2013 WL 365263 at *3-4 (N.D. Ill. 2013) (collecting cases). See also Rodriguez v. Pepsico Long Term Disability Plan, 716 F. Supp. 2d 855, 860 (N.D. Cal. 2010) (forum selection clause in long term disability policy enforceable against plan participant because enforcement "is not

inconsistent with the terms or policy rationales of ERISA"); Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 437 (S.D.N.Y. 2007) (forum selection clause in long term disability policy enforceable against plan participant because clause does not conflict with ERISA venue provision); Shoemann ex rel. Shoemann v. Excellus Health Plan, Inc., 447 F. Supp. 2d 1000, 1007 (D. Minn. 2006) ("nothing in the language or purposes of ERISA" rendered forum selection clause unenforceable against plan beneficiaries).

A minority of district courts have refused to enforce forum selection clauses against plan participants or beneficiaries because of public policy concerns. For example, the Northern District of Illinois held that enforcing a forum selection clause in a short-term disability program document would "run[] counter to the strong public policy announced by Congress in ERISA" that there be "open access to several venues for beneficiaries seeking to enforce their right." Coleman, 2013 WL 365263 at*5- 6. See also Nicolas v. MCI Health and Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006) (forum selection clause in employee benefits policy unenforceable because Congress intended ERISA's venue provision to remove procedural obstacles for participants and beneficiaries).

I need not choose a side in this debate, because the public policy concerns that motivate the minority position do not arise when an employer seeks to avoid a forum selection clause in an employer-benefit plan contract. The policy expressed in 29 U.S.C. § 1001(b) favors wide access to federal courts to protect plan participants and beneficiaries. However, this concern has no bearing on the validity of the forum selection clause negotiated at arms length between an employer and a union. Moreover, most district courts would

enforce forum selection clauses even against participants and beneficiaries. Therefore, the forum selection clause in the parties' 2007 participation agreement should be considered presumptively valid, like the other provisions in a freely negotiated business contract,

Because the ERISA venue provision does not supersede this forum selection clause, the remaining question is whether the clause is "unreasonable under the circumstances." M/S Bremen, 407 U.S. at 10 (internal quotations omitted). This is a high hurdle to overcome: a forum selection clause is unreasonable only if (1) it was incorporated into the contract because of fraud, undue influence or "overweening bargaining power," id. at 12; (2) the selected forum is so "gravely difficult and inconvenient that [the challenger] will for all practical purposes be deprived of its day in court," id. at 18; or (3) enforcement would be contrary to public policy, id. at 15. Bonny v. Society of Lloyd's, 3 F.3d 156, 160 (7th Cir. 1993) (identifying the M/S Bremen factors as the only relevant ones).

Plaintiff cannot make this showing. It has asserted that defendants imposed on it "an adhesive 'take it or leave it' . . . choice of forum provision," Plt.'s Br. dkt. # 32, at 32, but it has no evidence of such an imposition. Rather, the facts suggest that the parties are two sophisticated businesses that negotiated the contract at arm's length. Plaintiff states in its own response brief that it "negotiated" the 2001 participation agreement containing the forum selection clause and "negotiated" the 2007 agreement incorporating the clause. Id. at 9, 17. This does not suggest coercion. Muzumdar v. Wellness International Network, Ltd., 438 F.3d 759, 762 (7th Cir. 2006) (upholding forum selection clause because "parties to a somewhat sophisticated business deal . . . would [not] have signed a contract . . .

without considering its provisions."). The contracted-upon forum will not be "gravely difficult and inconvenient" to plaintiff. Because it agreed to this venue in the contract, it cannot now argue that the Northern District would be "gravely inconvenient." M/S Bremen, 407 U.S. at 17-18 ("whatever 'inconvenience' [the defendant] would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting."). As to the third factor, I have already discussed why enforcement of the clause will not contravene the public policy of ERISA.

B. Transfer under § 1404(a)

The remaining question is whether the existence of an enforceable forum selection clause favors granting defendants' motion to transfer venue under § 1404(a). Regarding the first consideration, "the convenience of parties and witnesses," it is nearly dispositive that the parties have agreed that the Northern District of Illinois, Eastern Division, is a proper venue and is the most convenient forum. Plaintiff has waived its right to assert its own convenience. Heller Financial, 883 F.2d at1293. Furthermore, plaintiff's argument that its witnesses will be inconvenienced is not persuasive, because review of the plan administrator's determination will likely be limited to the administrative record. Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan, 195 F.3d 975, 981-82 (7th Cir. 1999).

Transfer would also be "in the interest of justice." Public policy favors judicial enforcement of freely negotiated contracts. Furthermore, upholding the forum selection clause will benefit the plan's participants and beneficiaries. Allowing defendant to bring or

defend suits in a single forum will reduce the plan's litigation costs and allow for efficient administration of the plan. In addition, the Northern District of Illinois has adjudicated many cases between defendants and employers or unions and is familiar with the parties and their relationships. E.g., Central States, Southeast and Southwest Areas Health and Welfare Fund v. Pathology Laboratories of Arkansas, P.A., 71 F.3d 1251 (7th Cir. 1995); Leilani Exbom v. Central States, Southeast and Southwest Areas Health and Welfare Fund, 900 F.2d 1138 (7th Cir. 1990). Therefore, I conclude that considerations of fairness, convenience and the interests of justice support transfer of this case to the Northern District of Illinois, Eastern Division, under 28 U.S.C. § 1404(a).

ORDER

IT IS ORDERED that the motion of defendants Central States Southeast and Southwest Areas Health and Welfare Fund, Charles A. Shobrey, Jerry Younger, George J. Westley, Marvin Kropp, Arthur H. Bunte, Jr., Gary F. Caldwell, Ronald DeStenfano, Greg R. May and Teamsters General Union Local 662 to dismiss or, in the alternative, to transfer venue, dkt. #19, is GRANTED IN PART and DENIED IN PART. Defendants' motion to dismiss the case under Fed. R. Civ. P. 12(b)(3) is DENIED and defendants' motion to transfer venue to the United States District Court for the Northern District of Illinois, Eastern Division, under 28 U.S.C. § 1404(a) is GRANTED.

Further, IT IS ORDERED that defendants' motion for a protective order, dkt. #30,

is DENIED as moot.

Entered this 9th day of May, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge