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)

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE TO UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Robert D. Wick
Michael M. Maya
COVINGTON & BURLING LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-6000
rwick@cov.com
mmaya@cov.com

Michael C. Nicholson
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018-1405
(212) 841-1000
mcnicholson@cov.com

Attorneys for Defendants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Defendants JPMorgan Chase Bank, N.A. and JPMorgan Chase & Co. (collectively, "Chase") respectfully submit this reply in support of their motion to transfer this case to the United States District Court for the District of Columbia.

PRELIMINARY STATEMENT

Transfer should be granted because this action is closely related to the Schneider False Claims Act case pending in the United States District Court for the District of Columbia (the "Schneider FCA Action"). As Chase demonstrated in its opening brief, this action and the Schneider FCA Action both revolve around a common core of allegations that Chase intentionally cheated on its obligations under the National Mortgage Settlement ("NMS") through a pattern of misconduct that included forgiving debts it did not own, releasing liens it did not hold, and claiming settlement credits it was not due. In both actions, moreover, the complaints cite Chase's dealings with the plaintiffs here (the "Schneider Entities") as the primary evidence of the alleged misconduct. The strong public policy favoring litigation of related actions in a single forum therefore supports transfer of this action to the District of Columbia.

Citing *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), the Schneider Entities counter that a contractual forum selection clause bars transfer of this action away from New York. Opp'n at 1-7. That argument fails for two independent reasons. First, the forum selection clause at issue applies to only *one* of the three plaintiffs in this action and encompasses only *one* of the nine causes of action in the Third Amended Complaint. Having asserted claims that extend far beyond the scope of the forum selection clause, the Schneider Entities may not invoke that clause to bar transfer of this action to the same forum in which their owner and principal is already pursuing related claims against Chase. Second, a private forum selection clause will not bar transfer where, as here, transfer would further the strong public interest in avoiding piecemeal

litigation of related claims. Indeed, *Atlantic Marine* itself emphasized that a forum selection clause does not relieve courts of their obligation to consider whether "public-interest factors" support transfer of an action to another forum. *Atl. Marine*, 134 S. Ct. at 582.

The federal judiciary should not be burdened with the waste and inefficiency that accompanies piecemeal litigation of related claims. Nor should Chase be forced to defend an overlapping set of factual and legal allegations in two different courts. For these reasons, as more fully set forth below, Chase's motion should be granted.

ARGUMENT

I. THIS ACTION SHOULD BE TRANSFERRED TO THE DISTRICT OF COLUMBIA FOR COORDINATION WITH THE RELATED FCA ACTION.

In ruling on a motion to transfer, the "interest of justice" is such a "strong factor" that it "may be determinative." *Williams v. City of New York*, No. 03-5342, 2006 WL 399456, at *3 (S.D.N.Y. Feb. 21, 2006); *see also id.* (noting that this factor focuses on considerations of "judicial economy," which are furthered by "avoiding multiple cases on the same issues"). For this reason, courts in this District repeatedly have transferred actions to forums where related cases were pending, even though a forum selection clause favored New York. *See, e.g.*, *Capital Venture Int'l v. Network Commerce, Inc.*, No. 01-4390, 2002 WL 417246, at *2 (S.D.N.Y. Mar. 15, 2002) (where related actions were pending in transferee court, "the public interest in judicial economy" outweighed enforcement of forum selection clause); *ZPC 2000, Inc. v. SCA Grp., Inc.*, 86 F. Supp. 2d 274, 278 (S.D.N.Y. 2000) (transferring case because "the 'interests of justice' so overwhelmingly favor transfer"); *APA Excelsior III L.P. v. Premiere Techs., Inc.*, 49 F. Supp. 2d 664, 671-72 (S.D.N.Y. 1999) (transfer was appropriate in light of pendency of related actions, notwithstanding forum selection clause).

Contrary to the Schneider Entities' assertions, the force of these cases is not diluted by the Supreme Court's decision in *Atlantic Marine*. *Atlantic Marine* addressed a breach of contract action that was filed in Texas, notwithstanding a forum selection clause that required litigation in Virginia. 134 S. Ct. at 575-76. After the lower courts denied the defendants' motion to transfer, the Supreme Court reversed, finding that the forum selection clause should have been enforced. *Id.* at 584. The Court viewed the case as a clear example of forum shopping, in which the plaintiff "def[ied]" and "flout[ed] its contractual obligation" by arbitrarily filing suit in a different forum. *Id.* at 581-83. Under these circumstances, the Supreme Court held that "a court evaluating a . . . motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests," but should continue to consider the "public-interest factors." *Id.* at 582.

As discussed below, *Atlantic Marine* does not control here because (1) the forum selection clause in this case does not apply to most of the parties or claims in the action, and (2) the clause does not override the strong public interests supporting the transfer and coordination of this action before the court presiding over related litigation.

