UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTGAGE RESOLUTION SERVICING, LLC, 1ST FIDELITY LOAN SERVICING, LLC, and S & A CAPITAL PARTNERS, INC.,

Plaintiffs,

v.

JPMORGAN CHASE BANK, N.A., CHASE HOME FINANCE, LLC, and JPMORGAN CHASE & CO.,

Defendants.

No. 15-CV-00293(LTS)(JCF)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE

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PRELIMINARY STATEMENT

Defendants (together "Chase") move to transfer this action to the United States District Court for the District of Columbia (the "DC Court") pursuant to 28 U.S.C. § 1404(a) even though Chase does not claim that a single operative event occurred within that district. Moreover, Chase virtually ignores the fact that the complaint arises out of a contract that Chase drafted, which contains an exclusive forum selection provision mandating that "all disputes arising hereunder shall be submitted to and [the parties] hereby subject themselves to the jurisdiction of the courts of competent jurisdiction, state and federal, in the State of New York" and that the contract "shall be deemed to have been made in the State of New York and governed by New York law." (*See* Maya Decl., Exh. O (Mortgage Loan Purchase Agreement), § 15). It is because of this provision that Plaintiffs sued here rather than in their home state of Florida.

From Chase's Memorandum, one would think that forum selection clauses are largely irrelevant on a Section 1404(a) motion. Chase does not mention the provision until the last page of its Memorandum, where it devotes exactly 14 lines to the subject. (Defs. Mem. at 18). But in commercial transactions such as this, forum selection clauses are virtually always dispositive. As the Supreme Court explained in its most recent exposition on the subject, where a plaintiff had sued in a forum different from the agreed upon venue and the defendant moved under Section 1404(a) to transfer the case to that venue:

> When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause.

Atlantic Marine Constr. Co., Inc. v. U.S. District Court for the Western District of Texas, 134 S.Ct. 568, 581 (2013).

Chase argues that transfer is appropriate under the "private and public interest" factors applicable to a Section 1404(a) motion because this action is related to a False Claims Act case

brought on behalf of the United States Government in the DC Court (the "FCA Case"). But, the Plaintiffs are not parties to the FCA Case. It was brought by Laurence Schneider who owns a substantial, but not exclusive, equity interest in the Plaintiffs. As Chase acknowledges, the Government is the real party in interest in the FCA case, whereas here the Plaintiffs (and not Schneider) are the only parties in interest. (Defs. Mem. at 12, n.1).

Unlike the FCA Case, the core of this action is a breach by Chase of its contracts with the Plaintiffs. Indeed, in its motion to dismiss, Chase argued that many of Plaintiffs' tort claims should be dismissed because they were duplicative of the contract claims. (*See* Defs. Mem. (ECF Doc. 36) at 14-15).[1] The FCA Case does not involve any of the contracts at issue here and, in the FCA case, any recovery will benefit the Government, not the Plaintiffs. (Defs. Mem. at 12, n.1).

But even if Chase could sustain its factual argument, the Supreme Court has held that where, as here, a valid forum selection clause pertains, a district court may not consider the traditional private interest factors on a transfer motion; it may only consider the public interest factors, which "will rarely defeat a transfer motion . . . [thus,] the practical result is that forum-selection clauses should control except in unusual cases." *Atlantic Marine*, 134 S.Ct. at 582.

In *Atlantic Marine*, the Court expanded on its seminal decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), and reiterated that the "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." *Atlantic Marine*, 134 S.Ct. at 581 (citing *Stewart*, 487 U.S. at 33). Thus, transferring this case would thwart the interests of justice, not further them.

Perhaps Chase relegated the issue of the effect of a forum selection clause to the last few

[1] That motion is moot in view of the June 18, 2015 Consent Order granting Plaintiffs leave to file a Third Amended Complaint and suspending any briefing with respect thereto until the Court resolves the pending transfer motion. (*See* ECF Doc. 58). Plaintiffs will file that complaint on or before July 31, 2015, and we respectfully request that the Court defer consideration of this motion until then, so it can read the new complaint in conjunction with this motion.

lines of its Memorandum because it is "holding its fire" and intending to make its case on reply. That would be wholly improper.[2] More likely, Chase is virtually mute on this point because it has no case to make. As shown below, the two pre-*Atlantic Marine* cases it cites are inapposite on the facts and diminish Chase's argument rather than support it.

Accordingly, Chase's motion to transfer should be denied and the instant action retained in this, the contractually-mandated forum.

ARGUMENT

I. THE FORUM SELECTION CLAUSE COMPELS DENIAL OF THIS MOTION

Chase addresses both the "private" and "public" factors typically considered in a Section 1404(a) analysis. Why it does so is a mystery. The Court's holding in *Atlantic Marine* could not have been more emphatic:

> …a court evaluating a defendant's §1404(a) motion to transfer based on a forum-selection clause **should not** consider arguments about the parties' private interests. When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum.

Atlantic Marine, 134 S.Ct. at 582 (emphasis added).

This Court firmly applied that holding in *In re Residential Capital, LLC*, 527 B.R. 865 (S.D.N.Y. 2014), where, citing *Atlantic Marine,* it wrote:

> The Supreme Court has held that "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases," and the Second Circuit has held that "forum selection

[2] New legal arguments may not be raised for the first time in a reply, nor may they be preserved by a fleeting reference in the moving memorandum. *See*, *e.g., Rowley v. City of New York*, No. 00Civ.1793 (DAB), 2005 WL 2429514, at *5 (S.D.N.Y. Sept. 30, 2005) (noting that the Second Circuit "has made clear it disfavors new issues' being raised in reply papers" and refusing to consider in reply an argument made only in a footnote in the moving submission). As Judge Selya stated in *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 12 (1st Cir. 1996): "Since appellate judges are not haruspices, they are unable to decide cases by reading goats' entrails. They instead must rely on lawyers and litigants to submit briefs that present suitably developed argumentation . . . ."

> 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 873 (citation omitted) (granting transfer in accordance with forum selection clause).

Thus, while we respond to Chase's "private convenience" arguments below, we do so only for completeness: as *Atlantic Marine, Stewart* and *In re Residential Capital* establish, this motion stands or falls on Chase's ability to show that this is such an extraordinary case that the Court should ignore the forum Chase insisted upon in the Agreement. Chase cannot do so.

Chase's argument boils down to the argument that the case should be transferred to the DC Court to avoid duplicative litigation of common questions of law and fact and to take advantage of Judge Collyer's "unique expertise" in interpreting and applying the National Mortgage Settlement ("NMS"). The argument is disingenuous. This case revolves around Chase's breach of a contract it entered into with MRS on February 25, 2009. The Government and Chase entered into the NMS in April 2012 -- more than three years later. While Chase's breach of the NMS is at the core of the FCA case, it has nothing whatsoever to do with Plaintiffs' breach of contract action here. Plaintiffs are not parties to the action before Judge Collyer and they are not claiming thereunder in this action. Moreover, with all due respect to Judge Collyer, this Court has had extensive experience with precisely the same issues as those raised in the FCA case. *See, e.g., FDIC v. Bear Stearns Asset Backed Securities I*, No. 12-CV-4000, 2015 WL 1311300 (S.D.N.Y. Mar. 24, 2015) (Swain).

Plaintiffs' claims in this action arise under New York law. And there the expertise is undeniably with this Court, which deals with New York law on a daily basis. As the Supreme Court explained, public interest factors under Section 1404(a) include "the interest in having the trial of a diversity case in a forum that is at home with the law." *Atlantic Marine*, 134 S.Ct. at

581, n.6 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, n. 6 (1981)). Chase's assertion that the existence of a single, arguably related, action in another forum can overcome a concededly valid forum selection clause would eviscerate the Supreme Court's holding in *Atlantic Marine* that it is "the enforcement of valid forum-selection clauses…that furthers vital interests of the justice system." *Atlantic Marine*, 134 S.Ct. at 581 (internal quotation marks omitted). Even before *Atlantic Marine*, Chase's argument was never accepted by the courts:

> It is true that justice would be best served by consolidating the cases . . . and trying them together. However . . . [the defendants] should not be deprived of the benefit of [their] bargain—namely the forum-selection clause—to achieve this goal.