A. The Forum Selection Clause Does Not Apply to Most of This Case.

The contract that contains the forum selection clause (the "MLPA") was entered into by plaintiff Mortgage Resolution Servicing, LLC ("MRS") and defendant Chase Home Finance, LLC. *See* Maya Decl. Ex. O. The other two plaintiffs here, 1st Fidelity Loan Servicing, LLC and S&A Capital Partners, Inc., are separate entities that allegedly made separate purchases of loans from Chase. Third Am. Compl. (Dkt. No. 67) ("TAC") ¶¶ 2-4, 13-15. They were not parties to the MLPA and are not covered by its forum selection clause. *See, e.g.*, *Nasik Breeding & Research Farm Ltd. v. Merck & Co.*, 165 F. Supp. 2d 514, 543 (S.D.N.Y. 2001) (non-parties to forum selection clause are not subject to clause).

The forum selection clause also has no relevance to eight of the nine causes of action asserted in the TAC. The clause provides that disputes "arising []under" the MLPA "shall be submitted to . . . the courts of competent jurisdiction, state and federal, in the State of New York." Maya Decl. Ex. O § 15. Among the claims asserted in the TAC, however, only the First Claim for Relief—a breach of contract claim brought on behalf of MRS—"arises under" the MLPA. All of the remaining claims arise under the RICO statute, tort law, or separate contracts that are not alleged to contain New York forum selection clauses. *See* TAC ¶¶ 154-63, 171-75, 193-220. None of these claims are covered by the MLPA's forum selection clause because a forum selection clause encompassing claims that "arise out of" a contract reaches only those claims that "originate from" the contract; claims that merely "relate to," are "associated with," or "arise in connection with" the contract are not covered. *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 389-90 (2d Cir. 2007) (forum selection clause did not reach copyright, unjust enrichment, or unfair competition claims that "relate[d] to" recording contract (internal quotation omitted)).[1]

Where, as here, a forum selection clause does not apply to most of the parties or claims before the court, the clause will not prevent the transfer of the action. *See In re Rolls Royce Corp.*, 775 F.3d 671, 679 (5th Cir. 2014). As the Fifth Circuit explained in *Rolls Royce*, "*Atlantic Marine* was premised on the fact that the parties had agreed in advance where their private litigation interests lie." *Id.* But "[a] litigant not party to such a contract," like 1st Fidelity and S&A, "did not, of course, make any such advance agreements"; nor did the parties to the

[1] Although plaintiffs assert that Chase waived this argument by asserting in its motion to dismiss the Second Amended Complaint that some of plaintiffs' tort claims were duplicative of their breach of contract claim, *see* Opp'n at 2, Chase has not asserted any such argument as to the current complaint, and even as to the prior complaint, Chase did not assert this argument as to plaintiffs' RICO, tortious interference, or slander of title claims. *See* Defs.' Mem. of Law in Supp. of Mot. to Dismiss Second Am. Compl. (Dkt. No. 36) at 6-9, 18-23. Furthermore, under *Phillips*, the MLPA's forum selection clause simply does not apply to plaintiffs' tort claims.

contract make any arrangement for the litigation of claims that do not arise out of their agreement. *See id.* Likewise here, the MLPA's forum selection clause does not apply to most of the claims or parties before the Court and thus does not control Chase's motion to transfer. *See id.*; *Samuels v. Medytox Solutions*, Inc., No. 13-7212, 2014 WL 4441943, at *8 (D.N.J. Sept. 8, 2014) (where single forum selection clause did not govern entire lawsuit, "the parties [did] not unambiguously agree[] to litigate in a particular forum," and clause did not control motion to transfer); *Howmedics Osteonics Corp. v. Sarkisian*, No. 14-3449, 2015 WL 1780941, at *6 (D.N.J. Apr. 20, 2015) (same).

B. The Interests of Judicial Economy and Efficiency Outweigh the MLPA's Forum Selection Clause.

Even if the MLPA's forum selection clause applied to all of the parties and claims in the case, transfer still would be appropriate because of the gains to judicial economy and efficiency that would result from uniting this litigation with the closely-related Schneider FCA Action. The public interest in litigating related claims in a single forum is unaffected by the presence of a forum selection clause. Indeed, considerations of judicial economy and efficiency "***must*** be weighed by the district court" even in the face of such a clause; they "cannot be automatically outweighed by . . . a purely private agreement between the parties." *See Capital Ventures, Int'l*, 2002 WL 417246, at *1 (internal quotation omitted; emphasis added); *see also Atl. Marine*, 134 S. Ct. at 582 ("public-interest factors" unaffected by forum selection clause).

The *Howmedics* case is particularly instructive. After thoroughly analyzing the Supreme Court's decision in *Atlantic Marine*, the *Howmedics* court concluded that the decision did not prevent the transfer of an action from New Jersey to California, notwithstanding a series of forum selection clauses that supported a New Jersey forum. *See* 2015 WL 1780941, at *3-*9. The court reasoned that *Atlantic Marine* is distinguishable where, as here, enforcing a forum

selection clause would "divide [a] case" that should be litigated in a single forum. *See id.* at *3. The court also emphasized that *Atlantic Marine* "does not overrule case law that recognized that a district court has wide discretion to transfer venue, including a transfer contrary to a forum selection clause." *Id.* at *6. Because enforcing the forum selection clause at issue would have led to "palpable inconvenience, ineconomy, and injustice" in light of the focus of the action on California, transfer was appropriate. *Id.* at *3-*4.

The same reasoning applies here. The public interest in judicial economy and efficiency strongly supports the transfer of this action to the District of Columbia because of the extensive overlap between this action and the Schneider FCA Action. Although the Schneider Entities now attempt to downplay the overlap between the cases, both actions rely on a common core of allegations that Chase:

- sold large numbers of loans (including to the Schneider Entities) and released large numbers of liens (including liens owned by the Schneider Entities) in an attempt to circumvent NMS requirements, *see, e.g.*, TAC ¶¶ 59-60, 134-45, 212; Maya Decl. Ex. E ("FCA Compl.") ¶¶ 10, 14-15, 19, 191-210, 221-35;

- forgave loans that it did not own (including loans previously sold to the Schneider Entities) in an attempt to show compliance with NMS requirements, *see, e.g.*, TAC ¶¶ 103-08, 114-31; FCA Compl. ¶¶ 11-13, 17, 19, 199-204, 236-57;

- belatedly sought to repurchase loans that it purported to release after it sold them to the Schneider Entities, and imposed unreasonable conditions on those repurchases, *see, e.g.*, TAC ¶¶ 109-13; FCA Compl. ¶¶ 258-76;

- claimed credit under the NMS for forgiving loans that were ineligible for credit, *see, e.g.*, TAC ¶¶ 206-07, 210, 213; FCA Compl. ¶¶ 175, 189-90, 193-94, 205-10; and

- violated the servicing standards and anti-blight requirements of the NMS, including through its use of the Recovery One system and third-party collection agencies, *see, e.g.*, TAC ¶¶ 59-60, 204, 212; FCA Compl. ¶¶ 172-83, 211-20.

In short, both complaints rely heavily on allegations that Chase conspired to breach and evade the requirements of the NMS, including through extensive dealings with the Schneider Entities. Transfer should be granted to avoid burdening the judiciary with duplicative

litigation of these common factual and legal questions and to eliminate the prospect of inconsistent rulings on those questions.[2] Transfer also should be granted to take advantage of Judge Rosemary M. Collyer's unmatched expertise in interpreting and applying the NMS.[3]

Transfer under these circumstances would not represent an exercise in forum shopping, as plaintiffs mistakenly assert in their brief, *see* Opp'n at 6, but rather, a vindication of the public interest in judicial economy and efficiency. This is especially true because it was Schneider, not Chase, who moved to transfer the Schneider FCA Action to D.C. for the express purpose of placing that action before the judge who presided over the NMS consent judgments. *See* Maya Decl. Ex. H (Mem. in Supp. of Mot. to Transfer) at 3, 5-7. In seeking to transfer this action to D.C., Chase merely seeks to avoid piecemeal litigation by coordinating the action before the same court to which Schneider successfully transferred his related FCA action.

Plaintiffs counter that this action is not actually "related" to the Schneider FCA Action because the relator in the FCA action—Laurence Schneider—is legally distinct from the Schneider Entities that filed this action. *See* Opp'n at 1-2. There is no dispute, however, that Schneider is the controlling principal and owner of all three Schneider Entities. Second Am. Compl. (Dkt. No. 27) ¶¶ 7-9 (alleging Schneider is the "President" and "shareholder" or "managing member" of each of the Schneider Entities); *see also* TAC ¶¶ 2-4.[4] Indeed, the Third Amended Complaint refers interchangeably to Schneider and the Schneider Entities and makes

---

[2] *See, e.g.*, *APA Excelsior*, 49 F. Supp. 2d at 670; *Williams*, 2006 WL 399456, at *3; *River Road Int'l, L.P. v. Josephthal Lyon & Ross, Inc.*, 871 F. Supp. 210, 214 (S.D.N.Y. 1995).

[3] *See, e.g.*, *Robertson v. Cartinhour*, No. 10-844, 2011 WL 5175597, at *4 (S.D.N.Y. Oct. 28, 2011) (Swain, J.); *Dahl v. HEM Pharm. Corp.*, 867 F. Supp. 194, 197 (S.D.N.Y. 1994); *Savin v. CSX Corp.*, 657 F. Supp. 1210, 1214 (S.D.N.Y. 1987).