Faberge USA, Inc. v. Ceramic Glaze, Inc., No. 87 Civ. 5780, 1988 WL 31853, at *3 (S.D.N.Y. Mar. 28, 1988); *see also Texas Source Grp., Inc v. CCH, Inc.*, 967 F. Supp. 234 (S.D. Tex. 1997) ("Courts should announce and encourage rules that support private parties who agree to forum-selection clauses because it protects parties legitimate expectations and furthers vital interests of the justice system") (internal quotations omitted); *Mfg. & Mktg. Concepts, Inc. v. S. California Carbide*, 920 F. Supp. 116, 120 (N.D. Ill. 1996) (where the court declined to "contravene the forum selection clause" by consolidating "two actions arising out of the same nucleus of facts.").

Chase cites only two cases in support of this argument but those cases demonstrate the error in its argument. (*See* Defs. Mem. at 18). In *APA Excelsior III L.P. v Premier Techs., Inc.*, 49 F. Supp. 2d 664, 673 (S.D.N.Y. 1999), transfer was granted where there were 22 previously-filed related actions consolidated in the Northern District of Georgia. In addition, there was substantial doubt as to the enforceability of the agreement containing the forum selection clause because most of the parties, including the plaintiffs, were not parties to it. *Id.* at 671. That is hardly a persuasive precedent.

The only other case Chase cites on this issue is even less helpful to its cause. In *Savin v. CSX Corp.*, 657 F. Supp. 1210, 1214–15 (S.D.N.Y. 1987), which antedates both *Atlantic Marine* and *Stewart*, the court engaged in the standard Section 1404(a) analysis, giving the forum selection clause no particular weight and considering the "private" convenience factors that *Atlantic Marine* holds cannot be considered where a forum selection clause exists. Moreover, the forum selection clause there was not exclusive and permitted suits outside of New York if Chase consented -- and Chase was the party seeking the transfer. The court stated "in the instant case, the forum selection provision . . . authorizes litigation outside New York with the 'voluntary written consent' of [Defendant] Chase. The Court thus does not interpret this provision as an exclusive venue clause . . . ." *Savin*, 657 F. Supp. at 1214, n.2.

Here, however, Chase insisted on an exclusive, mandatory choice of forum provision which gave it no right to reject the selected venue. It is bound by its contractual designation that there be a New York forum. Courts in this District have rigorously rejected the expedient of a party's alleging an overweening "public interest" factor to permit it to end-run its contractual venue choice. *See, e.g.*, *Weiss v. Columbia Pictures Television, Inc.*, 801 F. Supp. 1276 (S.D.N.Y. 1992); *Faberge, supra*, 1988 WL 31853, at *3.

But there is one public interest factor that should be considered: Section 1404(a) may not be used as a vehicle to facilitate forum shopping. As the Court wrote in *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), citing *Van Dusen v. Barrack*, 376 U.S. 612 (1964): "*Van Dusen* also sought to fashion a rule that would not create opportunities for forum shopping. Some commentators have seen this policy as the most important rationale of *Van Dusen.*" *Ferens*, 494 U.S. at 527 (citations omitted). Chase's attempt to repudiate the contractual choice of forum it imposed on Plaintiffs is redolent of the worst kind of forum shopping.

Plaintiffs do not dispute the proposition that, in truly exceptional circumstances, courts may find it appropriate in the public interest to override a forum selection clause. However, as the Supreme Court wrote in *Atlantic Marine*, in "all but the most unusual cases . . . the interest of justice is served by holding parties to their bargain." *Atlantic Marine*, 134 S.Ct. at 583 (internal quotations omitted). Here, justice is served by denying Chase's transfer motion.

II. THE RELEVANT PUBLIC AND PRIVATE INTEREST FACTORS DO NOT FAVOR TRANSFER BUT RETENTION OF JURISDICTION IN THIS COURT

As this Court has stated, where, unlike this case, no governing forum selection clause is present, courts

> routinely consider the following factors in deciding whether to transfer an action to another district: (1) the convenience of witnesses, (2) the location of relevant documents and the relative ease of access to sources of proof, (3) the convenience of the parties, (4) the locus of the operative facts, (5) the availability of process to compel attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum, and (9) trial efficiency and the interests of justice based on the totality of the circumstances. There is no rigid formula for balancing these factors and no single one of them is determinative. In performing the analysis the Court must, however, give due deference to the plaintiff's choice of forum which should not be disturbed unless the balance of convenience and justice weigh heavily in favor of defendants' [proposed] forum.

Royal & Sun Alliance Ins. PLC v. UPS Supply Chain Solutions, Inc., No. 09 CIV. 5935, 2010 WL 4967984, at *1 (S.D.N.Y. Dec. 1, 2010) (Swain) (denying motion to transfer) (internal citations and quotation marks omitted). Factors 1-6 and 8 are generally regarded as "private convenience" factors and 7 and 9 the "public interest" factors.

From a public interest standpoint -- over and above Chase's ill conceived "interests of justice" argument, fully debunked in Point I *supra* -- only three factors are material and none works in Chase's favor: (1) any administrative difficulties caused by court congestion; (2) the

interest in having a localized controversy decided at home; and (3) the "interest in having a trial of a diversity case in a forum that is at home with the law." *Atlantic Marine,* 134 S.Ct. at 581, n. 6. In fact, these considerations would tip the scale in favor of keeping this case here, even absent a governing forum selection clause.

A. The Public Interest Factors Militate Against Transfer

1. The administrative difficulties caused by court congestion.

There is no allegation anywhere in Chase's moving papers that this Court is ill-equipped to manage its own docket. Thus, there is no valid concern for any administrative difficulties caused by court congestion.

2. The interest in having a localized controversy decided at home.

The Plaintiffs have sued under an agreement that is deemed to have been made in New York and is subject to New York law. Moreover, defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. are headquartered at 270 Park Avenue, New York, New York. (*See* ECF Doc. 27 (2d Am. Compl.) ¶¶ 10-11). Defendant Chase Home Finance, LLC was a Delaware limited liability company headquartered in New Jersey, which, effective May 1, 2011, was merged into JPMorgan Chase Bank. (*Id*. ¶ 12). Thus, Defendants have been sued in their home forum. As a result, New York certainly has an interest in ensuring that this local controversy is decided here.

3. The Court's familiarity with the applicable law.

With one exception, all of Plaintiffs' claims are cognizable in this Court based on the diversity of citizenship of the parties. The parties' Agreement mandates that the contractual relationship at the heart of this case, and any dispute arising thereunder, be resolved under New York law. (*See* Maya Decl., Exh. O (Mortgage Loan Purchase Agreement), § 15). Thus, this

public interest factor does not favor transfer to the DC Court, but militates in favor of retaining jurisdiction here.

B. Even if this Court were to consider the private convenience factors, the result is the same.

Assuming that, contrary to *Atlantic Marine*, consideration of the "private convenience" factors under Section 1404(a) were permissible, the result would be the same.

1. The convenience of the parties and witnesses.

Chase's "convenience" argument is based on a frivolous predicate. Chase is domiciled and resides in the District. How in the world can it be "inconvenient" for Chase to litigate here? Obviously, it cannot. Indeed, Chase concedes that, "with respect to Chase's employee witnesses . . . there would be no meaningful difference between litigation in New York and litigation in the District of Columbia." (Defs. Mem. at 16).

Chase also makes the argument that the convenience factor favors transfer because "Schneider essentially conceded that the District of Columbia would be a convenient forum for this litigation when he moved to transfer the Schneider FCA Action from the District of South Carolina to the District of Columbia." (Defs. Mem. at 14) (*citing* Maya Decl., Exh. H). But, Chase ignores the fact that the real party in interest in the FCA action is the Government whereas, in this action, the real parties in interest are the Plaintiffs. Thus, the convenience of the forum for Government witnesses is irrelevant on this motion.

Further, Chase asserts that "[t]o the extent that [the] witnesses reside outside of either New York or the District of Columbia, it would be far more convenient for them to travel only once to the District of Columbia rather than to be required to travel separately to the District of Columbia and to New York." (Defs. Mem. at 15). Chase overlooks the fact that these matters are distinct and will necessarily require two separate trials, and that most of the witnesses in this

contract based action having nothing to do with, and will not be witnesses in, the FCA case. In any event, to the extent needed, discovery in the actions can be coordinated so witnesses would only have to appear once for depositions, which would likely occur in the districts in which the witnesses reside.

Thus, Chase has not made the "clear and convincing showing" through detailed affidavits of why their motion should be granted that this Court requires. *Day Village Ltd. P'ahip v. CW Capital L.L.C.*, 2006 WL 2572118, *3 (S.D.N.Y. Sept. 7, 2006) (Swain, J.) ("The moving party has the burden to establish a clear and convincing showing that a transfer is appropriate and the motion should be granted. The moving party must supply an affidavit that contains detailed factual statements explaining why the motion should be granted, including information on the potential principal witnesses and a general statement as to their testimony.") (denying transfer).