[4] Although the Second Amended Complaint has been superseded, it is still admissible against the Schneider Entities. *See United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984).

clear that Schneider served as the sole point of contact between those entities and Chase. *See* TAC ¶¶ 19-83 (referring to Schneider more than 50 times). Moreover, because the government has declined to intervene in the Schneider FCA Action, *see* Notice of Election to Decline Intervention in Amended Complaint, *United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A.*, No. 10-1047 (D.D.C. Aug. 31, 2015) (Dkt. No. 96), Schneider alone will control the litigation of that action, *see* 31 U.S.C. § 3730(c)(3), just as he will control this one.

Plaintiffs fare no better with their assertion that this is a simple breach of contract action that does not overlap with the Schneider FCA Action. *See* Opp'n at 2, 4, 9-10. Plaintiffs emphasize that the MLPA was executed almost three years prior to the NMS, *see id.* at 4, but they ignore the fact that the same alleged conduct that forms the basis of their breach of contract, tort, and RICO claims also lies at the heart of the Schneider FCA Action. *See, e.g.*, FCA Compl. ¶¶ 191-210, 221-57. In fact, plaintiffs' RICO and tort theories are based on more than 50 paragraphs of allegations related to Chase's alleged misconduct under the NMS. *See* TAC ¶¶ 92-145, 148-220. This case is about far more than an alleged breach of contract, and as Chase has shown, it overlaps substantially with the Schneider FCA Action.

II. THE REMAINING FACTORS SUPPORT TRANSFER.

Chase respectfully submits that the pendency of the Schneider FCA Action should be "determinative" of Chase's motion to transfer. *See Williams*, 2006 WL 399456, at *3. Because *Atlantic Marine* does not control here, however, the Court may consider the private interest factors that courts frequently analyze in ruling on motions to transfer. Those factors support transfer as well.

As Chase showed in its opening papers, the Schneider Entities are in no position to argue that the District of Columbia would be a less convenient forum for them than New York. The Schneider Entities are located in Florida, and Schneider previously moved to transfer

the Schneider FCA Action to the District of Columbia on the grounds that the District of Columbia would be a convenient forum. Chase Mem. of Law at 14-15.

With respect to the convenience of the witnesses, the substantial overlap between this action and the Schneider FCA Action means that many witnesses likely would be deposed in both cases. Transfer would prevent these duplicative depositions. As Chase has shown, moreover, *none* of the likely witnesses are located in New York; rather, the potential witnesses reside primarily in North Carolina, Florida, Arizona, and Texas. Chase Mem. of Law at 15-16.[5]

Plaintiffs do not dispute that the locus of operative fact is outside of New York. Instead, they contend this case lacks a connection to the District of Columbia. This argument should be rejected because the case revolves heavily around allegations that Chase breached the NMS, which was entered by Judge Collyer in D.C. Chase Mem. of Law at 16.

The forum's familiarity with governing law likewise supports transfer. Federal courts routinely analyze the common law of other states, but they do *not* routinely analyze the voluminous and highly complex NMS consent judgment. That is something that only Judge Collyer has done. Judge Collyer's unique expertise with respect to the NMS consent judgment thus supports transfer to the District of Columbia. Chase Mem. of Law at 17; *see supra* n.3.[6]

Finally, plaintiffs' argument that their choice of forum is entitled to deference should be rejected because none of the Schneider Entities reside in New York and their

---

[5] Plaintiffs claim that "most of Chase's documents and witnesses are in New York." Opp'n at 10. This is flatly wrong. *See* Boyle Decl. ¶¶ 3-6 (key Chase witnesses located in Arizona and Texas; no Chase witnesses likely to be located in New York).

[6] Citing *FDIC v. Bear Stearns Asset Backed Securities I LLC*, No. 12-4000, 2015 WL 1311300 (S.D.N.Y. Mar. 24, 2015) (Swain, J.), plaintiffs assert that this Court "has had extensive experience with precisely the same issues as those raised in the FCA case." Opp'n at 4. This assertion is meritless, as the subject matter of *Bear Stearns* had nothing to do with the NMS or any other issue raised by the Schneider FCA Action.

controlling principal is the party that selected the District of Columbia as the situs of the Schneider FCA Action. Chase Mem. of Law at 17-18.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Chase's opening brief, this case should be transferred to the United States District Court for the District of Columbia.

Dated: September 4, 2015

Respectfully submitted,

COVINGTON & BURLING LLP

By: /s/ Robert D. Wick
Robert D. Wick

Michael M. Maya
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
Telephone: (202) 662-6000
Facsimile: (202) 662-6291
rwick@cov.com
mmaya@cov.com

Michael C. Nicholson
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018-1405
(212) 841-1000
mcnicholson@cov.com

Attorneys for Defendants