2. The locus of operative facts concern Chase's breach of a New York agreement.

Chase argues that transfer is appropriate because "this action revolves in part around allegations" at issue in the FCA case such as breaches of the NMS. (Defs. Mem. at 16) (emphasis added). Chase's conflation of this action with the DC case is spurious. This action arises out of injuries Plaintiffs sustained as a result of Chase's breach of an agreement that pre-dates the NMS. The contract claims at issue here have nothing to do with the FCA case. The Plaintiffs are not parties to the FCA case and Chase's violations of its obligations to the Government will not form an independent basis for relief in this case.

3. The location of relevant documents, the availability of compulsory process, and the forum's familiarity with governing law do not support transfer.

Chase asserts that these factors are neutral, but they are not. Aside from the fact that most of Chase's documents and witnesses are in New York, this Court's familiarity with New

York law, which is properly a public interest factor, clearly favors retaining jurisdiction. Chase argues that the D.C. Court would be more convenient for Fannie Mae and Freddie Mac witnesses, but such witnesses have evidence relevant to the FCA case, not to the breach of contract case before this Court. Thus, the convenience of such witnesses is irrelevant here.

4. Plaintiffs' choice of forum is entitled to considerable weight.

Chase argues that Plaintiffs' choice of forum should be given no weight where "the plaintiff does not reside in the chosen forum and has elected to litigate related claims in the transferee forum." (Defs. Mem. at 17-18). The second part of the argument is factually wrong: Plaintiffs have not sued in the proposed transferee forum. But more importantly, the entire argument is wrong as a matter of law.

In cases where no forum selection clause exists, plaintiffs' forum choice is entitled to substantial deference. *Royal & Sun Alliance Ins. PLC v. UPS Supply Chain Solutions, Inc.*, No. 09 Civ. 5935, 2010 WL 4967984, at *1 (S.D.N.Y. Dec. 1, 2010), *citing Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir.2001) (denying transfer); *accord Am. Steamship Owners Mut. Prot. & Indem. Ass'n, Inc. v. Lafarge N. Am., Inc.*, 474 F. Supp. 2d 474, 480 (S.D.N.Y. 2007) ("In performing the analysis, however, the district court must give due deference to the plaintiff's choice of forum which should not be disturbed unless the balance of convenience and justice weigh heavily in favor of defendants' [proposed] forum.") (denying motion to transfer), *aff'd sub nom. New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102 (2d Cir. 2010). Indeed:

> The Second Circuit has clarified the amount of deference to which a plaintiff is entitled when he files a lawsuit outside of his home forum: the more such a decision is "dictated by reasons that the law recognizes as valid, the greater the deference that will be given to" it; the more it appears the decision is "motivated by forum shopping reasons," the less deference will be accorded to it. Here, there is no evidence that plaintiff chose the Southern District to

> give him an improper advantage or put defendants at a tactical disadvantage. In such an instance, plaintiff's choice of forum weighs against a transfer, but it is not controlling.

Hershman v UnumProvident Corp., 658 F. Supp. 2d 598, 601 (S.D.N.Y. 2009) (*citing Iragorri v United Techs Co.,* 274 F.3d at 73); *see* also*, Day Village Limited Partnership supra*, 2006 WL 2572118 at *3.

Accordingly, the "choice of forum" factor would weigh heavily in Plaintiffs' favor if the parties' forum selection agreement were not controlling on the issue of venue.

5. The relative means of the parties.

While Chase all but omits any discussion of this factor in its analysis, there is no dispute that the financial means of the Plaintiffs pales in comparison to the financial means of the nation's largest bank. Thus, this factor favors Plaintiffs' choice of forum as well.

CONCLUSION

The parties' mandatory forum selection clause should be determinative of the question of venue and, even if it were not, Chase has failed to meet its traditional Section 1404(a) burden of showing that the relevant factors tip heavily in favor of transfer. The interests of justice are furthered in this case by the Court's holding Chase to its agreement and retaining jurisdiction here. Accordingly, Chase's transfer motion should be denied in all respects.

July 9, 2015

Respectfully submitted

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